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Former Judge, Gujarat High Court. Former Judge, Gujarat High Court. Former Judge, Gujarat High Court.

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PREFACE TO THE NINTH EDITION

As Lord Macaulay's draft of the Indian Penal Code has by common consent been acclaimed as a monumental piece of legal drafting, Dr. Gour's "*Penal Law of India*" has been aptly described as a classic upon a classic. The diligence with which authorities are scrutinised, the skill with which they are incorporated, the luminous expositions of the underlying principles of law, are qualities rare in themselves and rarer still in combination. It is this unique combination that secured for Gour's Treatise on the Code its place of pride in the legal literature of India. Gour did not hesitate, wherever necessary, to differ from judicial decisions and to register his dissent when a principle had been abandoned or distorted. It is a great task indeed to revise a treatise of such a high standard of excellence and to be able to maintain that standard.

With the accretion of large number of new judgments delivered by the Supreme Court and various High Courts of India and Foreign Courts a text-book such as Gour on Penal Law is bound to grow edition by edition to an inordinate length. Past and present constitute a *continuum* and one cannot at one sweep jettison old cases to make way for new: the prodigious growth of case-law has to be reckoned with. Every new edition gives an opportunity for removing dead wood and making the work one of up-to-date authority.

In revising this 9th Edition all the special features of the original work relating to the general plan, classification of points and critical analysis of case-law have been adhered to and new cases have been discussed under the appropriate headings to enhance the utility of this classic which has been serving the Bench, Bar and University Scholars and Police Officers for several decades. It is the rare distinction of Gour to have been frequently quoted with judicial approval.

Suggestions for improvement are welcome which will be given full consideration when preparing the next edition.

REVISING AUTHORS.

PREFACE TO THE EIGHTH EDITION

Sir Hari Singh Gour's name has always appeared like a star of the first magnitude in the field of legal literature ever since his commentaries on this "*Penal Law of India*" made its first appearance several decades back. Lord Macaulay's Draft of the Indian Penal Code has by common consent been acclaimed as a monumental piece of legal drafting and Dr. Gour's Penal Law of India has been aptly described as a classic upon classic. The supremacy of Sir Hari Singh Gour's work lay in its masterly, luminous, analytical exposition of the principles of the law, the diligence with which authorities are scrutinised and the skill with which they are incorporated. At the same time Sir Hari Singh Gour did not hesitate whenever necessary to differ from judicial decisions and to register his dissent when a principle had been abandoned or distorted. It is this unique combination that has secured for this great work a place of pride in the Legal Literature of India. Sir Hari Singh Gour realised that in a work intended for use in daily practice the macrocosm of principle should be eked out with the macrocosm of fact. The distinction of this great work is that each successive edition has been able to contribute to the next stage of development with its lucid and analytical comments acting as a source of profitable guidance for the Bench, Bar and the Legislature. It has been the rich recipient of enduring homage, always first consulted, always ultimately relied upon for the solution of ticklish and abstruse problems. The author and the revising authors cast their drag-net for precedents far and wide and rendered meshes so thin that hardly any case escaped their attention for scrutiny and comment.

The present revision was planned thus, so as to maintain all the special features of the original general plan, classification of points arising under each section and analysis of case-law bearing thereon which have sustained the popularity of the book making it run into several editions. To enable the reader to catch at a glance the requisite point, marginal notes to the paragraphs have been introduced in this edition. Further, each volume has been indexed and a consolidated index appears in the last volume. The last edition was published in 1961. Since then there have been numerous decisions of far-reaching significance delivered by the various High Courts and the Supreme Court of India, dealing with the provisions contained in the Code and their correlation with provisions in other enactments. As a result more than 500 pages of fresh matter has been added to this edition. The Eighth Edition of this great work is placed before the Bench, Bar and the authorities who are responsible for the maintenance and enforcement of law and order and it is hoped that the readers will find it rewarding from every point of view and that they will accord to it the same high position earned by the preceding editions.

25th July, 1966.

S. C. MANCHANDA
and
R. B. SETHI

PREFACE TO THE SEVENTH EDITION

Gour's Treatise on the Indian Penal Code, like Coke's on Littleton's Tenures, has been justly regarded by the common consent of discerning critics as a classic upon a classic. Ever since it was first published several decades ago, it has established itself as the most comprehensive contribution to the understanding and administration of the existing law. The distinguished author demonstrated that the field of crime is as interesting as, if not more interesting than, any other field of legal knowledge. The present edition laid before the public is the seventh, and the second edition prepared by hands other than Gour's. Editors charged with the preparation of the new edition of Gour's classic have striven their best to maintain the high standards set by the original author. A new edition of Gour has virtually become a quinquennial event to which practitioners engaged in criminal work as well as Judges and Magistrates look forward with interest. The present edition virtually coincides with the centenary of the Indian Penal Code.

The diligence with which the authorities are scrutinised, the skill with which they are incorporated, the luminous exposition of the underlying principles of law, are qualities rare in themselves and rarer still in combination. It is this unique combination that secured for Gour's Treatise on the Code its pride of place in the legal literature of India. The avowed object of the learned author was to search out the general principles of Criminal Law and it cannot be disputed that he achieved remarkable success. A dull massing of authorities makes the *apparatus criticus* groan under its weight; and the formulation of principles, done for the most part *ad hoc* to meet particular emergencies, is apt to be unsatisfactory. It is the distinction of Gour's Treatise that it is concerned mainly to state and expound the principles before plunging into case-law. The learned author was critical of the prodigious output of case-law and were he alive today, his criticism would have taken a sharper edge for the number of High Courts has grown since Gour's days with a corresponding increase in the number of reported decisions. The Indian author may well envy his English compeer who is not snowed under an avalanche of cases. It is unfortunate that many decisions which are peculiar to their facts and enunciate no new principle encumber the reports. In spite of an effort to be selective it is inevitable that whenever a new edition of a major work is prepared, the addition of new cases increases the bulk of the book.

The seventh edition of Gour's work has been prepared with the greatest care. Apart from bringing the statutory and case-law up to date, every line,

every word of the previous edition has been critically read; references in the footnotes have also been scrutinised. No effort has been spared to correct errors, if any, of omission or commission. Where the evolution of the law required it, new matter has been added, obsolete matter excised and some new headings have also been devised. A thorough and well-planned index given at the end of the work is intended to help the busy practitioner to locate the required reference quickly.

Gour did not hesitate, where necessary, to differ from judicial decisions and to register his dissent when a principle had been abandoned or distorted. The clarity and incisiveness with which he expounded the basic principles of Criminal Law distinguished his work from the rest. The editors of this new edition have endeavoured to maintain these distinctive qualities.

It is, therefore, hoped that this edition of Gour's Treatise on the Penal Law of India will, as the previous editions, occupy a premier position as an unrivalled classic on the subject and it will prove to be useful to the Bench and the Bar.

S. K. VERMA,

20*th May*, 1961.

28 *Elgin Road, Allahabad.*

E. S. SUBRAHMANYAN,

Advocate.

PREFACE TO THE SIXTH EDITION

Good wine needs no bush. The late Dr. Hari Singh Gour's book on the Penal Law of India is one of those legal classics which need no introduction.

The last edition, which was the fifth, was published in the year 1936 and has been out of print for some time. A new edition was, therefore, due. Moreover, many changes have taken place since 1936. The country has achieved Independence, there have been amendments in the Code and several new High Courts have been established. Thus, it had become necessary to revise the book and bring it up to date.

In his Preface to the last edition Dr. Gour referred to the increase in the number of reports in the country in these words :

"The multiplication of reports within the last few years and the competition between them in reporting the largest number of cases has enormously increased the bulk of the case-law without correspondingly shedding more light on the subject. If I had followed the wake of the reports and cited all the cases irrespective of their value, I would have made the work more ponderous, and possibly more confusing to the practitioner, and, indeed, too bewildering to the student of law." With the increase in the number of High Courts the number of reports has also increased. Furthermore, the competition to report the largest number of cases continues unabated. The result is that the task of any one who wants to bring out a new and revised edition of Dr. Gour's books which is not intended to be a mere collection of case-law, is not easy.

The present editors could not, however, overlook the fact that a subordinate court is bound to follow the decisions of the High Court to which it is subordinate, in preference to those of other High Courts. So a large number of new cases has had to be incorporated in this edition. The number of volumes has, therefore, to be increased to three, because otherwise the volumes would have become too bulky. Every effort has, however, been made to maintain the original plan of the book, namely, that it should explain the principles and not be a mere collection of cases.

A special feature of the present edition, to which attention may be invited, is the Synopsis which is given below each section of the Code.

ALLAHABAD :
21*st January*, 1955.

K. K. VERMA,
R. L. ANAND,
S. S. SASTRY.

PREFACE TO THE FIFTH EDITION

In preparing a new edition of this work, I have tried to reduce its bulk by avoiding as far as possible repetitions of the same discussion and concentrating it in one place, to which reference is made under appropriate heads. The advantage of repetitions under appropriate heads was intended to limit the discussion as applied to a particular section in hand. To a practitioner, this is an advantage, but it had to be sacrificed because, if the same scheme had been continued, the two volumes would have further grown in size against which I have received complaints. In the second place, when this work was originally planned, it was intended to be an exhaustive review of the law on the subject. As such, all the reported and unreported cases were pressed into service for this purpose. But on reconsideration, I have preserved the original scheme, and yet eliminated cases which merely paraphrase the text of the sections, and were found in fact to be new cases without deciding a new point. It has led to the reading of such cases in detail, but will, I hope, assist the reader in sorting out only such of them as possess any ratiocinative value. "The multiplication of reports within the last few years, and the competition between them in reporting the largest number of cases, has enormously increased the bulk of the case-law without correspondingly shedding more light on the subject. If I had followed the wake of the reports and cited all the cases irrespective of their value, I would have made the work more ponderous, and possibly more confusing to the practitioner, and, indeed, too bewildering to the student of law."

All cases reported in the authorised and unauthorised reports may, broadly speaking, be divided into four groups: (*i*) Those in which the Court has to state the points calling for decision for which it has necessarily to paraphrase a section or those points thereof requiring notice with reference to the fact of the case before it. (*ii*) Those in which the Court has to concede or repel an argument addressed to it with reference to some point arising out of a section. (*iii*) Those disposed of in the ordinary course of routine work, in which casual reference to the law and cases are not intended to be *ex cathedras*—such cases swell the reports with unreportable cases and furnish examples of the same Courts having given contradictory decisions. (*iv*) Those in which the Court has to apply its mind to the elucidation of a section and at times to deduce corollaries therefrom, it may be, in the light of other provisions of the law. The first three form the bulk of the case published in the reports, those of the fourth class being few and far between; though it is these that really interest the commentator. But in the Courts, unfortunately, there is a growing tendency to overwhelm them with indiscriminate citation of authorities, a tendency which might be curbed if the Courts were to pay greater regard to the principles rather than to the authorities which at times are bafflingly conflicting.

If this work has made any contribution to the clarification of the Indian law on the subject, it has been because in groping my way through the jungle of cases, I have never lost sight of my objective, and I am happy to find that my work has, in some degree, helped to fix the principle which I have striven to state, and which my commentary is intended to elucidate. My work was never intended to be a mere collection of cases, though their citation has grown with each edition. They have now been recast from first to last, and I believe that in this respect this edition of my work may more be regarded as a new work rather than a new edition.

There remain another class of cases indiscriminately reported, and many of these placed cheek by jowl, in which the same Court, and the same learned Judges have permitted themselves to give contradictory decisions. These judgments were never given *ex cathedra* and should never have been reported.

I have rewritten many parts of the work and brought the references down to the latest date of publication. I hope the economy of space effected will make the work more handy, but nonetheless equally, serviceable, both alike to the student and the practitioner, while my critical review of the cases might be of some help to those who have to interpret and administer the law.

As the superior Courts naturally prefer to follow decisions of their own Court on a given point, I have added such references in the footnotes.

In order to avoid a lengthy addenda, special arrangements had to be made for printing of the work within the shortest time possible, and I am obliged to Mr. S. N. Kherdekar, who took upon himself the duty of proceeding to Madras to read through the proofs without reference to me.

H. S. GOUR.

NAGPUR:

15*th March*, 1936.

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INDIAN PENAL CODE

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ABBREVIATIONS EXPLAINED

All E.R.	..	All England Law Report
A.C.	..	Appeal Cases
A. & E.	..	Adolphus and Ellis' Reports (1834—1840) New Series (1841—1852)
A.I.R.	..	All India Reporter
Ajmer	..	Ajmer
All.	..	Allahabad
Andh.	..	Andhra
Assam	..	Assam
Bom.	..	Bombay
Cal.	..	Calcutta
Dacca	..	Dacca
E.P.	..	East Punjab (Simla)
F.C.	..	Federal Court
Guj.	..	Gujarat
H.P.	..	Himachal Pradesh
Hyd.	..	Hyderabad
J. & K.	..	Jammu and Kashmir
Ker.	..	Kerala
Kut.	..	Kutch
Lah.	..	Lahore
M.B.	..	Madhya Bharat
Madh. Pra.	..	Madhya Pradesh
Mad.	..	Madras
Mah.	..	Maharashtra
Manipur	..	Manipur
Mys.	..	Mysore
Nag.	..	Nagpur
Orissa	..	Orissa
Oudh	..	Oudh
Pat.	..	Patna
Pepsu	..	Pepsu
Pesh.	..	Peshawar
Punj.	..	Punjab
P.C.	..	Privy Council
Raj	..	Rajasthan
Rang.	..	Rangoon
Sau.	..	Saurashtra

Sind	..	Sind
S.C.	..	Supreme Court
T. C.	..	Travancore-Cochin
Tripura	..	Tripura
V.P.	..	Vindhya Pradesh
A.C.C.	..	Allahabad Criminal Cases
A.L.J.	..	Allahabad Law Journal
A.L.R.	..	Annotated Law Reports
Andh. W.R.	..	Andhra Weekly Reporter
A.L.W.	..	Allahabad Law Weekly
A.W.N.	..	Allahabad Weekly Notes (1881—1908)
A. W.R.	..	Allahabad Weekly Reporter
Agra	..	Agra High Court Reports (1866—1868)
A.M.L.J.	..	Ajmer-Merwara Law Journal
Alison	..	Alison's Criminal Law of Scotland
Austin	..	Austin's Jurisprudence
Bacon	..	Bacon's Abridgment of the Law
B. & A.	..	Barnwell and Alderson (K. B. Reports, 1817—1822)
B. & C.	..	Barnwell and Creswell (King's Bench, 1822—1830)
Beav.	..	Beavan's Reports (Rolls, 1836—1866)
Bell	..	Bell's Crown Cases Reserved (1858—1860)
B.H.C.R.	..	Bombay High Court Reports (1862—1875)
B.L.J.R.	..	Bihar Law Journal Reports
B.L.R.	..	Bengal Law Reports (1868—1875)
Bing.	..	Bingham's case (Common Pleas, 1834—1840)
Bishop	..	Bishop's Criminal Law
Black.	..	Blackstone's Commentaries (Ed. 1773)
Bligh	..	Bligh's House of Lords Reports (1819—1821)
Bligh N.S.	..	Bligh's House of Lords Reports (1827—1837
Bom. L.R.	..	Bombay Law Reporter (1899—1944)
Boul.	..	Boulnois' Reports (Calcutta, 1862—1875)
B.R.	..	Bihar Reports
B. & S.	..	Best and Smith (Q. B., 1861—1869)
B.U.C.	..	Bombay Unreported Cases (1862—1898)
Bur. L. J.	..	Burma Law Journal (Vols. I—VI)
Bur. L.R.	..	Burma Law Reporter (Vols. I—XIV)
Bur. L.T.	..	Burma Law Times (Vols. I—XIII)
Burr.	..	Burrow's Reports (K.B., 1757—1771)

Cald.	..	Caldecot's Settlement Cases (K. B., 1776—1785)
C. C. R.	..	Crown Cases Reserved
C. L. J.	..	Calcutta Law Journal (1905—1943)
C. L. R.	..	Calcutta Law Reports (1878—1883)
C. W. N.	..	Calcutta Weekly Notes (1896—1944)
Camp.	..	Campbell's Reports (N. P., 1808—1816)
Com. C.	..	Company Cases
Com. L. J.	..	Company Law Journal
C. P. L. R.	..	Central Provinces Law Reports (1887—1904)
C. B.	..	Common Bench Reports (C.P., 1845—1856)
C. P.	..	Common Pleas (Law Reports, 1866—1874)
C. P. D.	..	Common Pleas Division (L. R. 1870—1890)
C. & K	..	Carrington and Kirwan (N P., 1843—1850)
C. & M.	..	Crompton and Meeson (Exch., 1832—1834)
C. & P.	..	Carrington and Payne (N. P., 1823—1841)
Ch. D	..	Chancery Division (L. R., 1857—1890)
Cl. F.	..	Clark and Finnelly (N. P., 1831—1846)
Coke	..	Coke's Reports (1752—1816)
Cox	.	Cox's Criminal Cases
Cr. Car.	..	Crok's Reports of the Reign of Charles I (1625—1641)
Cr. L. J.	..	Criminal Law Journal (1904)
Cr. P. C.	..	Criminal Procedure Code (1898)
C. L T.	..	Cuttack Law Times
Cur. L. J.	..	Current Law Journal
D. R.	..	Dacca Reports
D. & B.	..	Dearsley's and Bell's Crown Cases (1856—1858)
Dears.	..	Dearsley's Crown Cases (1852—1856)
Den. C. C.	..	Dewsons' Crown Cases (1844)
D. L. R.	..	Dominion Law Reporter
Doug.	..	Douglas' Reports (K. B., 1778—1784)
Dow.	..	Dow's House of Lords Reports (1812—1818)
Dow & C.	..	Dow and Charles' House of Lords Reports
	..	(1827—1831)
Dowl. & Ry.	..	Dowling and Ryland's King's Bench (1822—1827)
D. & Ry. K. B.	..	Dowling and Ryland's Reports (Nisi Prius)
D. & R. N. P.	..	Magistrates Cases (1822—1827)
D. & R. M. C.	..	Dowling and Ryland's Report (Nisi Prius)
East	..	East's Pleas of the Crown

East R.	..	East's Reports of the King's Bench (1801—1812)
E. B. & E.	..	Ellis Blackburn and Ellis (Q. B., 1858)
E. & B.	..	Ellis and Blackburn (Q.B., 1852—1858)
E. & E.		Ellis and Ellis (Q. B , 1858—1861)
Ell. & E.	..	
E. & I. App.	..	English and Irish Appeal Cases
E. L. R.	..	Election Law Reports
Esp.	..	Espinasse's Reports (N. S., 1793—1807)
Exch.	..	Exchequer
Ex. D.	..	Exchequer Division
F. C. R.	..	Federal Court Reports
Fac. L. R.	..	Factories and Labour Reports
F. J. R.	..	Factories Journal Reports
F. L. J.	..	Federal Law Journal
Forst.	..	Forster (Dublin C. C., 1767)
F. B.	..	Full Bench
F. & F.	..	Foster and Finlayson (Nisi Prius, 1856—1867)
Foster	..	Foster's Crown Law (1743—1761)
Guj. L. R.	..	Gujarat Law Reports
Hagg.	..	Haggard's Report (Admiralty Cases, 1822—1837; Consistorial Reports, 1789—1802; Ecclesiastical Reports, 1827—1833)
Hale	..	Hale's Pleas of the Crown
Hare	..	Hare's Reports (1841—1853)
Hawk.	..	Hawkin's Pleas of the Crown
Hay	..	Hay's Reports, Calcutta (1862—1863)
H. & C.	..	Hurlstone and Coltman (Exchequer, 1862—1865)
H. L.	..	House of Lords
H. L. C.	..	House of Lords Cases (1847—1866)
Hob.	..	Hobbart's Reports (1608—1625)
Hyde	..	Hyde's Reports (Calcutta, 1863—1864)
I. A.	..	Law Reports, Indian Appeals
I. C.	..	Indian Cases (1909—1944)
I. J.	..	India Jurist (Old Series, Calcutta, 1862; New Series, Calcutta, 1866—1867)
I. L. R.	..	Indian Law Reports
I. T. J.	..	Income Tax Journal
I. T. R.	..	Income Tax Reports
Jab. L. J.	..	Jabalpur Law Journal
J. P.	..	Justice of the Peace (Reports 1836—1952)

K. L. J.	.. Karnatak Law Journal
Keb.	.. Keble's Reports, King's Bench (1661—1679)
Kel.	.. Kelyng's Reports, King's Bench (1637—1706)
Ker. L. J.	.. Kerala Law Journal
Ker. L. R.	.. Kerala Law Reporter
Ker. L. T.	.. Kerala Law Times
Lab. A. C.	.. Labour Appeal Cases
Lab. L. J.	.. Labour Law Journal
L. B. R.	.. Lower Burma Rulings (1901—1922)
L. & C.	.. Leigh and Cave's Cases (1861—1865)
L. L. J.	.. Lahore Law Journal
L. L. T.	.. Lahore Law Times
L. J. Ch.	.. Law Journ. (Chancery, 1831—1946)
L. J. C. P.	.. Law Journ. Common Pleas
L. J. Ex.	.. Law Journ. Exchequer
L. J. M. C.	.. Law Journ. Magistrates' Cases
L. J. M.	.. Law Journ. Matrimonial Cases
L. J. P. M. & A.	.. Law Journ. Probate Matrimonial and Admiralty
L. J. Q. B.	.. Law Journ. Queen's Bench
L. Q. R.	.. Law Quarterly Review
Ld. Raym.	.. Lord Raymond's Reports (K. B. & C. P., 1694—1734)
Leach	.. Leach's Crown Cases (1730—1788)
L. R. A.	.. Law Reporters, Allahabad (Vols. I—VIII)
L. R. A. C.	.. Law Reporters, Appeal Cases
L. R. C. C.	.. Law Reports, Crown Cases
L. R. C. P.	.. Law Reports, Common Pleas (1866—1875)
C. R. C. P. D.	.. Law Reports, Common Pleas Division
L. R. E. & I.	.. Law Reports, English and Irish Appeal Cases
L.R. Q. B.	.. Law Reports, Queen's Bench
L. T.	.. Law Times (1845—1858)
L. T. (N. S.)	.. Law Times New Series
L. W.	.. Law Weekly
Ld. Ray.	.. Lord Raymond's Reports (Common Law, 1694—1734)
Lewin	.. Lewin's Crown Cases (1822—1833)
Loff.	.. Loff's Reports, King's Bench (K. B., 1772—1774)
Luck.	.. I. L. R., Lucknow
M. B. L. J.	.. Madhya Bharat Law Journal
Mah. L. J.	.. Maharashtra Law Journal
M. P. L. J.	.. Madhya Pradesh Law Journal
M. H. C. R.	.. Madras High Court Reports (1862—1875)
M. L. J.	.. Madras Law Journal
M. L. T.	.. Madras Law Times
M. W. N.	.. Madras Weekly Notes
M. & R.	... Manning and Ryland's—Reports (K. B., 1827—1830)

Marsh.	..	Marshall's Reports (Common Pleas, 1813—1816)
M. L. R.	..	Modern Law Review
Mood C. C.	..	Mood's Crown Cases Reserved (1824—1844)
M. I. A.	..	Moor's Indian Appeals (1836—1873)
M. & R.	..	Moody and Robinson (Nisi Prius, 1830—1843)
M. & S.	..	Maule and Selwyn (King's Bench, 1813—1819)
M. & W.	..	Meeson and Welby (Exchequer, 1836—1847)
Mod.	..	Modern Reports (King's Bench, 1669—1732)
Mys. H. C. R.	..	Mysore High Court Reports
Mys. L. J.	..	Mysore Law Journal
N. L. J.	..	Nagpur Law Journal
N. L. R.	..	Nagpur Law Reports (1905)
Nev. & M.K. B.	..	Neville and Manning (K. B., 1832—1836)
Nev. & M. M. C.	..	Neville and Manning, Magistrates' Cases (K. B., 1832—1838)
Nol.	..	Nonal's Magistrates' Cases (K.B., 1791—1793)
O. A.	..	Oudh Appeals
O. L. R.	..	Oudh Law Reports
Oudh L. J.	..	Oudh Law Journal
Oudh W. N.	..	Oudh Weekly Notes
Palm.	..	Palmer's Reports (King's Bench, 1619—1629)
Parl. Rep.	..	Parliamentary Reports
Pat. L. J.	..	Patna Law Journal
Pat. L. R.	..	Patna Law Reporter
Pat. L. T.	..	Patna Law Times
Pat. L. W.	..	Patna Law Weekly
Pat. W. N.	..	Patna Weekly Notes
P. C.	..	Privy Council
P. J. L. B.	..	Printed Judgments, Lower Burma (1893—1900)
P. L. R.	..	Punjab Law Reporter
Price	..	Price's Reports Exchequer
P. R.	..	Punjab Record
P. W. R.	..	Punjab Weekly Reporter
P. &D.	..	Parry and Division (Q. B., 1838—1841)
Q.B.	..	Queen's Bench Reports (Adolphus and Ellis Q.B., 1841—1852)
Raj. L. W.	..	Rajasthan Law Weekly
Rang. L.R.	..	Rangoon Law Reporter
Ray.	..	Lord Raymond's Reports (Common Law, 1694—1734)
R. & M.C.C.R.	..	Russell and Mylne Crown Cases Reserved (1829—1831)
R.R.	..	Revised Reports (1735—1865)
R. & R.	..	Russell and Refan (1799—1823)
Rob.	..	Robert's Reports
Roll.	..	Sir H. Rolle's Reports (K.B., 1614—1625)

Russ. & Ry.	..	Russell and Ryan's Crown Cases Reserved (1799—1823)
S.C.A.	..	Supreme Court Appeal
S.C.C.	..	Supreme Court Cases
S.C.D.	..	Supreme Court Decisions
S.C.W.R.	..	Supreme Court Weekly Report
S.J.L.B.	..	Select Judgments, Lower Burma (1872—1892)
S.T.C.	..	Sales Tax Cases
Salk.	..	Salkert's Reports (1689—1712)
Sau.	..	Saurashtra Law Reporter
S.C.J.	..	Supreme Court Journal
S.C.R.	..	Supreme Court Reports
Show.	..	Shower's Report (Q.B. 1678— 1695)
S.L.R.	..	Sind Law Reporter
Sm.	..	Smith (Q.B., 1803—1806)
Sm. & B.	..	Smith (Q.B., Ireland—1824—1825)
Steph. Comm.	..	Stephen's Commentaries of the Laws of England
Steph. Cr. L.	..	Sir James Stephen's Criminal Law
Steph. Dig.	..	Sir James Stephen's Digest of Criminal Law
Str.	..	Strange's Reports (King's Bench, 1795)
St. Tr.	..	Howells' State Trials (1163—1584)
S.C.J.	..	Supreme Court Journal
Sw. & Tr.	..	Swabey and Tristam (1858—1865)
Sty.	..	Style's Reports (K.B., 1646—1655)
Taunt.	..	Taunton's Reports Common Pleas) 1807—1819)
T.C.L.J.	..	Travancore Law Journal
T.L.R.	..	Times Law Reports (1885)
T.R.	..	Durnford and East's Term Reports (K.B., 1785—1800)
U.B.	..	Upper Burma
Vent.	..	Ventrie's Reports (1688—1691)
Ves.	..	Vesey's Reports (Senior, 1746—1756)
Ves. J.	..	Vesey's Report of Junior (1789—1817)
Weir	..	Weir's Law of Offences (Vol. 1, 4th Ed., 1905)
Will.	..	Willmore, Wolloston and Devison (K.B., 1695—1735)
W. & D.	..	Willmore, Wolloston and Hodges (K.B.,
W.W. & D,	..	1838—1839)
Will W. & H.	..	Wilson's Report (1805—1817)
W.W. & H.	..	Weekly Law Reports
Wilson	..	Weekly Reporter (Calcutta, 1862—1875)
W.L.R.	..	Weekly Criminal Letters
W.R.	..	Wyman's Revenue and Criminal Rulings
W.Cr.L.	..	Yelverton (Q.B., 1603—1613)
Wym.		
Yelv.		

ADDENDA

INDIAN PENAL CODE

Section 23 (P. 215): What constitutes wrongful gain or wrongful loss?—It is not necessary in order to constitute wrongful gain or wrongful loss that there must be an intention to utilize the property concerned for the purpose of personal gain. If the company was entitled to possession of the property and if the company was kept out of possession of the property and if the intention behind the removal was to keep the company out of possession of the property, that was an intention to cause wrongful loss.[1]

Section 23 (P. 215): "Wrongful gain" and "wrongful loss,"—Meaning of.—Under Sec. 23, "wrongful gain" includes wrongful acquisition as well as wrongful retention and "wrongful loss" "includes wrongful deprivation of property as well as wrongfully being kept out of property.[2]

Section 24 (P. 216): "Dishonestly".—Under Sec. 24 of the Indian Penal Code, the term "dishonestly" means doing something with the intention of causing wrongful gain to one person or wrongful loss to another.[3]

Section 34 (P. 250): Essentials to invoke Sec. 34.—Section 34 of the Indian Penal Code will not be attracted unless first it is established that a criminal act was done by several persons, second, that there was a common intention and a pre-arranged plan to commit an offence and third, that there was participation in the commission of the offence in furtherance of that common intention.[4]

Section 34 (P. 278): Common intention—Requirement and proof.—Common intention within the meaning of Sec. 34, I. P. C., implies a pre-arranged plan. To convict the accused of a crime with the help of Sec. 34, I. P. C., the burden is upon the prosecution to prove that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult, if not impossible to procure direct evidence to establish the intention of an accused person. Intention has to be inferred from his act or conduct or other relevant circumstances of the case. There is also a distinction between the same or similar intention and common intention and an inference of common intention within the meaning of the term in Sec. 34, I. P. C., should not be reached, unless it is a necessary inference deducible from the circumstances of the case.[5] Where there is no indication whatever of pre-meditation or of a pre-arranged plan, the mere fact that the two

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1. R. L. Mallick *v.* P. G. Menon, 73 C. W. N. 371 at p. 375.
2. *Ibid.*
3. *Ibid*, at p. 374-75.
4. Parichhat *v.* State of Madhya Pradesh, A. I. R. 1972 S. C. 535 at p. 540 : 1971 S. C. D. 1151.
5. *Vide* Mahbub Shah *v.* Emperor, A. I. R. 1945 P. C. 118.

accused were seen at the spot or that the two accused fired as a result of which one died and two others received simple injuries could not be held sufficient to prove or to infer a common intention. Common intention referred to in Sec. 34 pre-supposes a prior meeting of the minds. This does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. It is also not necessary to adduce direct evidence of the common intention. The common intention may conveniently be inferred from the surrounding circumstances and the conduct of the parties. The existence of the common intention shared by the accused persons is, on ultimate analysis, a question of fact. At any rate, the crucial circumstances is that the plan must precede the act constituting the offence.[1]

Section 84 (P. .278): "Common intention"—What is required to establish to invoke Sec. 34, I. P. C.?—There is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and though, it is difficult in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, for instance that all of them had left the scene of the incident together and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. The Supreme Court had in *Krishna Govind Patil* v. *State of Maharastra*[2] held that the pre-arranged plan may develop on the spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so before a court can convict a person under Sec. 302 or Sec. 304 read with Sec. 34 of the Indian Penal Code it should come to a definite conclusion that the said person had a prior concert with one or more persons named or unnamed for committing the offence.[3]

Common intention within the meaning of Sec. 34 of the Indian Penal Code implies pre-arranged plan. There must be evidence of prior meeting of minds or pre-arranged plan. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by Sec. 34 of the Indian Penal Code because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the

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1. Ramchander *v.* State of Rajasthan, 1970 Raj. L. W. 118 at pp. 123-24.
2. (1964) 1 S. C. R. 678 A. I. R. 1963 S. C. 1431.
3. Ram Tabal *v.* State of Uttar Pradesh, A. I. R. 1972 S. C. 254 at p. 257.

others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of murder [1]

Sections 34 and 149: (P. 284) : "Common intention" and "common object"—Compared and distinguished.—Like Sec. 149 of the Indian Penal Code Sec. 34 also deals with cases of constructive liability but the essential constituent of the vicarious criminal liability under Sec. 34 is the existence of a common intention, but being similar in some ways the two sections in some cases may overlap. Nevertheless common intention, which Sec. 34 has as its basis, is different from the common objects of unlawful assembly. The common intention denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from same intention or similar intention.[2]

Section 7 (P. 421): Applicability.—Section 70 of the Indian Penal Code does not apply to contempt of court proceedings, and as such fine imposed in such proceedings can be realized even after a period of six years from the date of the imposition of fine, Sec. 70 of the Penal Code is no impediment by way of limitation in the way of the recovery of the fine.[3]

Section 96 : Free fight.—When there is a fight, that means, when both the parties come determined to fight without there being corresponding rights of private defence, no party is entitled to the protection of law. Each party and the members thereof are responsible for the illegal acts caused by them. There is, therefore, no question of any exercise of right of private defence on the finding recorded that there was a free fight.[4]

Section 99 (P. 802): Benefit of doubt.—Where the prosecution has not been able to show that the deceased was unarmed when he took part in the assault on the appellant, it is difficult to say that the appellant had exceeded the right of private defence. In any event the benefit of doubt must be given to the appellant and he must be acquitted.[5]

Section 102: (P. 832) Commencement of the right of private defence of body.—The right of private defence of the body commences only on a reasonable apprehension of danger to the body caused by an attempt or threat to commit an offence. There must be an attempt or threat and consequent thereon an apprehension of danger. Thus, reasonable ground for apprehension of danger to body is an essential requisite for exercise of the right of private defence of person, a reasonable apprehension of danger to the body must arise from an attempt or threat to commit the offence.[6]

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1. Parichhat *v.* State of Madhya Pradesh, A. I. R. 1972 S. C. 535 at pp. 539-40 : 1971 S. C. D. 1151.
2. Ram Tahal *v.* State of Uttar Pradesh, A. I. R. 1972 S. C. 254 at p. 257 ; Mohan Singh *v.* State of Punjab, A. I. R. 1963 S. C. 174.
   R. L. Kapur *v.* State of Tamil Nadu, A. I. R. 1972 S. C. 858 at pp. 859-60.
4. Dwarika Misra *v.* State, (1969) 35 Cut. L. T. 255 at pp. 256-57.
5. Hira Rai *v.* State of Bihar, A. I. R. 1972 S. C. 244 at p. 246.
6. State *v.* Jang Singh, 1969 Raj. L. W. 301 at pp. 305-6.

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GENERAL INTRODUCTION

1. Genesis of the notion crime.—Self-preservation is the first instinct of nature. It is the first instinct in man. The primitive savage living in his rude dwelling—a cave or a crevice, or wandering at large—first felt the awakening of this impulse when he felt hungry. He killed aught that came in his way. He knew that his continued existence depended upon the nutrition of his body and he remorselessly slayed his prey as he ruthlessly slaughtered aught that threatened his existence. The instinct of self-preservation quickened the feeling of revenge, and revenge led to retaliation, and retaliation to reflexion. In the lower forms of life where this higher sense is still undeveloped, this phenomenon may be seen still at work.

2. The instinct of self-preservation is, therefore, the first law of nature, and it is one which man possesses in common with all sentient life. But if this had been the sole instinct animating creation, there would have soon been the end of the world. For the bitter feelings of revenge and retaliation would have soon led to mutual extermination, and though at first the weaker, but afterwards the strong, would have fallen a victim to the brute force which though employed for preservation would have inevitably ended in annihilation. But such is the providence of nature that while it ensures preservation of the individual, it does not neglect perpetuation of the species. With that end in view it has implanted in all beings a desire of procreation. This desire leads to intercourse between the male and female representatives of the species, and which is more or less in duration according as it is necessary to the nourishment and support of the young ones who are to be sustained by those that beget them till they are able to shift and provide for themselves. "This rule, which the infinite wise Maker hath set to the works of his hands, we find the inferior creatures steadily obey. In those herbivorous animals, which feed on grass, the conjunction between male and female lasts no longer than the very act of copulation, because the teat of the dam being sufficient to nourish the young till it be able to feed on grass, the male only begets, but concerns not himself for the female or young, to whose sustenance he can contribute nothing. But in beasts of prey the conjunction lasts longer, because the dam, not being able well to subsist herself and nourish her numerous offspring by her own prey alone (a more laborious as well as a more dangerous way of living than by feeding on grass), the assistance of the male is necessary to the maintenance of their common family, which cannot subsist, till they are able to prey for themselves, but by the joint care of male and female. The same is to be observed in all birds (except some domestic ones, where plenty of food excuses the cock from feeding and taking care of the young brood), whose young, needing food in the nest, the cock and hen continue mates till the young are liable to use their wings and provide for themselves. And herein I think, lies the chief, if not the only, reason, why the male and female in mankind are tied to a longer conjunction than other creatures, viz., because the female is capable of conceiving and *de facto* is commonly with child again and brings forth too a new birth, long before the former is out of a dependency or support on his parent's help and able to shift for himself, and has all the assistance which is due to him from his parents, whereby the father, who is bound to take care for those he hath, is under an obligation to continue in conjugal society with the same woman longer than other creatures, whose young, being able to subsist of themselves before the time of procreation returns again, the conjugal bond

dissolves of itself, and they are at liberty till Hymen at his usual anniversary season, summons them again to choose new mates."[1]

3. Nucleus of family.—Now this is clearly the reason, as it is the nucleus of joint family, and its development into a family of sons and daughters, brothers and sisters under the suzerainty of its eldest member would be matter of course.[2] A joint family so formed would, it is clear, owe no allegiance to society. There would, indeed, be no society but a conglomeration of families, of which the Government would be as far as possible the eldest member. They would live together under the same roof and would, of course, be subject to the same discipline.[3] The head of the family was in other words its king. He was their lawgiver, judge and priest. That the patriarchal system was the first form of government is confirmed by History. Later on as the strong preyed upon the weak, the family grew into kingdom and the kingdoms grew into empires with the head still as their monarch. "Amongst these was Nimrod who no doubt was by good right lord or king over his family; yet against right did he enlarge his empire by seizing violently on the rights of other lords of families; and in this sense he may be said to be the author and first founder of monarchy. And all those who do attribute unto him the original regal power do hold, he got it by tyranny or usurpation, and not by any due election of the people or multitude or by any faction with them."[4] And it is the survival of this form of monarchy that makes the king commonly spoken of as the *pater patrioe*, and the property of his objects passes to him by the right of escheat.

4. Patria potestas.—It has been observed before that the power of the father in the ancient family was absolute. He could put to death any of his children, and this power appears to have survived to him even upon the establishment of orderly Government. It was recognised and even enlarged in the Twelve Tables which enabled the parents even to sell their children two or three times over. By the help of the fatherly power Rome long flourished, and often times was freed from great dangers. The fathers have drawn out of the very assemblies their own sons when being tribunes they have published laws tending to sedition. So Cassius threw his son down from the Tarpeian Rock and the Magistrates and people assembled dared not resist him. The same power was possessed by the Persians and Gauls and the Israelites. So the judicial law of Moses gave full power to the father to stone his disobedient son so it be done in the presence of a Magistrate, and yet it did not belong to the Magistrate to enquire into and examine the justness of the cause, but it was so decreed lest the father should in his anger suddenly or secretly kill his son. So according to the law of the Romans the earnings of the children belonged not to them but to their father, though Solon made a law which relieved a son from his duty to maintain his father if he had taught him no trade to enable him to earn his living.

5. Evolution of society.—From individualism to family, and from family to state we mark the natural transition of archaic society. In the two earlier stages of human progress there was but a dim, if any, appreciation of criminal responsibility. Indeed, as the sole anxiety of the individual was self-preservation, so in the second stage it became the sole anxiety of the family to protect it against foreign attacks as a necessary means for its own preservation.

6. Jus naturale.—At this stage while the family would feel no responsibility towards another family and would repel attack by attack, as between its

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1. Locke, Civil Government, Ch. VII, Secs. 79-80.
2. Gen. Ch. XXVII, v. 29.
3. Even the word (olikois means a house); Hooker Eccl. Pol, Bk. I, Sec. 10.
4. Filmer, Patriarcha, I, Sec. 6, but see on this Locke's comment in the Civil Government, Ch. XI, Sec. 148.

members there would be the enforcement of some sort of discipline which the *patria potestas* would call forth. If, therefore, one member of a family attacked another, or violated the rude principles upon which the establishment of family became possible, the aggressor would not be left to the unbridled violence of the aggrieved. They would both refer their differences to the arbitrament of the patriarch who would naturally curb the savagery of the one as he would suggest some reparation to the other. The first rudiments of orderly government would thus be mastered, and it would in course of time lead to its extension to an ever-widening circle. But as the *patria potestas* did not extend the family circle beyond the only means of preserving order, it would repeal an attack by an attack, at times supported by a vendetta. These family feuds were, it is notorious, long-drawn-out, and traces of their existence may be seen even up to the present day. But as the population of nomads settled down to stationary life, mutual dependence and mutual confidence naturally grew. And the inherent instinct of gregariousness helped to create alliancer, offensive and defensive, the value of which grew with the prolongation of peace and the horror of bloodshed. For the love of life and the avoidance of horrors of death were as characteristic of the golden age of the poets as of the less romantic period of history.

7. Dawn of law.—In these early scattered settlements in which the nomad mingled with the householder we may discern the dawn of law and of something approaching to peace. For so long as man obeyed only the promptings of his untrained mind, his love of life dictated fear of all persons and all things, but that very fear gave rise to a feeling of loneliness which the construction of family ties helped to dissipate. And as families grew into clans and the commerce of life brought man in contact with his fellow man, there grew out of the chaos a system of crude government, the nucleus of which was at first a family, but which by absorption or engagement grew into a clan,—but the family still remained an *imperium in imperio*, which so far as regards this country has not even yet wholly ceased to be. But in the Western countries where the march of progress has been more rapid, there arose a system of government which attained its highest development in the formation of democracies the history of which brings us within a measurable distance of the present times. But the intervening period must have been necessarily considerable, though history ushers us at once to well organized societies and orderly Governments, and dismisses with scant notice this great epoch of primitive society during which the new ideas were formed and in which the modern science of government was developed.

Suave marimagus turbantibus oequora ventis.
Eterra magnum alterius spectare laborem.[1]

8. Right of self-defence.—Two things are, however, perfectly clear. As the love of life and procreation led to the formation of family groups, the first use of violence must have been in what we should call real or fancied self-defence of one's own person. Such violence may, or may not be effectual in destroying life, but it would nevertheless bring on the same retaliation. And "to this war of every man against every man, this also is consequent that nothing can be unjust. The notion of right and wrong, justice and injustice have there no place. Where there is no common power there is no law : where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties, neither of the body nor mind. If they were, they might

1. "It is pleasant, in a great storm, to contemplate from a safe position on ashore the perils of some ships tossed about by the furious winds and the stormy Ocean", —*Lucretius.*

be in a man that were alone in the world, as well as his senses and passions. They are qualities that relate to men in society not in solitude. It is consequent also to the same condition, that there be no property, no dominion, no mine and thine distinct; but only that to be every man's that he can get; and for so long as he can keep it. And this much for the ill-condition, which man by mere nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his reason. The passions that incline men to peace, are fear of death : desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggesteth convenient articles of peace upon which men may be drawn to agreement. These articles are they which otherwise are called the Laws of Nature."[1]

9. This is probably the first stage in human progress when the conceptions now designated *sin*, *crime*, and *civil wrongs* were not distinguished. At this stage, the law, properly so-called, has become evolved out of the primitive usages which love of peace and fear of pain would readily give rise. But law would then correspond to general duty, and acts which transgress the usages so establishes or the law so understood would then be regarded as reprehensible and as such they would be equally subjected to some punishment and penances, the degree of which would be judged by their frequency and supposed harm threatened to society rather than the innate malignity of the doer or the quality of his act. Indeed, it is not difficult to recognise that the good of society demanded mutual forbearance and duties. But the exact correlation between man *versus* the State has puzzled some of the ablest sociologists, and it is still a problem as to what should be the rules of conduct which, while insuring the greatest liberty to the man, should also insure the longest continuity to the State. Connected with these problems though somewhat remotely, would arise the question as to what acts, in what circumstances and to what extent are injurious to the State, and what should be the form of deterrents which should check the evil and promote the peace of society. At first, the punishments more than the offences would demand the attention of the legislator, and so we find in the early Codes more space devoted to penalties than to the offences themselves.

10. At this stage naturally, all transgressions are classed as sins and as such their expiation demands both punishment and the performance of penances. This is well represented both in Manu and Vishnu who devote not the least important portions of their institutes to the subject of penances appropriate to each crime. From this state, the evolution of law, distinguishing between a transgression spiritual and one purely secular would mark a distinct epoch. And its further evolution would mark the distinction between *crime* and *civil wrongs* and the two as wholly distinct from sin. But even then the development of law is incomplete. For there still remains the great subject as to what transgressions shall be crimes, and as such the suppression of which is the concern of the State, and what shall be merely private wrongs for which the individual must obtain civil redress, and upon which there is not likely to be a complete unanimity. For while the criminality of certain acts will be readily recognised, there will still remain a large number of delicts upon which opinions as to the advisability of classifying them as offences will always differ. So while theft was in the early Roman and Hindu periods treated as purely a civil wrong, and petty thefts were not even up to the latest periods brought under the lash of the criminal law, all countries are now practically agreed as to theft being a crime, and the thief a menace to society, because theft destroys the general feeling of security that is a necessary basis for the accumulation of wealth.

1. Hobbes, Leviathan, Ch. XIII, p. 65

But nevertheless there still remain grave divergencies as to what is theft in the eye of the law, and upon which the English and Indian laws are certainly widely different.

11. The one great aim of criminal law is punishment. Punishment implies the existence or certain well or ill defined obligations which demand obedience, and the disobedience of which exposes the delinquent to the hostility of society.

12. Early history of crimes.—The feeling of criminal responsibility thus postulates an advanced society in which each individual has a defined position and status. There is nothing that is innately criminal. There can be nothing that must be inherently immoral. It is society that makes the criminal, it is the criminal that attacks society. In the rude age when society was simple, crimes were few. The use of violence against one's person or the abduction of one's females were probably the two earliest known crimes. The one led to sanguinary conflicts unrecorded by history—the other led to the battle of Troy. And as society progressed and the futility of such conflicts became more and more evident,—as the moral sense grew and the minds of men became more united on peaceful pursuits—there grew up by degrees the sense of responsibility which checked indiscriminate revenge giving birth to sanction and punishment. And as the notions of property germinated, there grew attendant in its train notions of theft and plunder. And as society begot human sympathy, the idea that the criminal was the concern of the State and not of an individual become more vivid and easily stereotyped. It was then that the criminal began to be accorded a trial, and the unbridled ferocity of the accuser was transferred to the arbitrament of the *comitia*. It is this which accounts for the great disproportion between the punishments meted out to an offender seized *flagrante delicto* and one apprehended after the deed had been done.

13. The Twelve Tables.—So we find in the Twelve Tables, theft divided into manifest and non-manifest; in the former the thief was caught red-handed, or at any rate, with the spoils on his person; in the latter the thief was one who was detected under any other circumstances, and he was then bound only to refund double the value of what he had stolen, even though if he were arrested while he was moving off with his booty. The Twelve Tables condemned the manifest thief to death if he were a slave, otherwise, he lost his freedom and was made a slave of the owner for life. The punishment of the non-manifest thief was, however, limited to a fine of twice the value of the goods stolen. Here then the sentence was not suited to the gravity of the crime, but rather to the feeling of the aggrieved. The justice administered was, as far as possible, such as he would have dealt out if he had been left to himself; indeed, it is only in this way that the power of punishment would be transferred from the accuser's right arm to the community, and as the latter grew and became more complex, it naturally delegated its powers to its wise men who thus became Judges for the trial of crimes. But as crimes grew and the function of Judges became more and more exacting, the question of remuneration naturally arose, and who, but the disputants, would pay for the arbitration of a cause which they had themselves brought about ? "An eye for an eye, and tooth for a tooth"[1] was the first grim law of social evolution. It was the rule of primitive society when crime was only the concern of the accuser and the accused. The advent of a intermediary marked an advanced epoch in the progress of human history. It was the herald of the modern judiciary. This step forward was, however, not the isolated outcome of human

1. Exodus, xxiv—20 ; Deuteronomy, xix—21; St. Mathew, v—83

progress, for with it there grew up the conception of property, and thus the two great sub-divisions of law became a concern at first of the community and afterwards of the State. At first the distinction between them was neither perceived nor observed.

14. Vinculum juris.—And hence we find in archaic society both crimes and contracts are treated of as obligations or *vinculum juris*, and both to be required by a payment of money. Probably, no general statement can be made as to the stage of social development when the payment of fine was substituted as a penalty for crime, for it followed the course of other considerations which have, in time, marked the differences of one society from another. The earliest authentic record of Grecian history would seem to suggest a social advancement when the crude penalties of a rude age had already been abandoned in favour of a trial—the most conspicuous part of which appears to be the magnitude of the reward allotted to the Judges. In the Homeric trial-scene, for instance, which the God Hephoestus, is described as moulding into the first compartment of the shield of Achilles, the parties are depicted as litigating about the composition of a homicide. Two talents lie in the centre as the reward of the Judge who shall decide the dispute most to the satisfaction of the audience. A similar, though a much smaller, reward was allotted to the Roman Proctor who undertook to arbitrate for the disputants. It is, perhaps, a trite saying that the history of a nation is the history of its nature, but no exhaustive survey of humand evolution is necessary to convince one of its verity. The formations of different Governments and the great variety of thief laws which even up to the present time have not become assimilated show the temperament of the people, the influences to which it has been subject and the manner in which it has been moulded. For while in the Western States the influence of the communities developed the instinct of self-government leading up to the formation of those democracies which throw, as it were, a golden dome over primitive society, the race that migrated to the East having found a congenial climate and a fertile soil, abandoned the strenuous life of the past and settled down to peaceful pastoral pursuits relegating the work of arbitration and Government to a class which soon became hereditary and which in course of time withdrew all vitality and independence from the very class that had created them.

15. Aryan criminal law.—In such a community the development of juristic conceptions would not necessarily follow the same course as in the West. The two would grow like two seeds from the same pod sown on different soils. They would necessarily preserve that underlying unity due to their common genesis, but they would, at the same time, present characteristic differences due to different environments which became as inevitable as they are unmistakable. Such at any rate has been the history of criminal law in this country. Divesting it of all mythical and allegorical gloss, we find the primitive Aryan race on the threshold of India, as peaceful peasants confronted by the great unknown region in front and ill-arrayed to combat the awful forces of nature. At this stage we are ushered to a society which had ceased to be nomadic and tentative, and on which the elements of cohesion and discipline had become visibly impressed. It was a society formed and yet forming, and which possessed as its heritage its own lars and lemurs, its own institutions, and which, above all, had long since adopted a tolerable form of government and ethics.

16. Effect of admixture of races.—But since the people, on which we open the earliest pages of the history of India, were homogeneous, of one line and home, the law of crimes does not present any marked divergence from that which the same people had carried further West. But the impact of the people with an inferior race, the aborigines of the country, soon produce a change which became

welded with the national history, and the admixture of which with the religion of the dominant race soon conferred upon it a veneration and rigour which no subsequent cataclysms have materially abased. As the people became heterogeneous, the law of crimes began to discriminate between the Gentile and the Jew, between the Partician and the Plebeian, the privileged classes and the proletariat. These distinctions must have been well marked by usage at the time Manu promulgated his Code,[1] for we find his conception of crime depends not upon its gravity, but upon the status, of the offender. Of this Code Sir William Jones has justly observed, "It is a system of despotism and priestcraft, both indeed limited by law, but artfully conspiring to give mutual support, though with mutual checks; it is filled with strange conceits in metaphysics and natural philosophy, with idle superstitions, and with a scheme of theology most obscurely figurative, and consequently liable to dangerous misconception, it abounds with minute and childish formalities, with ceremonies generally absurd and often ridiculous; the punishments are partial and fanciful, for some crimes; dreadfully cruel, for others reprehensively slight; and the very morals, though rigid enough on the whole, are in one or two instances (as in the case of light oaths and of pious perjury) unaccountably relaxed : nevertheless, a spirit of sublime devotion, of benevolence to making, and of amiable tenderness to all sentient creatures, pervades the whole work."[2]

17. Manu on crimes (880 B. C.).—The Code of Manu contains, not only the ordinances relating to law, but a complete digest of the then prevailing religion, philosophy, customs and usages observed by the people whether Aryan or non-Aryan. Being the work of a Brahmin, it naturally places that class above all law, and it appears to be the only blemish observable in the Code, otherwise, on the whole just and well-balanced. But that is a foible from which none of the canonical laws are free, and indeed, if the gaze be confined to the present day, wherever there is a conflict of races, the dominant race will be found to have directly or indirectly ensconced themselves behind the wall of privilege from which the proletariat are ruthlessly excluded. It is the same rendering of "might is right" as applied to politics and to law; it is the same inherent vice of selfishness, which has spelt the doom of nations dead and dying, and which is spelling the doom of those boasting of culture and high ideals, but whose intellectual grasp is a mere veneer behind which the coarse grain of barbarism it is not difficult to discern.

18. Manu's classification of obligations and delicts.—Taking them all in all, the ordinances of Manu mark an epoch in the history of this country. The author first defines the constitution of the courts.

(1) "A king, desirous of inspecting judicial proceedings, must enter his court of justice, composed and sedate in his demeanour, together with Brahmins and counsellors, who know how to give him advice.

(2) There either sitting or standing, holding forth his right arm, without ostention in his dress and ornaments, let him examine the affairs of litigant parties.

(3) Each day let him decide causes, one after another, under the eighteen principal titles of law, by arguments and rules drawn from local usages and from written codes.

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1. The age of Manu has been calculated by Sir W. Jones to be about 880 B.C. (*see* Preface XIII to his Edition of the Institutes of Manu).
2. Manu (Sir W. Jones Edition) Preface, p. xix.

(4) Of these titles, the 1st is debt on loans for consumption; the 2nd, deposits and loans for use; the 3rd, sale without ownership; the 4th, concerns among partners, and the 5th, subtraction of what has been given.

(5) The 6th, non-payment of wages or hire; the 7th, non-performance of agreements; the 8th, rescission of sale and purchases; the 9th, disputes between master and servant.

(6) The 10th, contests, on boundaries; the 11th and 12th, assault and slander; the 13th, theft; the 14th, robbery and other violences; the 15th, adultery.

(7) The 16th, altercation between husband and wife, and their several duties; the 17th, the law of inheritance; the 18th, gaming with dice, and with living creatures; these eighteen titles of law are settled as the ground-work of all judicial procedure in the world.

(8) Among men who contend for the most part on titles just mentioned, and on a few miscellaneous head not comprised under them, let the king decide causes justly observing primeval law."[1]

19. Manu's view of crime.—It is thus clear that Manu's conception of crime was (*i*) Assault and Battery; (*ii*) Defamation; (*iii*) Theft and Robbery; (*iv*) Adultery and (*v*) Gambling; that is, all the principal offences against the person and property which form the ground-work of the Penal Code. After recounting the main heads of his jurisprudence, he enjoins the king either to dispense justice himself with the assistance of counsellors or to appoint a court of a Judge and three assessors,[2] who are enjoined to see for themselves before they hear, and carefully sift what they hear. The administration of justice may be entrusted to the three regenerate classes but never to a Sudra.[3] He exhorts the Judges to see "of man by external signs, the rights of men by their voice, colour, countenance, limbs, eyes and actior; from the limbs the look, the motion of the body, the gesticulation, the speech, the changes of the eye and the face are discovered the internal workings of the mind."[4] "He who says 'this is mine', must be only examined; and if, before he inspect it, he declare its form number and other circumstances, the owner must have his property."[5]

"As a hunter traces the lair of a wounded beast by the drops of blood; thus let a king investigate the true point of justice by deliberate arguments; let him fully consider the nature of brutes, the state of the case, and his own person; and next the witnesses, the place, the mode and the times firmly adhering to all the rules of practice."[6]

20. Defects of his system.—These precepts, so far as they go, are excellent. But the substantive criminal jurisprudence of Manu is unequal in its description of the offences and the apportionment of sentence. According to him, the gravity of the crime varies with the caste of the delinquent, and so does the sentence. As was to be expected, of all castes, the protection given to Brahmins was paramount: "Never shall the king slay a Brahmin, though convicted of all possible crimes let him banish the offender from his realm, but with all his property secure, and his body unhurt".[7] "No greater crime is known on earth than slaying a Brahmin; and the king, therefore, must not even form in his mind an idea of killing a priest".[8] In accordance with the then

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1. Institutes, Ch. VIII on judicature and on law, private and criminal.
2. *Ibid.*, Sec. 10.
3. *Ibid.*, Secs. 20, 21.
4. *Ibid.*, Sec. 31.
5. *Ibid.*, Secs. 25, 26.
6. *Ibid.*, Sec. 34.
7. Manu, Ch. VIII, v. 880.
8. *Ibid.*, v. 381.

prevailing practice, the punishment for the different crimes was usually inflicted on the organ concerned in the crime, as if the offending organ had a will of its own and had not been merely servitors of the central spirit. "Manu, son of the self-existent, has named ten places of punishment, which are appropriated to the three lower classes; but a Brahmin must depart from the realm unhurt in any one of them."[1] "The part of generation, the belly, the tongue, the two feet, the eye, the nose, both ears, the property, and, in a capital case, the whole body."[2] The measure of punishment was correctly laid down : "let the king, having considered and ascertained the frequency of a similar offence, the place and time , the agility of the criminal to pay or suffer, and the crime itself, cause punishment to fall on those alone who deserve it."[3] "The unjust punishment destroys reputation during life, and fame after death; it even obstructs, in the next life, the path to heaven: unjust punishment, therefore, let the king by all means avoid."[4] Manu showed a wise discrimination between casual offenders and hardened convicts. "First, let him punish by gentle admonition; afterwards, by harsh reproof; thirdly, by deprivation of property; after that, by corporal pain. But, when even by corporal punishment he cannot restrain such offenders, let him apply to them all the four modes with vigour."[5]

21. General exeptions to criminal liability.—He next prescribes the penalties one to each offence. Before doing so, he recognises the value of the rules of non-liability much on the lines embodied under the chapter of General Exceptions in this Code. Anything said or done under compulsion[6] or by fraud is declared to be null and void. The right of private defence is not only fully developed, but the rules bearing on it are as analogous as they can be with those enacted in the Code :

348. "The twice-born may take arms, when their duty is obstructed by force; and when, in some evil time, a disaster has befallen the twice-born classes."

349. "And in their own defence; and in a war for just cause; and in defence of a woman or a priest; he who kills justly, commits no crime."

351. "By killing an assassin, who attempts to kill, whether in public or in private, no crime is committed by the slayer : fury recoils upon fury."

48. "By whatever lawful means a creditor may have gotten possession of his own property, let the king ratify such payment by the debtor though obtained even by compulsory means."

49. "By the mediation of friends, by suit in Court, by artful management, or by distress, a creditor may recover the property lent; and, fifthly, by legal force."

50. "That creditor who recovers his right from his debtor, must not be rebuked by the king for retaking his own property."

22 (i). Cheating.—Of crimes, properly so called, Manu speaks of at least ten principal ones. He has classified them not according to their gravity, but rather according to their frequency. Thus the first place in his Criminal Code would be given to what is designated in the Code "criminal breach of contract". These occupy the first nine titles in his division. He expatiates on them more fully here and there. But he declares unequivocally

1. Manu, Ch. VIII v. 124.
2. *Ibid.*, v. 134.
3. *Ibid.*, v. 126.
4. *Ibid.*, v. 127.
5. *Ibid*, vv. 129, 130.
6. *Ibid.*, vv. 179—192.

the liability of those who go back upon their contracts, misappropriate a deposit,[1] or otherwise commit the offence of cheating : "That man, who, by false pretences, gets into his hands the goods of another, shall, together with his accomplices, be publicly punished by various degrees of whipping or mutilation, or even by death."[2] The word "cheating" is used here in its large sense as comprising all cases of fraud or deceit, whether practised in relation to property or otherwise. Even an imposition on an intended bridegroom, by showing him one damsel, and then offering him another in marriage is a fraud made so punishable. Manu enjoins *uberrima fides* in connection with sales of brides. "The kinsman who gives a damsel in marriage, having first openly told her blemishes, whether she be insane, or disordered with elephantiasis, or defiled by connection with a man, shall suffer no punishment."[3]

23 (i). Trespass and transgressions.—After dealing with the offence of cheating in its various varieties, Manu deals with the great subject of trespass and transgressions. This was a subject which naturally bulked large in the pastoral life of the early Aryan settlers, as indeed, it is even now in the great tracts of rural India. Indeed the early law-givers of all countries have naturally given a predominance to the question upon which depended their livelihood, and which formed the subject of bitter animosities. Now, to safeguard the just possessions of man, and to facilitate the investigation into titles, it was primarily necessary to protect the boundaries. This was as much recognised by the Hebrew sage who cursed those who removed their neighbour's landmarks, as by the Indian law-giver, who has laid down careful and elaborate rules for the creation of boundaries and the deposit of indestructible substances underneath to prevent their confusion. He then enacts penalties for the protection, for the transgressions of the cattle and the like.

24 (ii). Fornication and adultery.—Next to the protection of one's possessions arises the necessity of protecting one's own household. So the law-giver condemns and punishes the fornicator and adulterer. The offence is condemned, because it tends to the general ruin, and causes a mixture of classes among men : "thence arises violation of duties; and thence is the root of felicity destroyed."[4] Persons committing overt acts of adulterous inclinations are punishable with banishment after branding them with such bodily marks as excite aversion.[5] The Code then defines what is to be considered as such overt acts.[6] Fornication entails varying penalties apportioned to the status of the offender. An equal in rank being fined, a man of lower rank being subject to corporal punishment.[7] Rape is, however, in each case vested with condign punishment, for the penalty is the amputation of his two fingers and a fine of 600 *Panas*.[8] Enhanced and varying penalties are provided for previous convicts. The extirpation of thieves, adulterers, defamers and persons who commit assaults or are guilty of atrocious violence is the paramount duty of kings, and their suppression ensures them the mansion of *sacra*, besides procuring them earthly fame.[9]

25 (iii). Assaults, defamation, thefts.—The offences falling into the general category of assaults, defamation, theft, all receive adequate attention. The offences falling under the generic category of assault may be anything from the use of criminal force to murder. And this Manu knew. And in this

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1. Manu, Ch. VIII, vv. 179—192.
2. *Ibid.*, v. 193.
3. *Ibid.*, v. 205.
4. *Ibid.*, v. 353.
5. *Ibid.*, v. 352.
6. *Ibid.*, vv. 356—365.
7. *Ibid.*, v. 366.
8. *Ibid.*, v. 367.
9. *Ibid.*, vv. 386, 387.

respect his arrangement of these offences is even more scientific than the Code. But his punishments are necessarily unequal and vary according to the caste of the offender and the party aggrieved, and it must, moreover, be confessed, often grotesquely disproportioned. For instance, a low-born man assaulting or hurting a superiorl, lost the offending member with which the offence was committed, and which was more or less amputated in proportion to the injury.[1] But if the assailant was an equal, he was amerced only in fine. Fine could expiate all delinquencies committed between equals, but there was a limit beyond which fine would not go. For if the offender broke a bone he was to be instantly banished.[2] This was the highest penalty reserved for any crime—even murder. But Vishnu stated to be his contemporary[3] speaks of the capital sentence as being appropriate to this offence.[4] Manu recognised degrees in homicide. For instance, he knew that rash and negligent driving entailing loss of human life, was a minor offence compared to the crime of cold-blooded murder. Consequently, he provided for its expiation with a fine equal to that of theft.[5] Homicide, says Vishnu, may be intentional or unintentional; but both species of offences, even though committed against a Brahmin might have been expiated by adequate penances[6] the murder of a Brahmin by a horse-sacrifice and a visit to all the places of pilgrimages on earth,[7] but if the same killing was unintentional, a self-inflicted banishment for twelve days was deemed a sufficient punishment.[8] An undetected criminal could, however, make peace with his conscience by doing less : "the killer of a Brahmin is purified, if having approached a river, and bathed in it, he restrains his breath sixteen times, and takes only one meal consisting of a food fit for offerings, each day, for a month".[9] Now, as the workers of Manu and Vishnu were probably contemporaneous, a close study of these works confirm a belief that the early Aryan[10] as far back as two thousand years ago had threshed out a very serviceable system of Criminal Law. The penalties prescribed by them for certain offences may now appear inadequate and absurd, but then the sufficiency of punishment must be judged by its efficiency. And if the penalties which the ancient sages prescribed had the desired deterrent effect upon malefactors, and assured the citizens in the just possession of their rights and safeguarded their lives and limbs, criminal law had then attained its purposes far more easily than in modern times. These Codes appear to have held sway for a period of at least a thousand years, when the Mohammedan power became established in this country. Thenceforward the people were made necessarily subject to the criminal jurisprudence of the new conquerors.

26. Mohammedan criminal law.—The origin and fountain of Mohammedan criminal law is the Koran. In all ages since the advent of the Prophet it has been the sole Code both of criminal jurisprudence and of civil duties. Believed to owe its origin to divine inspiration, and embodying within its compass all the tenets of the faithful, it has for ages been the pattern of righteousness and an ethical Code to the whole of the Muslim world. Inspired by its teachings and considering its laws sacred and immutable, the Mohammedan conquerors of this country have been content to administer them in the form

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1. Manu, Ch. VIII, v. 279.
2. *Ibid.*, v. 284.
3. In Vishnu, 7 Sacred Books of the East, Introduction, p. xxxii, the age of Vishnu is estimated to be about the third century A. D., in which case he would be over a thousand years later than Manu.
4. "Great criminals should be put to death", Vishnu, Ch. V, vv. 1, 7; Sacred Books of the East, p. 24.
5. Vishnu, Ch. V, v. 296.
6. *Ibid.*, Ch. XXXV, v. 6.
7. *Ibid.*
8. *Ibid.*, Ch. L, v. 6.
9. *Ibid*, Ch. LV, v. 2.
10. Vishnu *sutras* are calculated to have been composed about the third century A. D.—7 Sacred Books of the East, Intro. p. xxxii.

they were revealed to the Prophet with such variations and adaptations as the dispensing justice found necessary to individual cases. As was to be expected, the Koran marks that stage in the intellectual development of a people when the idea of crime as distinct from sin is still in the course of evolution. At that stage there is not to be expected any difference between the conception of crime as distinct from the civil obligation, nor is there any distinction between civil obligation and mere social duties. In short, at that stage of human development, sin and crime, religious, public and moral obligations are all found blended in the same conception of duty, with their relative importance neither understood nor well defined. All are based on religious sanction, all are alike punishable with the torments of the hell-fire. As, however, the fulfilment of some obligations suggests also some mundane advantage the law-giver naturally couples the fear of divine vengeance with the more utilitarian view of selfish good, thereby doubly insuring the fulfilment of the obligation. So the Prophet said: "Kill not your children for fear of being brought to want; we will provide for them and for you; verily, the killing them is a great sin!" But the moral of other precepts was not so obvious. "Draw not near unto fornication; for it is wickedness, and an evil way. Neither slay the dove which God hath forbidden you to slay unless for a just cause; and whosoever shall be slain unjustly, we have given his heir power to demand satisfaction; but let him not exceed the bounds of modernation in putting to death the murderer in too cruel a manner, or by revenging his friend's blood, or any other than the person who killed him; since he is assisted by this law. And meddle not with the substance of the orphan, unless it be to improve it until he attains his age of strength; and perform your covenant; for the performance of your covenant shall be inquired into hereafter. And give full measure when you measure aught; and weigh with a just balance. This will be better, and more easy for determining every man's due. And follow not that whereof thou hast no foreknowledge, the hearing and the sight, and the heart, every one of these shall be examined at the last day. Walk not proudly in the land, for thou canst not cleave the earth, neither shalt thou equal the mountains in stature. All this is evil, and abominable in the sight of thy Lord. These precepts are a part of the wisdom which thy Lord hath revealed unto thee."[1] This is then the quintessence of Mohammedan criminal jurisprudence. It is certainly a fair exposition of the *jus naturalis* which had guided the course of the Roman republic, as it has since of many a nation which has no other code or system of ethics. The substantive law being thus divinely settled, all that remained for human hands to do was to prescribe some form of procedure by which it should be enforced and applied to individual cases. In some countries this was a matter of simplicity. And so we find in the *Ayeen-i-Akbari*, which bestows considerable space to the description of the cow-stables and the kitchen, disposing of the matter of judicial procedure by the following casual reference:

"Although it be the immediate duty of a monarch to receive complaints and administer justice: yet seeing that it is not possible for one person to do everything it necessarily follows that he must delegate his power to another. This delegate must not be satisfied with witnesses and oaths, but make diligent investigation; because it is very difficult to come at the truth without painful search, and minute enquiry. Considering the depravity of human nature he ought not to place much reliance on depositions, and solemn asseverations. Divesting himself of partiality and avarice, let him distinguish the oppressed from the oppressor, and when he has discovered the truth act accordingly. He shall begin with asking the circumstances of the case and then try it in

1. Koran (Sale's Tran.), Ch. XVII, p. 230

all its parts. He must examine each witness separately upon the same point, and write down their respective evidence. Since these objects can only be effectually obtained by deliberateness, intelligence and deep reflection, they will sometime require that the cause should be tried again from the beginning, and from the similarity or disagreemnet, he may be enabled to arrive at the truth. The *Kazi* tries the cause; and the person who passes sentence and orders punishment is called the Mir Abdul."[1]

27. Mohammedan and Roman judicature compared.—This duel responsibility for the administration of all justice, civil as well as criminal, probably arose out of a desire to insure an impartial trial of causes submitted to their joint arbitrament. In this respect the system was probably the forerunner of the present constitution of judicial benches. As such, it compared favourably with the trials held before the Roman proctor in the early days of the republic. There was, however, this difference between the selection of the *Kazi* and Mir Abdul and the proctor, that while the office of the *Kazi* was hereditary and so in later times became also the Mir Abdul, the proctor was annually elected by the *comitia centuriata* and were thus directly responsible to the people. But the administration of justice was in each case based upon the *jus naturale* which would in both cases be eked out by precedents.

28. Corpus juris.—In Rome these proctorian edicts were published, and as they grew they became in course of time the foundation of a *corpus juris* which were in later times transformed into a code under the *imprimatur* of Justirian. It does not appear that any similar attempt was made in this country towards the codification of criminal jurisprudence under the Mohammedan emperors. As a matter of fact it was not possible. For many of them were military despots who ruled the realm over which they held their sway for the time being at the point of their swords rather than by the strength of their constitution. Their function of government was to collect taxes and acquire fresh territory. They had seldom time to think of legislation or develop the materials found ready to hand with a view to lay the foundation of lasting peace or popular contentment: *inter arma silent leges.*

29. Even emperors like Akbar who thought of consolidation and conciliation never dared to improve upon the system which they found sanctified by the dust of antiquity. And even to them the toleration of the great Hindu system which had become established ages ago by the more discriminating wisdom of their forbears was impossible, for it was a system in which religion and law were so welded together that to adopt the one would have been tantamount to the toleration of the other—which was the last thing that iconoclastic monarchical preachers of the Faith could endure. The result was a system in which a want of system was pre-eminent. At this stage the advent of the East India Company upon the scene with its traditions of the great *corpus civile*—which had long since diffused its learning and its light all over Europe—forestalled the passing of local Regulations, the key-note of which was adaptation of the local customs and conditions and threshing them out into some form of uniformity. But the result of this was to make confusion worse confounded.

30. Period of Mohammeden power and its transition.—As already observed, the policy of the Mohammedan rulers was to entrust the expounding and elucidation of their laws to their *Kazis*, whose notions of crimes were not adapted to any fixed and rigid system of rules, but differed according to the power and purse of the offenders before them. The fountain head of all law was still the Koran, but Koran could not be expected to be a human Cyclopaedia. That offered the chance for the *Kazis'* cupidity and ingenuity. The result was the

1. *Ayeen-i-Akbari* (Gladwin's Trans.), p. 238

evolution of a system which was as elastic as it was bewildering. This system was in force on the assumption of the reigns of Government by the British. And their judiciary were enjoined to preserve the *status quo* in the matter of civil and criminal judicature. They at first readily turned to engraft that system upon their own administration, but baffled in their attempt to unravel it, both the Mofussil as much as the Presidency Courts gradually began to turn to the English law for information and guidance. But in adopting this system each presidency followed a course of its own. The result was a chaotic mass of conflicting and contradictory decisions, interpretations and views the reconciliation of which was as difficult as it was undefined. The Regulations enacted for each presidency, however, secured some measure of certainty to the area to which they applied. But as these Regulations were passed by the governments of each presidency there soon grew up a *corpus juris* which could only be compared to the system it had supplanted and displaced. The glaring discrepancies between the Regulations passed by the Presidencies of Bengal, Bombay and Madras became more and more noticeable as they became united under a Central Government, and which afforded greater facilities for their closer study and mutual comparison. So the framers of the Code, to whom these Regulations had been referred for enlightenment and guidance wrote in reference to them: "The British Regulations, having been made by three different legislatures, contain, as might be expected, very different provisions. Thus in Bengal serious forgeries are punishable with imprisonment for a term double of the term fixed for perjury[1] in the Bombay Presidency, on the contrary, perjury is punishable with imprisonment for a term double of the term fixed for the most aggravated forgeries[2]: in the Madras Presidency the two offences are exactly on the same footing.[3] There were many more and equally glaring discrepancies. The result was, utter chaos and confusion in administering the law of crimes.

31. Contribution to the Code.—Finding themselves thus landed in a hopeless quandary the Law Commissioners wrote: "Under these circumstances **we have not thought it desirable to take as the groundwork of the Code any of** the systems of law now in force in any part of India. We have, indeed, to the **best of our ability compared the Code with all those systems, and we have taken** suggestions from all; but we have not adopted a single provision merely because **it formed a part of any of those systems. We have also compared our work with** the most celebrated systems of Western jurisprudence, as far as the very scanty means of information which were accessible to us in this contry enabled us to do so. We have derived much valuable assistance from the French Code, and from the decisions of the French Courts of Justice on questions touching the construction of that Code. We have derived assistance, still more valuable, from the Code of Louisiana prepared by the late Mr. Livingston."[4]

32. History of the Draft Penal Code.—This was then the groundwork of the Code which the four Law Commissioners, of whom Lord Macaulay was the chief, prepared, and which they submitted to the Governor-General in Council on the 14th October, 1837. It was then circulated to the Judges and law advisers of the Crown, and on the 26th April, 1845, a communication was sent to a small commission of two gentleman with the following directions: "The Governor-General in Council is desirous that some step should be taken towards a revision of the Code with a view to its adoption with such amendments as may be found necessary, or to its final disposal otherwise. For this purpose I have been instructed to refer to you for examination all the opinions received from the several presidencies as per enclosed list, and to direct your attention to the 'Act of Crimes and Punishments,' contained in the seventh report of the Commissioners of the criminal law of England, with a view to comparison, and the detection of any omissions or other imperfections that may exist

1. Beng. Reg. XVII of 1817, Sec. 9.
2. Bom. Reg. XIV of 1827, Secs. 16, 17.
3. Mad. Reg. VI of 1811, Sec. 111.
4. Prefatory address, p. xiv.

in the Code with these materials, the Governor-General in Council trusts that you will be enabled to frame such a report as may assist the Government of India in forming a judgment or the merits of the Code at no distant date."[1] The effect of this commission was the revision of the Code in the light of English law which was then intended to be codified, and for which a similar commission had been then sitting in England. This commission submitted the result of its examination in two reports, dated 5th November, 1846, and 24th June, 1847, and recommended its enactment for the whole of British India. The Bill as so revised appears to have remained pigeon-holed for twelve or more years, for it was only on the 6th October, 1860. that is, some twenty-five years after its first conception, that it was passed into law, and became practically in supersession of all pre-existing rules, regulations and orders the Code of criminal law in India.

33. Present Penal Code.—As was to be expected, the Code as finally enacted, was as different from the Code as originally prepared by Lord Macaulay and his committee, as that Code confessedly was from the then existing regulations which it was intended to supersede. As originally enacted, the Code contained only 488 sections, but as added to from time to time it now contains no less than 530 sections, that is 511 sections as originally enacted, and to which have been added 19 other sections by subsequent amendments.

34. As the Code now stands, it has been spoken of as a model piece of legislation as the premier Code of criminal law, and as the monument of the great genius of Lord Macaulay who inaugurated and constructed it. Unfortunately the present writer cannot join in these encomiums which have been lavished upon it by indiscriminating critics without close examination, and, it may be feared, solely from the charm of the great name of its reputed author. It will, it is hoped, be understood, that this is not intended to be a sweeping condemnation of the Code, but only of its alleged perfection and freedom from blemishes. That as a Code, it is by far the most important piece of the Indian legislation cannot be questioned. But that it requires a thorough revision by an expert committee of lawyers is equally indisputable. Under the heading of "Analogous Law", the present writer has shown what are the strong points, and what are the defects of the present Code—in what respects it agrees with or differs from the modern English law, and in what respects it is ambiguous or defective, and requires emendation and improvements.

35. As it is, the Code sorely needs re-arranging of its many sections which would seem to have been juxtaposed for no reason other than a merest chance. Many provisions of the Code overlap one another. And while many sections are pedantically precise, others are bald and leave much to the ingenuity of construction. These blemishes should certainly not exist in the Code of one who pleaded for "uniformity when you can have it, diversity you must have it, but, in all cases, certainty".[2]

36. Arrangement of the Penal Code.—The Code, as at present, is divided into twenty-three chapters; and these in their turn are subject to great divisions into which the offences described in the Code naturally fall, viz.—(*i*) offences against the State and the public and (*ii*) offences against the person and property. In this respect the Code adopts the classification of the civil law into public and private offences. This division of crime has received the sanction of Austin who justifies it by reference to the division of civic duty. He divides that term into absolute and relative duties, the former being those, which the

1. Letter from the Secretary to the Government of India, dated 26th April, 1845.
2. Lord Macaulay's despatch on Codification, 1833.

subject owes to the State, and the violation of which constitutes offences against the State; the latter being duties which the subjects owe *inter se* and the violation of which constitute offences which necessarily involve violations of the rights of specified individuals. Relative duties thus correspond to right belonging to specific indivduals, while absolute duties correspond to no such rights. As the latter are, therefore, transgressions directly affecting the community at large and the State which is its representative and spokesman, offences falling into that category are as a rule non-compoundable, while offences directly affecting the individual are as a rule compoundable, unless they by their heinousness so affect the community as to be declared non-compoundable.

37. Such was also the view of the civil law which regarded such offences as fit subjects of private reparation, and as to which the State as a rule left the parties to themselves, So the offence of theft which is now justly regarded as a most heinous crime against property was not criminally indictable under civil law; and even under Justinian[1] this continued to be the rule, though he sanctioned the institution of criminal proceedings in more serious or aggravated cases. So in such a case the primary duty of a king as enjoined by Vishnu is to ensure recovery of the property to the owner,[2] and as a precautionary measure he enjoins the branding of a thief in the forehead so that others beware.[3] Manu is in this respect more modern, for he enjoins a fine in trivial cases, and corporal punishment for the rest.[4]

38. Its extent and operation.—The short chapter prefacing the Code, and consisting of but five sections may be considered to be a formal one defining the title, extent and operation of the Code, but it was a wider range of utility in view of the various nationalities inhabiting this country and its ever-increasing communication with the rest of the world. In this respect the chapter deals with the extent and operation of the Code (*i*) for intra-territorial offences, and (*ii*) for extra-territorial offences, such as offences committed in the Native States, foreign countries and on the high sea. The operation of the Code for such offences depends upon the jurisdiction of the Courts, and the effect of which is to claim such jurisdiction over only what has now come to be designated "Native Indian Subjects" European British subjects being not amenable to the Code in respect of offences committed in case (*ii*). Section 5 of the Code is important and has wisely left unrepealed all pre-existing laws, special or local. This was inevitable in view of the fact that it was impossible to make the Code exaustive of all offences howsoever trivial or local. Such a course was not even desirable, for the Code was intended to be the universal Code, dealing with general offences, and it could not be encumbered with offences which are merely transgressions of local rules and bye-laws and which can only be designated offences by courtesy. Besides special and local laws this section has been held to preserve intact what little of the common law was in force in this country prior to the present enactment. One such offence, which has been held to remain intact in spite of the Code, is the offence of contempt of the Courts of Record in respect of which the High Courts still claim plenary jurisdiction of discipline and punishment. The first great division of the Code naturally begins with the chapters which are now the integral part of every Code and Act of importance—the definition of words used in the Code. This

Definition.

forms Chapter II (Secs. 6-52) and is one of the most important chapters in the Code. For it defines with

1. Pandects, Bk. 47; tit 2, Sec. 92.
2. Vishnu (S. B. E.), III, 66, p. 20.
3. Vishnu, vv. 6, 7, p. 26.
4. Manu, Ch. VIII, v. 320, p. 183.

almost punctilious precision the meaning of various terms which are then used as terms of art everywhere in the Code, both in defining the offences as well in describing their inter-relations and differences. These words have now obtained a wider currency on account of their use in the companion Code of Criminal Procedure, and other special and local laws dealing with other offences and wrongs, since enacted.

39. Punishments.—The next chapter (Secs. 53-75) deals with the subject of punishments, which is really a branch of the adjective law, but which from its importance and close association with the substantive law of crime has become by usage a part of the substantive Code. The Code sanctions five principal forms of punishments, namely—(*i*) death; (*ii*) transportation; (*iii*) imprisonment, which may be simple or rigorous; (*iv*) fine; and (*v*) forfeiture of property, but which is a subsidiary punishment, the infliction of which is justifiable only in heinous cases and when coupled with other substantive punishment. One form of punishment which the Code originally provided for, but was subsequently abandoned, is banishment from British India. This form of punishment was provided for only three offences, namely—(*i*) sedition; (*ii*) waging war against the king; and (*iii*) unauthorised residence in British India.[1] The Law Commissioners deprecated its infliction upon a native of India as an "unwarranted severity". It was consequently deleted from the Code,[2] though in doing so the Legislature have only abolished what would have been a duplicate punishment, for the Government of India were by Regulation III of 1818 given ample power to deport persons for reasons of State. The sentence of transportation is still retained as a punishment, and as it is only a form of banishment coupled with enforced servitude in an appointed locality, that sentence may still be held to remain as an approved form of punishment under the Code. Banishment was a favourite punishment with the ancient nations. With the Greeks as with the Romans, it was a punishment as much self-imposed for political unpopularity or popular displeasure, as it was a sentence sanctioned by law. It was a form of penance which the great Ram performed in this land, and it was a sentence which in the form of ostracism was visited at one time or another upon the great popular leaders of Athens. And even as a pure criminal punishment it had a distinct place in the civil law. It was either *relegatio* or *deportatio*, the former being a banishment to an island for a term or life, and differed from *deportation* in that it was generally to a more pleasant island and did not carry with it the penalty of confiscation of property. Another form of banishment called *exilium* was occasionally resorted to, and it was either *relegatio* or *lata fuga*, which was residence restricted to a particular place or a prohibition from entering it. This form of punishment was almost indiscriminately commended by the Hindu law-givers as the approved mode of expiation,[3] its duration varying with the heinousness of the crime and its rigour with the caste of the delinquent. The perfomance of pilgrimages is still a relic of this form of self-imposed punishment for the absolution of sin.[4] But these are not the true forms of banishment properly so-called, which consists in the expulsion of a man from the country in which he is then residing and the prohibition of his return to it. In this sense banishment subserves none of the purposes which punishment has in view, and it may, as it often does,

1. Sections 287-290 forming Chapter XVI on illegal entrance into and residence in the territories of the East India Company drawn in pursuance of the Act of Parliament (3 & 4 Will. IV, c. 85, Sec. 84), but it was subsequently omitted as it did not deal with an offence but an administrative convenience.
2. 2nd Rep., Sec. 473.
3. Manu, Ch. XI, v. 103, p. 53.
4. Vishnu, Ch. XLII, v. 2, p. 40; for details, see *ibid.*, Ch. L—LVI, pp. 157-185.

imply a loss to the State which it may not be able to afford.[1] As such banishment pure and simple has wholly passed out of the armoury of punishment of almost all civilized communities.

40. Present forms and rationale of punishment.—Of the remaining forms of punishments the Code adopts all which are now acknowledged by all criminologists to be the only ones adapted for the repression and punishment of crime—death, transportation, imprisonment and fine.

41. Of these death is the extreme penalty of law. It is the foremost as it is the most dreaded of all punishments. But it is regarded as a punishment of doubtful utility, and it has consequently been abolished from the penal laws of many countries, and the present tendency is to confine its application only to exceptional cases. The question of the utility of the capital punishment depends upon the view one takes of punishment itself. It is probably a subject upon which criminologists will never agree. For though they all admit the necessity of punishment they are as much divided as to its aim and objects as the two poles asunder. But whether crime be regarded as a disease or a vice,—an uncontrollable impulse, or a deliberate raid on the peace of society,—the chief objects which the infliction of punishments serves are threefold, and which are the three stand-points from which it is possible to view the question. Looked at from the stand-point of the person injured, punishment serves the purpose of satisfying his craving for revenge, while it affords him compensation for any loss which he may have suffered. Looked at from the stand-point of the community at large, it serves as an example to other malefactors, while it affords them some security against the outbreak of lawlessness. As for the individual himself the object of punishment should be also threefold.

(*a*) In the first place, it should be sufficient to intimidate him against committing another crime. For this purpose it should be severe enough to be deterrent. If it is not deterrent it will fail to move society. Its second object must be reformation of the criminal; and its third object is said to be his incapacitation.[2] But this is not an object of itself, but is rather the result of the first. But this is probably a view which is only now gaining ground.

42. Rule of retaliation.—At one time both the passion for retaliation as well as the readiest means of incapacitation was suggested by the rule *membrum pro membro*[3]—an eye for an eye and a tooth for a tooth, which was the accepted doctrine in all countries Eastern or Western, and it was an approved form of punishment as much under the ancient laws of England, as it was till a couple of centuries back the punishment in vogue in Sweden.[4] It is still the punishment in force in China and Afghanistan and other countries where the rays of a kindlier humanity have yet to penetrate. At first sight this punishment strongly appeals to the vulgar mind, for it is the tit for tat of law, than which what could be fairer? But it is happily a punishment which is not likely to be revived again, though its one form still lingers in the shape of the Whipping Act, the revision of which has been recently effected by the Legislature.[5]

43. Mutilation as a punishment.—The chief drawbacks of mutilation as a punishment are that it cripples the victim for life, and thus diminishes his

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1. *See* Bentham's *Principles of Penal Law*, Bk. 2, Pt. 4, Ch. VIII (Bowrig), pp. 431-435.
2. Bentham's *Rationale of Punishment* I 83.
3. 3 Inst. 118.
4. 4 Black, 206.
5. *See* Act IV of 1909.

utility to the State. It, moreover, affords r o safeguard against repetitions of the crime, and in that case the same punishment cannot be resorted to. It gives no chance to the individual to reform himself, and as a punishment it lacks its one essential—remissibility in case of wrong conviction, or for any other cause. This is confessedly one great objection against corporal punishment. But these objections are scarcely to be regarded as insuperable so long as public opinion does not outlive that primitive condition of existence and conception of crime, sufficiently to revolt at the very thought of mutilation, and so long as the sight of it does not become at once sickening and abhorrent to it. This account for the abolition of all repulsive forms of execution, and the infliction of the revolting forms of torture which were at one time matters of usual occurrence. So at one time law sanctioned even different operations of the afflictive kind on persons condemned for high treason : (*i*) dragging at a horse's tail along the streets from the prison to the place of execution; (*ii*) hanging by the neck, yet not so as entirely to destroy life; (*iii*) plucking out and burning of the entrails while the patient was yet alive; (*iv*) decapitation; (*v*) quartering; (*vi*) exposure of the head and quarters in such places, as the king directs. The sentence had, of course, to be abolished, and now high treason is seldom visited with capital punishment. The ancient nations had devised various forms of tortures for the punishment of criminals, but it is unnecessary to refer to them, as they have happily all been long since buried in oblivion. These punishments with their exquisite cruelties were probably as much devised out of the tyrannical spirit and savagery of the age as out of a feeling of philosophic interest in the welfare of the community. So were the Roman plebian criminals exposed to the wild fury of wild beasts in the gladiatorial contests, and so does a bull fight attract to the present day the blue-blooded nobility of Spain. The nature of punishments and their extent thus varies with the changing phase of public morality. And its barbarity and cruelty become reduced and often eliminated with the intellectual refinement and elevation of society. It thus happens that while the rule of *memberum pro membro* still obtains in some countries, death by electrocution is only tolerated as an extreme social necessity in other countries, while the abolition of the capital sentence marks a new era of intellectual advancement of other countries which do not need the horrors of the death chamber to keep down crime.

44. Should the death penalty be abolished.—The question of punishment is, therefore, a complex sociological problem, and it is one upon which the jurists and the rationalists are not likely to agree. It has often been urged as a formidable argument against the obligation of the capital penalty that its existence acts as a salutary example to would-be assassins, and that it is itself a useful means of purging society of its worst criminals. The fallacy of this argument was sought to be exposed by Montague with reference to the countries where with the abolition of that penalty no worse consequences were experienced. But this argument would have been sound were it not for the fact that they were the countries where the social advancement had forced the hands of the Legislature; and where, therefore, it may be that the penalty was abolished after its abolition became otherwise justifiable. The test would have been a less fallacious one if an experiment were permitted in a country less advanced like India, and the result watched for a prolonged period, say a decade. But this has never been attempted. And it will be probably safe to prophesy that if it were attempted at the present stage of its social development the result would probably justify the necessity of its retention. But the propriety of its retention does not justify its indiscriminate infliction. As the gravest sentence known to law, its use must be necessarily reserved to cases of gravest heinousness and atrocity —and

even then to offenders to whom, having regard to the various objects of punishment, any other sentence would be both inadequate and non-exemplary. Reasons have been given in the Sequel as to what should be the guiding principle in awarding this sentence, the sole object of which is the extermination of the person who is, in the eye of the law, incorrigible and a standing menace to society.

45. Transportation.—Next in point of its gravity and importance stands the sentence of transportation. This sentence is only admissible in the case of native convicts, the sentence of penal servitude being the alternative sentence applicable to Europeans. The authors of the Code justified the sentence of transportation on account of the terror it struck into the minds of the people of this country. "The consideration which has chiefly determined us to retain that mode of punishment is our persuasion, that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is an unmixed evil. It is by the terror which it inspires that it produces good; and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country."[1] These words were written about three-quarters of a century ago, and even then, as the Law Commissioners remarked the terrors of the "Blackwater" had not ceased to exercise the imagination of those who were primarily interested therein.[2] And as regards the arousing of terror in the populace as a chastening effect of punishment, it is only one and not the only object as the authors seem to have assumed. As an alternative sentence reserved for the perpetration of crimes of great enormity, it is a sentence which the usage of nations has sanctioned as on the whole more salutary both from the stand-point of the individual as well as of society. But that it has some serious drawbacks cannot be ignored both by the legislators as well as those whose duty is confined to the administration of law. As a punishment it has been abolished in all the States of Europe and America and is also about to be abolished in this country. It is a punishment prescribed for such atrocious crimes as murder, *thuggee*, an aggravated form of robbery, dacoity and the like. It is also a sentence passed on person after a previous conviction for offences falling under Chapters XII and XVII, that is, offences relating to stamps, coins and property. It is also a sentence prescribed for political offences, such as sedition and the like. In the only case of sedition it may be a sentence passed for life, or any shorter term: in other cases it must be for a term not less than seven years.[3] The herding together of murderers, robbers and dacoits with preachers of sedition can scarcely be conducive to their reformation. Nor can the passing of such sentences be said to subserve the other great purposes which punishment has in view. It would have been perhaps much better if banishment had been the authorised sentence in case of political offenders. It was the sentence passed upon traitors and upopopular prelates.

46. Imprisonment.—Next to transportation, the Code prescribes the sentence of imprisonment which may be described as the normal sentence for the great majority of offences described in the Code. In its extent it varies from a mere normal sentence till the rising of the Court to ten years. In the majority of cases the apportionment of this sentence is left entirely to the discretion of the Judge, and it, therefore, happens that the sentences sometimes passed for the same offence committed in two places are grossly disproportionate, and even erratic. The reason is that the Code prescribes no rule for guidance, and as the Judges are often untrained and inexperienced men, its assessment is left to the

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1. Note A, Reprint, p. 94.
2. First Rep., Sec. 460.
3. Section 59.

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individual caprice or whim of the Judge. An attempt has been made in the present treatise to approach the question from a more scientific stand-point, and should the rules here laid down be followed, a greater uniformity is likely to arise in the punishment of crime than has been the case hithertofore[1] (Secs. 379-400).

47. Fine.—Next to imprisonment comes the punishment of fine. It is the sole punishment in trivial offences, an alternative sentence in offences of greater gravity, and an additional sentence in the rest. At one time this was regarded as a favourite punishment for all crime. It is a well-known adage that every man had his price. It is commonly meant of a man's virtue, though it was verified in a very different sense by the Anlgo-Saxon laws, by which a fixed price was set not upon a man's virtue indeed, but upon his life: that of the sovereign himself among the rest. For 200 shillings you might have killed a peasant, for six times as much a nobleman, and for six and thirty times as much you might have killed the king himself. A king in those days was thus worth 7,200 shillings.[2] The civil law had a more just appreciation of the value of fine as a mode of punishment. It only allowed the small delinquencies to be so atoned for. Indeed, the only contrast which it presents as compared with the Code is its view of the offence of theft, which it regarded as sufficiently punished by a pecuniary amercement. In this respect the laws of Manu and Vishnu show a marked advance in the conception of crime, for under both, the punishment of fine is reserved to offences of a comparatively venial character. The Code prescribes no limit to the amount of fine leviable in many cases : only in cases of relative unimportance does it prescribe a limit, and when it does so, the limit of judicial discretion is necessarily limited by the amount so fixed. The authors of the Code have made a correct appreciation of this form of punishment, which they regarded as the most common punishment in every part of the world. The advantages of fine are undoubtedly (*i*) the means it affords of compensating the person aggrieved; and (*ii*) of replenishing the State treasury, and thereby conferring an indirect benefit on the tax-paying community, and consequently upon those who are directly presumed to suffer from the offender's delinquency. But this punishment has one great disadvantage, and it is its popularity, carrying as it does no stigma with it, as do the other forms of punishment. Consequently, it is a punishment now limited only to trivial transgressions as it has no deterring effect in more serious cases. Its appropriateness in offences involving cupidity or avarice is however, unquestionable. As the authors remarked : "The punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences."[3] The amount of fine must, however, be adjusted to the wealth and means of the offender, the gravity of his offence, and the amount of pecuniary compensation to which the aggrieved party is justly entitled. It should never be pitched too high to insure the pressing of the alternative sentence of imprisonment, which it was never the intention of the Legislature to provide for in such cases.

Appropriate case for fine.

48. Forfeiture.—Fine is described as a pecuniary forfeiture, to which it is closely allied. The sentence of forfeiture was reserved by the Code to offences of the greatest enormity, since it had the effect of recoiling upon those who were wholly innocent and to whom the loss of the bread winner might have already plunged into sufficient misery. This punishment had then the effect of evoking commiseration of those who should approve of its exemplariness. As

1. Benthm has dealt with the subject exhaustively in his *Principles of Penal Law*, Vol. I, pp. 399-416.
2. Hume's *History*, Vol. I, p. 219; Wilkin's *Leg. Anglo-Saxon*, pp. 71-72; Benthame *Principles of Morals and Legislation*, Ch. XVI, pp. 87, note.
3. Note A, Reprint, p. 98.

a sentence, it has been long since abolished in England, and it has been abolished also in this country since the passing of Act XVI of 1921.

49. Inequality of punishment.—Unfortunately there is no sentence the infliction of which may not be cogently objected to from some stand-point or other. All punishments are a necessary evil. They are inflicted, because but for them the well-being of the community would be in jeopardy. Their measure must necessarily depend upon the social habits and feelings of the people. High caste Hindus would prefer death to the dishonour of a day's imprisonment in a penitentiary. A low caste Chamar would exult with inward delight at the thought of meeting his *quondam* cronies, and the comfortable lodging which his incarceration insures him. It is the function of the Judge to apportion his sentence so that it does not fall more harshly upon one malefactor than upon another betrayed into the same crime. The ancient law-givers who were free to appeal to the religious instincts of the populace had in this respect a comparatively easy task. But the modern law-giver cannot refer to the hell fire of a purgatory nor can he prescribe ordeals and penances. He has to be content with the means which abridge pleasure, liberty or wealth, and practice has found them to answer the most exacting requirements of punishment.

50. Genesis of crimes, and their degree.—But no punishment can be said to attain its true purpose which is disproportionate and unjust. This implies a close examination and view of crime in its true perspective. Really speaking, there is no absolute criterion or measure of crime. It varies with age, locality and circumstances. Indeed, what is crime, but a prohibited act? and prohibited by whom, but by the public opinion of society of which the Legislature is but a spokesman and the external embodiment. Such prohibitions have varied from time to time, but there are certain prohibitions which the intuition of man has condemned at all times and in all places. These form the backbone of criminal law. They are offences which by the consensus of mankind are regarded as evils of the highest degree, and both as destructive of society and its well-being. To this class belong offences such as treason, murder, rape and robbery. Next to them fall other offences which law reprobates as grave and which the moralist condemns as true manifestation of an evil nature. Such are the offences of hurt, adultery, defamation and acts involving fraud. Next below them fall offences which are constituted for the preservation of the State and to protect its revenues. Such offences are those against its revenue and servants. Then follow offences which would be called by the civil lawyer quasi-delicts, and which are offences not implying any moral turpitude, but are nonetheless punishable on account of the injury they do or threaten to the State or its subjects. Such are the offences called public nuisances and those allied thereto and made punishable by Secs. 304-A, 336-338. Into the same category fall other offences such as those relating to the breach of contract and of marriage obligations. It is not an easy task to classify offences according to their gravity, but the maximum punishment provided in each case is an indication of the place the Code intends to assign to each offence in the cadre of criminality (Secs. 365-377).

51. True measure of criminality.—But though this is sufficient to determine their relative gravity, it does not suffice to focus those great elements which underlie all criminal acts and the presence or absence of which is the true measure of their gravity. This has been the great battle-ground for the jurists of all countries. What are the essential prerequisites of a crime and what is the true standard of its gravity? At the first blush this does not appear to be a formidable query. For has not the Code provided the true essentials of each

crime, and what more is required than to read the section and apply it to the facts of each case ? This is no doubt true, but it is true only to a certain extent. The Code, no doubt, provides rules for determining the true nature and proportion of each act with a corresponding table of punishments appropriate to each case, but there still remain the questions of their application, and it is not always an easy matter. Suppose for example, *A* and *B* go out stage hunting; *A* receives from *B* a wound of which he dies. Now, what offence has *B* committed ? Or has he committed any offence at all ? Now, there are at least four different ways of looking at the question. From the stand-point of *B*'s motive in killing *A*, his intention, his act, and the effect. But these do not exhaust all the necessary considerations that have to be bestowed on the subject. For there still remain the questions of justification, extenuation, aggravation and the degree of *B*'s mentality. These are the most elementary considerations as will be presently apparent. There arise in the mind other and equally weighty questions the determination of which becomes essential before it can be safely asserted that *B* had murdered *A*. All these questions necessarily arise in each case, and the fact that they flash through one's mind in an incredibly short time augurs a trained mind and not their comparative unimportance.

52. Subjective and objective views of crime.—This fact is, of course, well recognised by all jurists, and the differences between the various systems of criminal jurisprudence are in a measure due to an attempt to simplify this work of ratiocination. For example, in the case last supposed, an English lawyer would at once say "*B* killed *A*: All killing is murder, therefore *B* murdered *A*." He says so, but he is not content to rest there. It is only a working hypothesis—one link in the chain of reasoning: other links equally important remain; they may be forged by the prosecution or the defence, it does not matter, but they have still to be forged. The English lawyer would then say "*B*'s" act was no doubt *prima facie* murder, but in fact it was not," and he then gives his reasons. This is what may be called the objective view of crime. It is very well suited to a country where both the prosecution as well as the defence can afford the services of counsel. But in this country this view of law does not obtain, and if it had, it would have led to many a judicial murder. For if *B* is *prima facie* guilty of the murder of *A*, it is on *B* to show that his act fell short of that high degree of crime, and if he fails, he must abide the consequence.

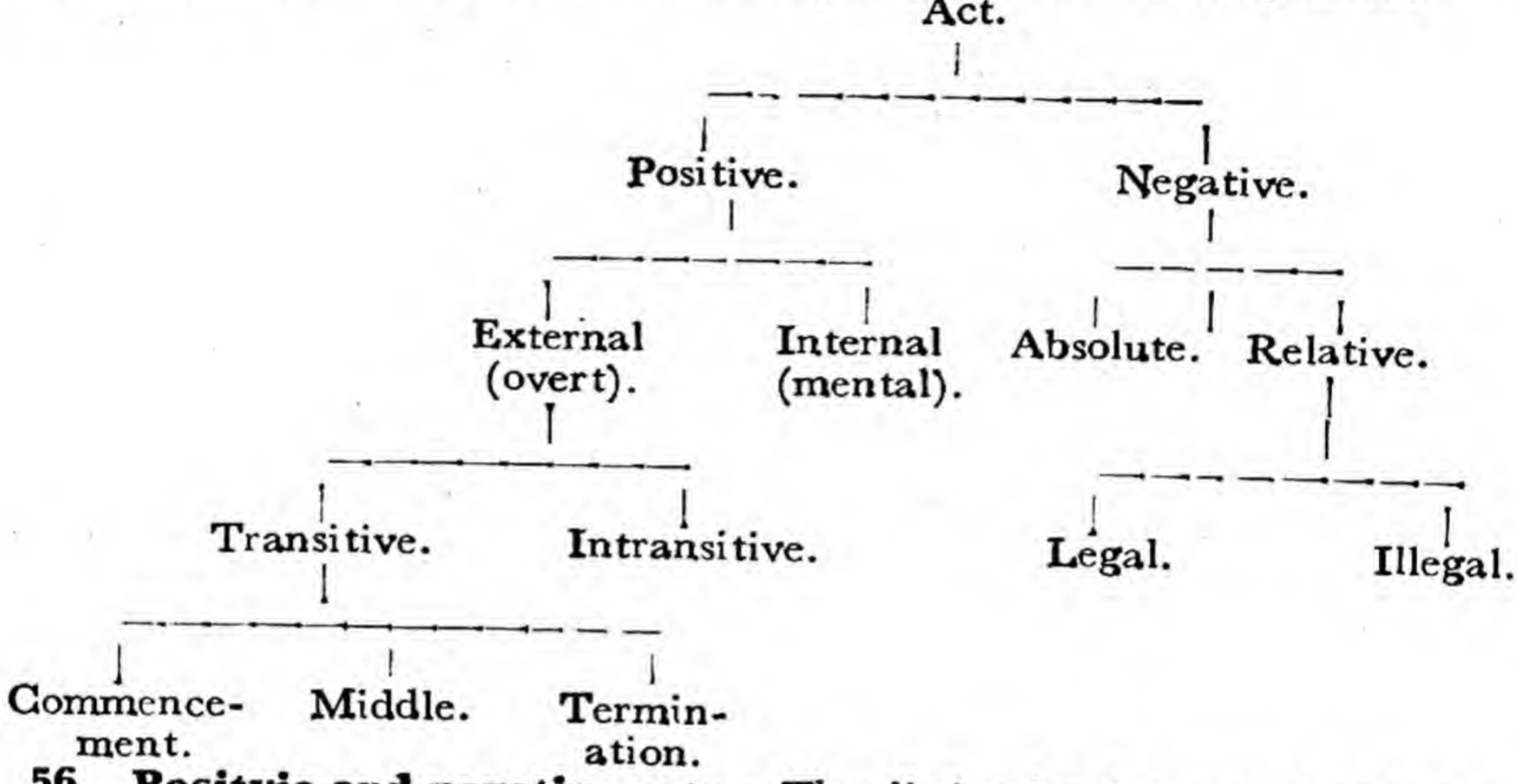
53. Subjective view of the Code.—But the Code does not view the crime in that light. It says "*B* killed *A*; it is only killing, but not murder. In order to constitute murder we must look into the mind of *B* at the time and see what was his *intention* in killing *A*. It will then be to see whether his act is an offence at all, and if an offence, what offence." This is what may be called the subjective view of crime. It places a heavier burden on the prosecution, but then it ensures a more thorough investigation into all the circumstances of the case, and is in the end more conducive to the ends of justice. But such an investigation, though more thorough, naturally presents greater difficulties. For instance, viewing the case last supposed from the subjective stand-point, there may be (*i*) *B*'s enmity with *A*, which furnishes a motive for the crime; (*ii*) there may be evidence of *B*'s intention to kill *A*, e.g. by conspiring with his servant, or the like; (*iii*) there may be no intention to kill him at all, but still a knowledge that he was as much likely to hit him as the stag for which his shot was intended; (*iv*) then there may be no intention or knowledge of killing him; but still (*v*) a knowledge that he was thereby to cause him hurt, and which may end in his death; or (*vi*) there may be no such intention or knowledge, but *B* may without the exercise of proper care and caution fire at the stag, hoping that *A* will escape, or that he is not there; or (*vii*)

he may have known that he is there, but takes insufficient precaution not to hit him; or (*viii*) he may have known that he is there, and the shot may have hit him by deflection; or (*ix*) he may have deliberately hit *A bona fide* believing him to be a stag; (*x*) or he may have hit *A* because *A* had offered him uncontrollable provocation; or (*xi*) he may have hit him in the course of a sudden fight; or (*xii*) he may have deliberately aimed low so as not to kill him, but *A* having fallen down on hard ground ruptured his diseased spleen which caused his death.

54. Distinction between mala in se and mala prohibita.—These are only a few of the contingencies which such a case may present; but they are sufficient to illustrate the discriminate consideration which law shows in judging of *B*'s criminality, and which varies from the deepest dyed murder to nothing—and in each case the question for the sole consideration of law being *B*'s intention or knowledge, which it regards as the best test of *B*'s turpitude. For this purpose, it does not ignore the other facts, but they are only looked at not for their own sake, but as being the outward manifestation of the internal working of *B*'s mind. For this purpose it inquires into *B*'s motive, for motive is the cause of *B*'s intention, as his intention is the cause of *A*'s death. But it does not consider the unravelling of *B*'s motive as essential for determining his criminal liability. This is not because an inquiry into men's motive is unavailing, but because it is often difficult to discover the motives of men. It is as much as law can do to discover men's intentions. And it is all that it declares to be necessary to determine *B*'s guilt. For that purpose it takes a comprehensive view of all that *B* said and did in compassing *A*'s death, the weapon he used, and the manner of using it, and the effect produced, and its proximity to the cause. These considerations have multiplied the sections of the Code, which, really speaking, deals with only about half a dozen primary offences. For all the offences which relate to personal violence are only derivative forms of assault and hurt, and they occupy the whole of Chapter XVI (Secs. 299-377). The offences of theft with its variations would cover all the ground occupied by Secs. 378-424; while the remaining offence affecting property are those in which fraud is conspicuously present. The offence of defamation includes not only the offences of criminal insult and defamation so-called, but also the offences of sedition and which is nothing more than defamation of the State and other offences of the same nature. As contrasted with these offences, there are others of a preventive character, such as offences relating to forgeries, the counterfeiting of dies, the publication of obscenity, and other similar offences the primary object of which is the closing of the door to further mischief by punishing the preliminary acts. All these offences are *mala in se* as implying a degree of moral turpitude and evil disposition towards society. In contrast with them there are others which the Code punishes, but which are *mala prohibita*, being acts which are classed as offences not because they are the outcome of an evil disposition, but because they are acts prohibited by law, being to the detriment of public or certain members of the public. Examples of such offences will be found interspersed in the Code, but public nuisances dealt with in Chapter XIV (Secs. 268—294-A) are all offences of this character, and so are those made punishable by Secs. 336-338 and 304-A. These two classes of offences are mainly distinguishable from the rest, in that they are offences in which a different test is applied to determine their criminality, and they are, moreover, offences which are the outcome of illegal omission as distinguished from an act of commission.

55. Act and omission in criminal law.—In theory the Code refuses to recognise any distinction between these two phases of an act, but in practice there is a noticeable difference between them.

Prima facie the word "act" is defined to include both an act properly so-called as well as an illegal omission. In the one sense an act is an exertion of the will accompanied by motion. It is then called an act of commission As such, it is to be distinguished from an illegal omission which is an abstention or forbearance from doing an act in the other sense. The one is sometimes called a manifest or overt act to distinguish it from its negation which is also an act in the eye of the law. This is the only sub-division of acts recognised in the Code, but the grammarians make a more exhaustive analysis of the concept which is not without interest to the lawyer. Their analysis gives the following table:



56. Positvie and negative acts.—The distinction between the positive and negative acts is obvious. Thus to strike is a positive act; not to strike on a certain occasion is a negative act. The latter may be so absolutely or relatively: absolutely, when they import the negation of all positive agency whatsoever; for instance, not to strike at all: relatively, when they import the negation of only a particular mode of agency; for instances, not to strike such a person, or such a thing, or in such a direction. The latter may, again, be sub-divided into a legal or illegal relative negative act; the former implies abstention when there is no duty to act, the latter forbearance when there was a duty to act in a certain way, and the omission of which is under the circumstances made penal.

57. Analysis of positive acts.—Adverting now to the positive acts, the Code is not concerned with internal or mental acts but only with the external, corporal acts, that is, acts of the body: thus to intend to strike is an internal act, to strike is an external act, which the lawyers call an overt act and which alone may become penal if it possesses all the other elements of criminality. Now, an external or overt act may be either transitive or intransitive. Acts may be called transitive, when the motion is communicated from the person of the agent to some foreign body; that is, to such a foreign body, on which the effects of it are considered as being *material*; as where a man runs against you or throws water in your face. Acts are intransitive, when the motion is communicated to no other body, on which the effects of it are regarded as material, then some part of the same person in whom it originated; as where a man runs or washes himself. Transitive acts may appear in three stages of development. In the first stage of progress, the motion is confined to the person of the agent, and has not yet been communicated to any foreign body on which the effect of it can be material. In the middle or intermediate stage or stages of its progress the motion has passed from the person of the agent, but has not yet been communicated to any foreign body: the last stage being

reached as soon as it is so communicated. Thus, as soon as a man raises his hand to strike, the act is in the first stage. As he runs up to strike, the act is in the second stage, or in *gradu mediativo*, as in the case where a man throws a stone or fires a bullet at you. The last stage arrives when the object is actually struck or hit. The criminality of the act depends upon the degree of progress made in the three stages, which may be roughly compared to the three degrees of crime—preparation, attempt and final act.

58. Criminal causation.—Closely connected with the question of act is the question of causation. In fact, the two are the different aspects of the same question. But here, again, the stand-point of the lawyer is necessarily different from that of the logician. The former is concerned not only with the discovery of the agency by which the effect is produced, but also with the *quantum* of its contribution to the production of the effect. For instance, suppose *A* gives *B* poisoned food which *B* innocently serves to *C*, and from which *C* dies. Here the logician will attribute *C*'s death to poison, so will also the medical man interested only in the toxicological aspect of the case. The logician will attribute the death to *B* who was the direct agent concerned in administering the poison. But the lawer regards neither as the true cause. To him the real cause is *A* who, though one degree remote, is solely responsible for *C*'s death. He is, therefore, the proximate cause, the *causa causans* of *C*'s death. If, however, *B* was privy to *A*'s intention, then both *A* and *B* would be the cause of *C*'s death. It sometimes happens that a number of individuals, each taking some part in a conspiracy, contribute to the result. In that case it may be difficult to apportion the individual responsibility of each in producing the result. But such an inquiry would often be fruitless, were it even possible. And the Code, consequently, declares that in such a case the act of one shall be deemed to be the act of all so that all are jointly and severally responsible for the result of their joint adventure.[1] But it is evident that in such a case there is such a thing as a *locus paenitentiae*. For a person may withdraw from a conspiracy before it has gone too far. The Code declares that he will not then be liable for the effect caused after his withdrawal.

59. Cause and intention.—Taking the view which the Code does of the criminal liability of a person for an offence, the question of cause is necessarily subservient to the question of intentions, so much so that in some cases the one question is obscured by the other. Take for example the case of a man who, intending to kill another, strikes him on the head. The victim drops senseless on the ground, but he is not dead. The assailant fearing detection sets fire to the hut in which the man fell, and the fire and smoke kill him. His object in setting the hut on fire was to destroy the traces of his guilt. Is he liable for the death of the deceased? The question was raised and considered by Birdwood and Parsons, JJ., and they differed as to the crime of the accused, Birdwood, J., holding that the offence of the accused was no more than an attempt, because the death of the deceased was caused by the fire when the accused had no intention of causing his death, and when in fact he believed him to be dead. Parsons, J., however, was in favour of presuming an intention to kill, because of the fact of the killing. But this was apparently not the view of Sargent, C. J., to whom the case was referred in consequence of this difference of opinion, and who was for judging of the criminality of the act by the actual and not a merely presumed or constructive intention of the accused and so agreeing with Birdwood, J., he sentenced the accused only for an attempt under Sec. 307.[2] This case is not unlike that of a Divisional Bench of the Allahabad

Primary and Secondary intention.

1. Sections 35, 149.

9. Khandu, I. L. R. 15 Bom. 194.

High Court in the case of *Bhagwandin*.[1] a pseudo-sadhu, who inveigled four travellers on their way from Cawnpur to Allahabad and poisoned them by mixing *dhatura* with their food, his object being clearly proved to be robbery. One of the four men died from the effects of the poison, and the question was, what offence had Bhagwandin committeed, culpable homicide or less? It was held that in view of the fact that Bhagwandin only intended to stupefy the travellers to facilitate his robbing them, the only offence of which he could be convicted was causing grievous hurt by means of a deleterious substance, punishable under Sec. 328. Neither of these cases refer to two judgments in which the contrary was laid down. In one of them the accused struck the deceased a blow behind the ear which knocked him down, and then taking him for dead, hung him up to a tree, so as to make it appear that the man had committed suicide. The medical evidence showed that the man died of the hanging, and not of the blow. The facts here were thus the same as in *Khandu's* case and yet the Court held that the offence of the accused would, under the circumstances, if proved, be no less than culpable homicide.[2] In the other case one Mst. Tulsa, being anxious to secure a chance for her elopement with her paramour and finding her parents in the way drugged them by mixing *dhatura* with their food, and from the consequence of which they only escaped by the timely ministrations of a native Hakim. Mst. Tulsa was prosecuted for attempted murder. There can be no doubt that she had no actual intention of killing her parents : she only wanted to stupefy them. But the Court held that she was guilty of an attempted murder, as persons of her age were *presumed* to know of the deadly effect of that drug, and not that she in fact *knew* of it.[3] Here then there are cases in which the Courts are not agreed as to the measure of the criminal responsibility of the accused. This is sometimes the result of a too literal construction of a criminal statute. In England, such a case would, of course, present no difficulty, nor indeed, should it in this country. For, as has been pointed out in the sequel, the question of intention is not the only question relevant for determining the criminal responsibility of the accused. But all the same such cases suggest a close analysis and accurate perception of the meaning of such words as "intention", "knowledge", "voluntarily" and the like, which lie at the very root of criminal jurisprudence, and which cannot be dismissed with a passing glance, as words, the meaning of which is known to every schoolboy.

60. Mens rea : general exceptions.—Another element is determining the nature of criminal responsibility, and upon which the Code has justly devoted considerable space is the question of *mens rea* considered from the stand-point of Chapter IV which deals with the subject of exceptions to criminal liability. This chapter is one of the most important chapters in the Code, and as it naturally controls the whole Code, its knowledge is essential at every stage of the question. This chapter consists of thirty-one sections (76-106) and deals with the facts which negative or reduce criminality. These sections are in a sense elaborations of the general principle "no criminality without intention", but they are not quite obvious deductions from it. The chapter as a whole deals with two classes of exceptions—those in which the offences, though committed, is excusable, and those in which, though committed, it is *justifiable*. The grounds of excusability are, (*i*) accident (Secs. 80, 81); (*ii*) mistake (Secs. 76, 79); (*iii*) non-mentality due to either immaturity (Secs. 82, 83) or derangement (Secs. 84-86); (*iv*) consent (Secs. 87, 90); (*v*) benevolence

1 I. L. R. 30 All. 568.
2. Gour Gobindo Thakoor, 6. W. R. 55.
3. Tulsa (Mst.), I. L. R. 20 All. 143. Secondary intention in trespass was recognised in Ram Saran, (1906) P. R. No. 12; Jiwan Singh *v.* King-Emperor, 8 Cr. L. J. 488 : (1908) P. R. No. 17, but subsequently overruled in Abdul Majid *v.* Emperor, A. I. R. 1938 Lah. 534,

(Secs. 88, 89, 92, 93); (*vi*) duress (Sec. 94); or (*vii*) triviality (Sec. 95). The grounds for justification are those comprised in the right of private defence, and which occupy the rest of the chapter (Secs. 96-106.) The difference between the two classes of exceptions is that while in the former case the act is excused for want of the necessary *mens rea*, in the latter case, the act is not excused but justified on account of some other considerations neutralizing the liability otherwise incurred. In the first case, the act is not criminal because the intention was not criminal; in the other case, the act though criminal, is not punishable because it was otherwise meritorious. The general rules governing the operation of the several exceptions here enumerated have been more appropriately considered in the text to which reference is invited in this connection.

61. Abetment.—Hitherto the question of criminality has been considered as if it were a question of sole and single individual responsibility. But it is unfortunately seldom the case. For it is notorious that there is no criminal without an accomplice. He may be invisible; but for him many a crime would become impossible. The Legislatures of all countries have, therefore, concerted measures for the prevention of such co-operation. But the subject naturally presents difficulties. For while the criminal is in the being, it is impossible to deny him the solace and succour of his companions. And in any case, it is obviously unjust to punish one merely for helping another unless his help was given with guilty intention. In such cases criminologists are naturally presented with three questions for solution: (*i*) when should an interference with an accessory commence? (*ii*) when should an interference with an accessory end? and (*iii*) what act should justify the interference? The authors of the Code were evidently much exercised by these questions, and their solution was, that accession should be punished both before and after the fact. They accordingly divided abetment into previous and subsequent abetments, and made provision for the punishment in each case. This gave rise to an animated controversy in which the chief defects of the system seem to have been lost sight of. For the division was undoubtedly a novel one, and critics versed in the legal lore of the West and accustomed to such phrases as principal in the fix degree, and principal in the second degree, could not tolerate a departure, the novelty of which was as conspicuous as were its defects. The division of abetment into previous and subsequent abetment was, however, not a novelty, for it closely corresponded with the division made in English law between an accessory before the fact and an accessory after the fact. Now, an accessory before the fact is defined by Lord Hale to be one who, being absent at the time the offence was committed, does yet procure, counsel, command, or abet another to commit a felony[1] and an accessory after the fact is where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felony. The sections as originally drawn were framed on this model, but the question what constitutes "receiving, relieving, comforting or assisting the felon"[2] has undoubtedly created difficulties in English law, and the chapter as ultimately recast, has done well to relegate subsequent abetment to specific sections more directly dealing with the crimes which it was intended to punish. The chapter on abetment only deals with what was called the *previous* abetment, or abetment before the fact, *subsequent* abetment, or abetment after the fact, being punishable under the provisions of Secs. 201-204, 212-216-B and Secs. 221-225-B. All these sections, though found scattered in the Code, have, however, the same object in view, namely to cut the felon off from all assistance before or after the fact, and thus render his task more difficult,

1. Hale P. C. 615.

2. *Ibid.* at p. 618.

if not impossible. There is necessarily a difference betweer a previous abettor, and one subsequent. The former helps to the commission of a crime; the latter in its detection. The nature of assistance given in each case will, therefore, differ. In the one case it is enough if he counsels another to commit a crime; in the other case, his assistance must be by an actin tended to screen the offender, and which presupposes knowledge of the person having committed a crime. A mere omission to apprehend the offender or to aid in his apprehension is not enough. Nor is the mere omission to inform about his whereabouts penal unless it is illegal.[1]

62. For the rest the sections dealing with abetment apportion the guilt according to the nature and degree of the offender's complicity and its effect upon the actual crime committed. The various contingencies here presented follow the well-known rules devised by the English Law Commissioners, and are deducible from the precedents the effects of which have been discussed in the text. All these are the general provisions of the Code, the rest of which, with the exception of the last (Ch. XXIII) consisting only of one (Sec. 511) is confined to the definition of specific offences and the punishment appropriate to them. The last section of the Code deals with the general offence of "criminal attempt"—that is to say, an attempt which is something more than a preparation and something less than a completed crime. This section is, however, professedly intended to provide for cases not otherwise expressly provided for. There are, indeed, several sections so providing for the punishment of attempts, as for example, an attempt to wage war (Secs. 121, 125); to wrongfully restrain or overawe the Governor-General, etc. (Sec. 124); attempting to rescue a prisoner of war (Sec. 130); to commit murder (Sec. 307); culpable homicide (Sec. 308); suicide (Sec. 308); and robbery (Secs. 393, 397). In this way attempts to commit all the principal offences have been accounted for—what remain are attempts to commit offences of lesser gravity; and which alone are punishable under the general provision of Sec. 511. It is general rule of criminal law that a mere preparation not amounting to an offence is too remote to be punishable as an offence. This policy is dictated by the rule that even a criminal is entitled to a *locus paenitentiae*. But there are certain offences which admit no *locus paenitentiae*, and in which even a preparation is made punishable by the Code. Such preparations relate to waging war against the King (Sec. 122); to commit depredation on an ally (Sec. 126); and to commit dacoity (Sec. 399). In other cases the general rule prevails. The question what act is a mere preparation, and what amounts to an attempt as distinct from a mere preparation, has been the subject of comment under Sec. 511. In the phraseology of that section it is a definite movement "towards the commission" of an offence. The language is not perspicacious, but whatever is its meaning has been set out under that section.

63. These are then the general principles of the Code which deal with introductory matters relating to the offences which occupy the rest of the enactment but which does not all contain an enumeration of the offences and their punishment. For the definition of the individual offences precedes the penal sections, which number no less than about 365 sections, but if we eliminate therefrom all derivative offences, the principal offences found to have been dealt with in the Code will be found to number no more than about 25 or 30 in number, which again, are interrelated to one another as described in the preceding pages. In short, all these offences, though distinct and separate, are intrinsically one, being the outward manifestation of an evil disposition; and though they differ in their nature, gravity and number, they are all encroach ments on the peace or rights of the people or are infringements of the social conventions essential to the cohesion and continuance of society.

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1. Section 44, Cr. P. C.

THE
INDIAN PENAL CODE
(ACT XLV OF 1860)
(As amended up to date)

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL

(Received the assent of the Governor-General on the 6th October, 1860)

CHAPTER I
Introduction

Whereas it is expedient to provide a general Penal Code for India; It is enacted as follows :

Preamble.

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1. Title.—The governing title of an Act, that which produces the statute is undoubtedly part of the Act itself and it is legitimate to use it for

the purpose of interpreting the Act as a whole and ascertaining its scope.[1] The short title is, however, given to the Act solely for the purpose of facility of reference, and it is not legitimate to use it for the purpose of ascertaining the scope of the Act.[2]

The full title and preamble have been often used to determine the scope and the purview of the Act and the object of the Legislature.[3] The title, however, is not conclusive of the intent of the Legislature.[4] If the statute is clear and unambiguous, no reference can be made to the title.[5]

The policy and purpose of a given measure may be deduced from the long title and the preamble thereof.[6] The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself.[7] The title of an Act is not conclusive of the intent of the Legislature but constitutes only one of the numerous sources from which assistance might be obtained.[8] It is undoubtedly part of the Act itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope.[9] Recourse may be had to the title (long or short) of an Act only when the meaning of the Legislature in the enacting part of the statute is not clear.[10] But if the language is plain the Court cannot refuse to give effect to it as going beyond the title or limit the construction of any section because of the title.[11] It is elementary to say that the intention of the Legislature must be gathered from the language of the Act itself. It is only when there is ambiguity and when an expression used by the Legislature is capable of more than one meaning that it is permissible to the Court to look at the preamble, even to look at the title of the Act, in order to find out what was the object with which the Legislature put the legislation upon the Statute Book or what was the mischief which the Legislature was out to remedy.[12]

The title of a chapter in an Act cannot be legitimately used to restrict the plain terms of an enactment.[13]

2. Preamble.—Preamble is a part of an Act, but it is not an operative part thereof.[14] A preamble, of course, does not override the plain provisions

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1. Vacher and Sons Ltd. *v.* London Society of Compositors, 1913 A. C. 107 at p. 118, *per* Lord Moulton.
2. *Ibid.*
3. Griffiths Carr *v.* Griffiths, (1879) 12 Ch. D. 655; Debendra Narain Roy *v.* Jogendra Narain Deb, A. I. R. 1936 Cal. 593 at p. 622.
4. *In the Estate of* Groos, (1904) 73 L. J. P. 82: 191 L. T. 322; Sutherland's *Statutory Construction*, 3rd Ed., Vol. II, Art. 4802 at p. 344.
5. Willmot *v.* Rose, (1854) 23 L. J. Q. B. 281; Sage *v.* Eicholz, (1919) 2 K. B. 171 at pp. 176 and 177, *per* Baray, J.
6. The Kerala Education Bill, *In re*, A.I.R. 1958 S C. 956 at p. 974: 1958 Ker. L. T. 465; *see* also Kedar Nath Bajoria *v.* State of West Bengal, 1954 S. C. R. 580: 1953 S. C. A. 835: 1953 S. C. J. 580: 54 C. L. J. 1621: A I. R. 1953 S. C. 404; Manoharlal *v.* State of Punjab, A. I. R. 1961 S. C. 418.
7. Poppatlal Shah *v.* State of Madras, A. I. R. 1953 S. C. 274, followed in Brij Bhukan *v.* S. D. O., Siwan, I. L. R. 33 Pat. 690: 1954 B. L. J. R. 513: A. I. R. 1955 Pat 1 at p. 15 (S. B.); *see* also E. & W. India Dock Co. *v.* Shaw Sevill and Albion, (1888) 39 Ch. D. 524 at p. 531.
8. Pannalal Lahoti *v.* State of Hyderabad, A.I.R. 1954 Hyd. 129 at p. 153: I. L. R. (1954) Hyd. 441: 1954 Cr. L. J. 1093 (F. B.).
9. State *v.* Hyder Ali, A. I. R. 1955 Hyd. 128 at p. 132: I. L. R. (1955) Hyd. 128: 1955 Cr. L. J. 798.
10. Mangilal Karwa *v.* State of M. P., A. I. R. 1955 Nag. 153 at p. 157 (D. B.): I L. R. (1955) Nag. 364.
11. E. M. Chacko, *In re*, (1954) 2 M. L. J. 737: 67 M. L. W. 1027.
12. Commissioner of Labour *v.* Associated Cement Companies Ltd., A. I. R. 1955 Bom. 363 at p. 365: 57 Bom. L. R. 367.
13. Commissioner of Income-tax Bombay, *v.* Ahmedbhai Umarbhai Co., Bombay, 1950 S. C. R. 315 at p. 353: A. I. R. 1950 S. C. 134.
14. *See* Mohammad Yusuf *v.* Imtiaz Ahmad, A. I. R. 1939 Oudh 131 at p. 137 (F. B.): I. L. R. 14 Luck. 492.

of a statute. It has been described as a key to an Act.[1] It is one of the cardinal principles of construction that where the language of an Act is clear, the preamble must be disregarded though, where the object or meaning of an enactment is not clear, the preamble may be resorted to explain it. Again, where very general language is used in an enactment which it is clear must be intended to have a limited application, the preamble may be used to indicate to what particular instances the enactment is intended to apply.[2] Courts cannot, therefore, start with the preamble for construing the provisions of an Act, though it would be justified in resorting to it, nay, it will be required to do so, if it finds that the language used by Parliament is ambiguous or is too general though in point of fact Parliament intended that it should have a limited application.[3] The preamble may afford useful light as to what a statute intends to reach, but if the enactment is itself clear and unambiguous, the preamble cannot qualify or cut down the enactment.[4] When a preamble contradicts the enacting portion of a statute and that portion is quite clear, the enactment must prevail over the preamble.

Preamble of statute is a key to its interpretation.

The preamble cannot be used to alter or detract from or add to this clear and unambiguous statement in the enactment itself.[5] It is true that a preamble of a statute is the key to its interpretation but the intention of the Legislature is not necessarily to be gathered from the preamble taken by itself. The intention of the Legislature can only be gathered from the Act taken as a whole.[6] The following passage from the judgment[7] of Lord Tenterden quoted in the above-noted Nagpur case may be read with advantage: "In construing Acts of Parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole Act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect, from the more large and extensive expressions used in other parts, the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause." As pointed out in the above-noted Nagpur case, the observations of Lord Tenterden apply equally to those Acts, where the preamble goes further than the Act itself. Ram Lal, J., in his order of reference to the Full Bench in *Manohar Lal* v. *Emperor*,[8] said that if the word has more than one meaning and it is a matter of doubt which of these meanings is used in the body of an Act, it is permissible to look at the preamble of that Act to decide which of several meanings attaching to the word was intended by the Legislature.

In finding out the purpose of the Act, the Court should look not only to the language of the preamble, but to the provisions of the Act as a whole and if it finds in the preamble an expression not so large and extensive in

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1. Emperor *v.* Dholaram Holaram, A. I. R. 1941 Sind 221 at p. 223: I.L.R. (1941) Kar. 431
2. Craies : *Interpretation of Statutes*, 5th Ed., pp. 188, 189.
3. Burrakur Coal Co. Ltd. *v.* Union of India, A. I. R. 1961 S.C. 954 at pp. 956-57 : (1962) 1 S. C R. 44.
4. *Per* Lord Halsbury, L C., in Powell *v.* Kempton Park Racecourse Co., (1899) A. C. 143 ; *see* also Secretary of State for India *v.* Maharaja of Bobbili. 46 I. A. 302 ; and Mani Lal Singh *v.* Trustees for the improvement of Calcutta, I L R. 45 Cal. 343 (F. B.).
5. Benoari Lal Sarma *v.* Emperor. A.I.R. 1943 Cal. 285 at p. 312: 207 I. C. 481.
6. Om Prakash Mehta *v.* Emperor, A.I.R. 1948 Nag. 199 at p. 201: I L.R. (1947) Nag. 579: 49 Cr. L. J. 230: 1947 N. L. J. 326.
7. Doe *v.* Brandling. (1828) 108 E.R. 863 at p. 870.
8. A. I. R. 1943 Lah. 1 at p. 2: I. L. R. (1943) Lah. 95: 202 I. C. 735: 43 Cr, L. J. 897: 44 P.L R. 524.

its import as used in any provision of the Act, it is the duty of the Court to give effect to the large expression notwithstanding phrases of less extensive import of the preamble. The true intention thus can be gathered from the preamble as well as other provisions of the Act.[1]

In Maxwell on *Interpretation of Statutes*,[2] the rule is stated as follows:

> "The preamble of a statute has been said to be a good means of finding out its meaning, and as it were, a key to the undertaking of it, and, as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope whenever the enacting part is in any of these respects open to doubt....But the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt."

> "The preamble may now be regarded like the title, as part of the statute for the purpose of explaining, restraining or even extending enacting words, but not for the purpose of qualifying or limiting express provisions couched in clear and unambiguous terms."[3]

It is now well settled that the preamble is part of the statute and that it could be referred to for explaining or even enlarging the meaning of the words occurring in the body of the statute.[4] The preamble of a statute has said to be a good means of finding out its meaning and, as it were, a key to the understanding of it.[5] In *Sardar Inder Singh* v. *State of Rajasthan*,[6] the petitioners sought to dispute the correctness of the recitals in the preamble, their Lordships of the Supreme Court held "this they clearly cannot do". The policy and purpose of a given measure may be deduced from the long title and preamble thereof.[7] While the preamble of a statute is the key to its interpretation, the intention of the Legislature is to be gathered not from the preamble alone but from the Act taken as a whole. The preamble is conclusive as to the facts which operated on the mind of the Legislature. It indicates the occasion and the reason for the enactment. But if the enacting part is clear and unequivocal, the preamble can neither restrict nor enlarge the

Supreme Court.

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1. Basudev *v.* Damodar Lal, A. I. R. 1971 Raj. 115 at p. 118.
2. 9th Ed., pp. 46 and 48.
3. Halsbury's *Laws of England*, 2nd Ed., Vol. XXXI, para. 558.
4. Nageswara Rao *v.* State of Madras, A. I. R. 1954 Mad. 643 at p. 647: (1953) 2 M. L. J. 724: 1953 M.W.N. 909.
5. Thangal Kunju Musaliar *v.* Venkatachalam Potti, A. I. R. 1956 S. C. 246 at p. 264: (1955) 2 S. C. R. 1247: 1956 S. C. A. 259 : 1956 S. C. J. 323 : (1956) 29 I. T. R. 349; *see* also District Board, Bhagalpur *v.* Province of Bihar, I. L. R. (1954) Pat. 563: 2 B. L. J. 603: A. I. R. 1954 Pat. 529 (D. B.); Passirlal Mannoblal *v.* Chhuttanbai, 1947 M. P. L. J. 769; State *v.* Hyder Ali, I. L. R. (1955) Hyd. 188: 1955 Cr. L. J. 798: A. I. R. 1955 Hyd. 128; Kavalappara Kottarathil Kuchuni *v.* State of Madras and Kerala, A.I.R. 1960 S.C. 1080: (1960) 3 S.C.R. 887.
6. A. I. R. 1957 S. C. 510 at p. 516: 1957 S. C. A. 735; *see* the observation of Holmes, J., in Block *v.* Hirsh, (1920) 65 L. Ed. 865: 256 U. S. 135.
7. The Kerala Education Bill, *In re*, A. I. R. 1958 S. C. 956 at p. 974: 1958 Ker. L. T. 465, relying on Biswambar Singh *v.* State of Orissa, 1954 S. C. R. 842: 1954 S. C. J. 219: I. L. R. (1954) Orissa 398: A. I. R. 1954 S.C. 139; *see* also Kedar Nath Bajoria *v.* State of West Bengal, 1954 S. C. R. 30: 1953 S. C. A. 835: A. I. R. 1954 S. C. 660: 54 Cr. L. J. 1621, which included "provisions" also for this purpose.

Limitations on the use of preamble.

scope of the enacting provision.[1] Whilst the preamble of an Act may be consulted when the enacting part is open to doubt, it cannot either restrict or extend the enacting part when the latter is free from doubt. Nor can it cut down the express provisions of a law by consideration of the supposed intention of the Legislature in passing it. If the Bill provides for a wider mischief than the Bill in its sections enacts the Courts are not to give those sections a wider scope than their language properly interpreted justifies.[2] But where the clear language of the enactment leads the Court to one conclusion only, namely that the Legislature was aiming at the removal of other mischiefs besides those referred to in the preamble, then the Court must give effect to the clear language of the enactment and help the Legislature to remove the mischiefs indicated.[3] The preamble of an Act discloses the primary intention of the Legislature but it cannot override the provisions of the Act if these provisions are in conflict with the preamble itself and lead to some result not warranted by the preamble.[4] It is elementary to say that the intention of the Legislature must be gathered from the language of the Act itself. It is only when there is ambiguity and when an expression used by the Legislature is capable of more than one meaning, that it is permissible to the Court to look at the preamble, even to look at the title of the Act, in order to find out what was the object with which the Legislature put the legislation upon the Statute Book or what was the mischief which the Legislature was out to remedy.[5] A preamble cannot control or delimit the plain and natural meaning of any part of an enactment. It is not open to a court to refuse to give effect to a plain statutory provision on the ground that it is beyond the scope and object of the Act as declared in the preamble thereto.[6] Where a statute is understood in the context of its preamble, enacting part, the existing state of law and other legitimate context, if the enacting part is open to one and one construction alone, that construction must be given effect to. Where, however, it is open to several alternative constructions then that construction which is in accord with the preamble should be accepted.[7] Radical amendments in an Act reflect a different intention to that expressed in the preamble and the fact that the preamble itself is unchanged does not in any way indicate that the legislative intention also is unchanged.[8] There is no justification for the restriction of plain and unambiguous language in a statute, years after its passing, on account of

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1. Mohamadali Fakruddin *v.* Gokulprasad Lalaram, A. I. R. 1954 Nag. 209 at p. 211 (D. B.): I. L. R. (1954) Nag. 323: 1954 Nag.L.J. 181; Raghavendra Singh *v.* Pushpandra Singh, A. I. R. 1955 V. P. 19; Mohammad Bin Salem *v.* Umaji, I. L. R. (1955) Hyd. 169: A. I. R. 1955 Hyd. 113 (F. B.); *In re* Chacko, (1954) 2 M. L. J. 737: 67 M. L. W. 1027; State of West Bengal *v.* Abdul Quader, 60 C. W. N. 962 (D. B.); Jitendra Pratap *v.* Bhagwati Prasad Singh, A. I. R. 1956 Pat. 457 (D.B.).
2. *In re* Chacko, (1954) 2 M. L. J. 727: 67 M. L. W. 1027.
3. Commissioner of Labour *v.* Associated Cement Companies Ltd., A. I.R 1955 Bom. 363 at p. 366 (D. B.) : I. L. R. (1955) Bom. 467 : 57 Bom. L. R. 367; *see* also Powell *v.* Kempton Park Racecourse Co., 1899 A. C. 143 : 68 L. J. Q. B. 392.
4. H. P. Barua *v.* State of Assam, A. I. R. 1955 Assam 249 at p. 257.
5. Commissioner of Labour *v.* Associated Cement Companies Ltd., A. I. R. 1955 Bom. 363 at p. 365 : I. L. R. (1955) Bom. 467: 57 Bom. L. R. 367; Deoragin Debi *v.* Satyadhyan Ghosai, 58 C. W. N. 64 : A. I. R. 1954 Cal. 119 (D. B); Rehman Shagoo *v.* State of Jammu and Kashmir, A. I. R. 1958 J. & K. 29 at p. 33 (F. B.): 1958 Cr. L. J. 885, where it was said that the preamble is not part of the Act but this, it is submitted, is against the warrant of authority.
6. Nanneka Seshayya *v.* State of Madras, A. I. R. 1957 A. P. 466 at p. 467 : (1957) 1 Andh. W. R. 160.
7. Kidar *v.* Gopal Tunyaji Sutar, 1957 M. P. L. J. 729.
8. Mohamed Salem *s.* Umaji, A. I. R. 1955 Hyd. 113 at p. 125 (F. B.) : I, L. R. (1955) Hyd. 169.

inconvenience or incongruity discovered *ex post facto*.[1] It cannot be held that if any particular provisions of the Act are not covered by the brief language of the preamble, the Legislature did not intend to make provision for purposes which can clearly be inferred from those provisions of the Act though not mentioned in the preamble.[2]

When preamble is conclusive.

The preamble is conclusive in so far as it elucidates the intention of the Legislature but it is not conclusive of the intent and purposes of the legislation. These have to be gathered from the various provisions of the statute itself and not merely from an isolated examination of the preamble which may indicate the primary object in view but may not refer in detail to certain other objects which are incidental and essential to the working out of the primary object of the legislation.[3]

It is permissibie to understand the scope of the preamble in the light of the Statement of Objects and Reasons.[4]

Motive or malice in prosecution cannot absolve a criminal; may be if established it may have its effect in appreciation of the evidence for the prosecution.[5]

Lord Blackburn in *River Wear Commissioner* v. *Adamson*,[6] said :

> "the office of the Judge is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious".

The Court, therefore, is not expected to play the role of a legislator and interpret law in such a way so as to expand its scope of activity on purely equitable considerations, for it would be transgressing the limits of its function, which is only to declare law and not to make it. Closely allied with this fundamental concept of interpretation is the doctrine explained in the maxim *a verbia legisnon recedemdum est* (from the words of the law there should not be any departure). It is well accepted as a golden rule of interpretation that the ordinary meaning of the words used by the statute and the grammatical sense thereof should be adhered to. It is therefore necessary to look into the words employed by the Legislature.[7]

Rules for the Interpretation of the Penal Code

3. Crimes and criminal law.—Acts relating to crimes and criminal law are subject to the uniformity provisions of the State constitutions and to the constitutional limitations forbidding special legislation where a general law is applicable. Many State constitutions forbid the punishment of crimes and misdemeanours by special or local laws,[8] and some constitutions

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1. Prince Ernest of Hanover *v.* Attorney-General, (1955) 3 W. L. R. 868 : (1955) 3 All E. R. 647.
2. Tej Bahadur Singh *v.* State, A. I. R. 1954 All. 655 at p. 658 (D. B.): 1954 A. L. J. 681 : 1954 Cr. L. J. 1399.
3. Anil Kumar Bhattacharjee *v.* Deputy Commissioner and Collector, Kamarup, A. I. R. 1959 Assam 147 at p. 151.
4. Kewalchand Sowcar *v.* State of Madras, A. I. R. 1957 Mad. 514 at p. 516 : (1957) 1 M. L. J. 329: (1957) M. L. J. (Cr.) 196.
5. P. Sirajuddin *v.* Government of Madras, A.I.R. 1968 Mad. 117 at p. 124.
6. (1877) 2 A. C. 743 at p. 764.
7. Laswaran Chettiar *v.* K. Subbarayan, A. I. R. 1971 Mad. 163 at p. 165.
8. Ala. Const., Art. IV, Sec. 104 ; Ariz. Const., Art. IV, Sec. 19; Cal. Const., Art. IV, Sec. 25; Fla. Const., Art. III, Sec. 20; Idaho Const., Art. III, Sec. 19; Ind. Const., Art. IV, Sec. 22; Ky. Const., Sec. 59; Mont. Const., Art. V, Sec. 26; Nev. Const., Art. IV, Sec. 30; N. D. Const., Art. II, Sec. 69; N. M. Const., Art. IV, Sec. 24; Ore. Const., Art. IV, Sec. 23; Utah Const., Art. VI, Sec. 26; Va. Const., Art. IV, Sec. 63; Wyo. Const., Art. III, Sec. 27.

forbid special laws restoring the rights of citizenship to persons convicted of famous crimes.[1] Acts relating to crimes and criminal law are valid if they do not conflict with specific constitutional limitations,[2] and if the classification is reasonable and not arbitrary.[3] A statute must not be enacted to meet the exigencies of a particular case, but must apply alike to all under the same circumstances or conditions.[4] The liberality of the Courts in construing Acts relating to crimes and criminal law is explained by the fact that the Courts hesitate to overthrow a legislative determination that a criminal statute has been proved necessary.[5]

Validity of acts, crimes and criminal law.

Liberality of Courts in construing Acts relating to crimes and criminal law.

4. Definition of a Penal Act—Ambiguity of the term.—The term "penal statute", if employed without qualification, is ambiguous.[6] Most, if not all, acts containing a command or prohibition contain also some express penalty or sanction for disobedience to the command or prohibition which they contain, and where they are silent as to the sanction for disobedience to their commands or prohibitions the common law or the received rules of construction import into them the appropriate sanction—i.e. where the disobedience affects the public interests, liability to indictment for misdemeanour[7] and where it affects private interest, liability to action by the person injured by the disobedience. In construing an Act, one must adhere closely to the language of the Act. If there is ambiguity in the terms of a provision, recourse must naturally be had to well-established principles of construction but it is not permissible first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principle.[8]

It is a well-established rule of interpretation of statutes that in case of ambiguity in a procedural provision that construction must be accepted which will advance the remedy rather than prevent it.

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1. Cal. Const., Act. IV, Sec. 25; Idaho Const., Art. III, Sec. 19; Ky. Const., Sec. 59; Mont. Const., Art. V, Sec. 26; N.M. Const., Art. IV, Sec. 24; N.C. Const., Art. II, Sec. 11., N. D. Const., Art. II, Sec. 69; Wyo. Const., Art. III, Sec. 27.
2. Pacific Coast Dairy *v.* Police Court of San Francisco, 214 Cal. 668: 8 P. (2d) 140 : 80 A. L. R. 1217 (1932); Fleming *v.* Superior Court Orange Co., 196 Cal. 344 : 238 Pac. 88 (1925); People *v.* Keseling, 35 Cal. App. 501: 175 Pac. 484 (1918); *Ex parte* Martin, 757 Cal. 51 : 106 Pac. 235: 26 L. R. A. (N. S.) 242 (1910); Gardner *v.* Superior Court Los Angeles Co., 19 Cal. App. 548 : 22 P. (2d) 757 (1935); People *v.* Jones, 280 Ill. 259: 117 N. E. 417 (1917).
3. People *v.* Dawson, 210 Cal. 366 : 292 Pac. 267 (1930); People *v.* Andrich, 135 Cal. App. 274 : 26 P. (2d) 902 (1933): People *v.* Comp, 42 Cal. App. 411: 183 Pac. 845 (1919); People *v.* Hale, 64 Cal. App. 523 : 222 Pac. 148 (1923).
4. Commonwealth *v.* Newhart, 97 Pa. Super. Ct. 216 (1930).
5. "A State may classify with reference to the evil to be prevented, and if the class discriminated against is or reasonably might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class.," Campbell *v.* Commonwealth, 229 Ky. 264: 17 S.W. (2d) 227 at p. 230: 63 A.L.R. 932 (1929); *Satutes and Statutory Construction*, by J. G. Sutherland, 3rd Ed., Vol. 2 at pp. 105, 107.
6. *See* Huntington *v.* Attrill, (1893) A. C. 150, for difference between a penal and remedial action, and *see* Stanley *v.* Wharton, (1821) 9 Price 301, and Halsbury's *Laws of England*, 2nd Ed., Vol. 31, pp. 459, 703; 3rd Ed., Vol. 36, p. 365.
7. R. *v.* Hall, (1891) 1 Q. B. 747 at pp. 753, 770.
8. Commissimer of Income-tax Madras *v.* India Bank Ltd., Madras, A. I. R. 1965 S. C. 1473 at p. 1475: (1965) 2 S. C. A. 208.

The rule of exhaustion of statutory remedies, that is, the courts would ordinarily refuse to exercise thei powers under Art. 226 until and unless the statutory remedies have been exhausted by the petitioner, is not rigid. As their Lordships of Supreme Court have pointed out in *A. V. Venkateswaran* v. *R. S. Wadhwani*,[1] the rule of exhaustion of statutory remedies before a writ is granted, is a rule of policy, convenience and discretion rather than a rule of law. Their Lordships referred to the decisions in *Union of India* v. *T. R. Varma*,[2] and *State of Uttar Pradesh* v. *Mohammad Nooh*.[3]

The observations made in the special context of a definition in a different statute by another legislature can obviously not be called in for the purpose of interpretation in the present case. One has only to hearken to the warning given by their Lordships in *L. A. Adamson* v. *Melbourne Board of Works*[4]:

> "Moreover their Lordships would observe that it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same legislature. *A fortiori* must it be so when resort is had, as in the *Swinburne* case,[5] for this purpose to the enactments of other legislatures."

Similarly, a Division Bench consisting of Chief Justice Grille and Hidayatullah, J., as he then was, in *Jainarayan Ramkisan* v. *Motiram Gangaram*,[6] have held—

> "It is well-known rule of construction that it is not permissible in interpreting one Act to travel beyond it and to apply definitions (except in the General Clauses Act) of other Acts."[7]

Penal statute from pleaders' view point.

From the point of view of a pleader a penal statute is one upon which an action for penalties can be brought by a public officer, or by a person aggrieved. But "Penal Act" in its wider sense includes every statute creating an offence against the State, whatever the character of the penalty for the offence. And the expression "penal," as used in the international rule that "the courts of no country execute the penal laws of another," applies "not only to prosecutions and sentences for crimes and misdemeanours but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws,[8] and to all judgments for such penalties".[9]

Examination of penal law by English Courts.

The English Courts will examine the terms of a foreign Act to see whether it is or is not a penal law, and in their examination will not be bound by the construction put upon the Act in the State to which it belongs;[9] otherwise an English Court might be bound to enforce a foreign law which it

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1. A. I. R. 1961 S. C. 1506.
2. 1958 S. C. R. 499 pp. 503-4: A. I. R. 1957 S. C. 882.
3. 1958 S. C. R. 595 pp. 605-7 : A. I. R. 1958 S. C. 86; Gangadhar Lalliram *v.* Nirvachan Adhikari Marketing Society, Vijayapur, A. I. R. 1971 M. P. 16 at p. 19.
4. A. I. R. 1929 P. C. 181.
5. (1920) 27 C. L. R. 377 (Aus.).
6. A. I. R. 1949 Nag. 34.
7. Gram Panchayat *v.* Amar Nath, A. I. R. 1971 Punj. 394 at p. 398.
8. In Sydney Municipal Council *v.* Bull, (1909) 1 K.B. 7, the English Courts refused to enforce the payment of a municipal tax or charge imposed by an Act of New South Wales, as being a liability imposed by a foreign State solely for its own domestic purposes.
9. State of Wisconsin *v.* Pelican Insurance Society, (1887) 127 U. S. 265 at p. 290, approved in Huntington *v.* Attrill, (1893) A.C. 150 at p. 157.
10. Huntington *v.* Attril, *supra*.

deemed penal on the strength of foreign decisions that it was not penal. In *Leconturier* v. *Rey*,[1] the House of Lords held that the French Law of Associations was a penal law or law of police and order, and could not receive any extra-territorial recognition. "The Courts of this country will not recognise a disability not amounting to a change of statute, not known to our law."[2]

5. Causes of the ambiguity.—The cause of the ambiguity is that—statutes fall from the point of view of penalty or sanction into three, and not into two classes, viz.:

(1) Acts enforceable by criminal remedies;

(2) Acts enforceable by civil remedies by way of damages;

(3) Acts enforcable by civil remedies in the form of penalty, forfeiture, or disability.

Into the third class fall those new comparatively rare Acts in which the sanction for disobedience consists in the right to sue for a specific penalty by civil procedure, i.e. by what is a penal action properly so-called. The object of such statutes is punishment, and the sum recoverable thereunder, whether called penalty or damage, is not assessed with a view of compensating the plaintiff.[3] These fall into two sub-divisions:

(*a*) Action by the Attorney-General or a public official.

(*b*) Action by persons aggrieved.

Right of private prosecutor to proceed in a criminal case.

The right of a private prosecutor to proceed in a criminal case is theoretically a right to act for the Crown. The prosecutor (since the abolition of common law appeal) recovers nothing for himself by the prosecution, except in the case of offences under Sec. 45 of the Larceny Act, 1916. The common informer procedure whereby in penal actions the common informer usually obtained by specific statutory provision the whole or part of the "blood-money"[4] has been abolished.[5]

Common law informer procedure.

Example.

In 1776 Lord Mansfield in an action of debt to recover penalties under the 7 & 8 Will. 3, c. 34 (Quakers), against bribery said: "Penal actions were never yet put under the head of a criminal law or of crimes. To make this a criminal cause, the construction of the statute must be extended by equity. It is as much a civil action as an action for money had and received."[6] And in the well-known case of *Attorney-General* v. *Bradlaugh*,[7] an information by the Attorney-General to recover penalties against the defendant for sitting and voting in the House of Commons without taking the oath, Brett, M. R., said: "The recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that that distinction which has been well-known and established in law for many years between a penal statute

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1. (1910) A.C. 262; *cf. Re* Selot's Trust, (1902) 1 Ch. 488.
2. Worms *v.* De Valdor, (1880) 49 L. J. Ch. 261, Fry, J., on a French "prodigal".
3. Thomson *v.* Lord Clanmorris, (1900) 1 Ch. 718 at p. 725; and *see* Saunders *v.* Wiel, (1892) 2 Q.B. 321.
4. A term used opprobriously, but surviving from the ancient Saxon law and the procedure by appeal.
5. Common Informers Act, 1951 (14 & 15 Geo. 6, c. 39), Sec. 1.
6. Atcheson *v.* Everitt, (1775) 1 Cowp. 382 at p. 391.
7. (1885) 14 Q.B.D. 667; *cf.* Brown *v.* Allweather Mechanical Grouting Co., (1954) 2 Q.B. 443.

and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment."

Proceedings of Cl. (*b*) differ from ordinary civil action only in that the sum recoverable is liquidated. They are not penal laws within the meaning of International Law in that they are actions brought by a subject to enforce his own interest and the liability is imposed for the protection of his private rights.[1]

Reason for importance of penal Act in civil cases.

The question whether an Act is or not penal is now in civil cases material for four reasons only:

(1) with respect to discovery, inasmuch as equity has dealt with such actions as so far criminal in their nature as to refuse to assist the plaintiff by interrogation of the defendant;

(2) with respect to the need of leave of the Court to compromise an action brought on the statutes;

(3) with respect to venue, which in penal actions was usually local;[2] and

(4) with respect to the right of appeal; for if a penal action were held to be "a criminal cause or matter", no appeal would lie to the Civil Court of Appeal.[3]

Reason for importance of penal Act in criminal law.

With reference to criminal law the question whether an Act is penal is material for the purpose of deciding whether disobedience to the Act is or is not a misdemeanour, but this question can only arise in the absence of a specific sanction in the Act itself. "It may I think be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment.... Now it is true that there are statutes which do not create ar imperative and positive duty to the public but which only impose, as the result of non-compliance with the directions of the statute, a pecuniary loss on the individual who does not so comply. In such a case it is not the intention of the Legislature to make the disobedience of the law a misdemeanour, it is only the intention to provide that if the person does not comply with the directions of the statute he must submit to the penalty. In each case it is a question of the construction of the Act to see if that is what is meant."[4]

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1. Huntington *v.* Attrill, (1893) A. C. 150.
2. Local venue in actions under statutes prior to 1875 was abolished by Ord. 36, r. 1 of the Supreme Court Rules of 1875, and was not revived by the R. S. C., 1883; Buckley *v.* Hull Docks Co., (1893) 2 Q.B. 93; and by the Public Authorities Protection Act, 1893, it was abolished as to all proceedings to which that Act applied.
3. Supreme Court of Judicature Act, 1925, Sec. 31 (1) (*a*) *Ex parte* Woodhall, (1888) 20 Q.B.D. 832; R. *v.* Wiltshire JJ., (1912) 1 K.B. 566.
4. R. *v.* Tyler, (1891) 2 Q.B. 588 at pp. 592, 594, *per* Bowen, L. J. ; *cf.* Attorney-General *v.* Radloff, (1854) 10 Ex. Ch. 84 ta pp. 101, 102, *per* Platt, B.

6. Rules for deciding whether an Act is penal.—The following rules apply for deciding whether statutes are not to be deemed penal :

First Rule.

(1) *Prima facie*, the imposition of a fine or penalty or forfeiture by a statute makes the procedure criminal.[1] "Where a proceeding is one to enforce a penalty, or where a proceeding is one—not that it must end in a penalty, because the decision may be in favour of the person against whom it is taken—but where the proceeding is of such a nature that it may result in a penalty, it is a penal proceeding."[2]

Lord Fitzgerald, in *Bradlaugh* v. *Clarke*,[3] thus laid down the rule to be deduced from the old authorities[4]: "Where it is ordained by statute that for feasance, misfeasance, or non-feasance the offender shall forfeit a sum of money, and it is not expressed to whom he forfeits it, in all such cases the forfeiture shall be extended for the Queen, save in cases where the penalty is assessed as compensation to the party injured and a private individual cannot sue."

Second Rule.

(2) That the fine, penalty, or forfeiture is payable to an individual does not *per se* render the remedy civil.[5]

Third Rule.

(3) But where the penalty is recoverable by action of debt the remedy is civil. Even in this case the action may not be compromised without the leave of the Court,[6] and a collusive action for penalties is both unlawful[7] and ineffectual.[8]

Fourth Rule.

(4) In certain cases the penalty has been held to be in truth liquidated damages and not a penalty in the stricter sense.[9] Where an Act imposes a penalty for its contravention, the question arises whether the penalty is inflicted by way of punishment or by way of compensation for the breach. If the former, the contravention is a criminal offence, and even if the sole remedy for the offence is the statutory penalty, the contravention is nonetheless criminal.[10]

Fifth Rule.

(5) In certain other cases, the penalty being recoverable only by a person aggrieved, the action is deemed so far penal that discovery in aid of it is not permitted.[11]

Sixth Rule.

(6) An Act may be remedial from one point of view and penal from another.

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1. Mellor *v.* Denham, (1810) 5 Q. B. D. 467 ; R. *v.* Whitchurch, (1881) 7 Q. B. D. 534 ; Paget, (1881) 8 Q. B. D. 151; at p. 157, *per* Field, J.; *Ex parte* Schofield. (1891) 2 Q. B. 428.
2. Derby Corporation *v.* Derbyshire County Council, (1897) A. C. 550 at p. 552, *per* Lord Herschell.
3. (1883) 8 App. Cas. 354, 383.
4. Bacon, Abr. tit. Prerogative, B. 10. *Cf.* Llewellyn *v.* Vale of Glamorgan Ry., (1898) 1 Q. B. 473 on Sec. 53 of the Rys. Clauses Consolidation Act, 1845, under which the penalties go in certain events to the road authority, in other cases to private owners.
5. R. *v.* Paget, (1881) 8 Q. B.D. 151, at p. 157, following Heare *v.* Garton, (1859) 2 E. & E. 66 ; *see* R. *v.* Tyler, (1891) Q. B. 588.
6. *See* R. S. C., Ord. 50, rr. 13, 14, 15.
7. 4 Hen. 7, c. 20 (collusive actions).
8. Girdlestone *v.* Brighton Aquarium Co., (1878) 3 Ex. D. 137, affd. (1879) Ex. D. 107.
9. *See* Reave *v.* Gibson, (1891) 1 Q. B. 652, and 3 & 4 Will., c. 15, Sec. 2.
10. R. *v.* Tyler, (1891) Q. B. 588 at p. 598, *ser* Kay, L. J.; *cf.* Musgrove *v.* Chung Teong Toy, (1891) A. C. 272.
11. *See* the cases as to forfeiture discussed in Earl of Mexborough *v.* Whitwood, W. C., (1897) Q. B. 111.

In *Stanley* v. *Wharton*,[1] it was argued that Sec. 3 of the Distress for Rent Act, 1737, which enacted that "if any person shall wilfully.... assist any tenant in fraudulently conveying away or concealing any part of his goods, every person so offending shall forfeit and pay to the landlord....double the value of the goods....to be recovered by action of debt", was a penal Act. "But," said Graham, B., "this Act is clearly distinguishable from those Acts which impose penalties," and is "entirely and purely remedial". But in *Hobbs* v. *Hudson*,[2] the same Act was held so far penal that discovery could not be obtained in an action brought upon it. In *Ex parte Pearson*,[3] James, L. J., declined to treat section of the Bankruptcy Act, 1869, dealing with fraudulent transfers, as a penal statute, and in *Derby Corporation* v. *Derbyshire County Council*,[4] it was held that the Rivers Pollution Prevention Act, 1876, which created an offence, but authorised proceedings in a county court for an order to abstain from committing the offence, was, so far as the County Court proceedings were concerned, not a penal statute.[5]

7. Interpretation favourable to accused.—The rules for the interpretation of criminal statutes express the solicitude which law feels for the life and liberty of the subject.

It is an axiom of criminal law that it is better that a hundred guilty persons should escape than that an innocent person should suffer. Therefore, it resolves all reasonable doubts in favour of the accused. The golden rule of criminal jurisprudence is that an accused is presumed to be innocent till he is proved to be guilty ; hence the law requires the accuser to prove all facts compatible with his guilt and incompatible with his innocence.[6] And in this respect law does not weigh in golden scales the conflicting testimony offered by each side, but taking its stand on the side of the accused, it examines all facts and circumstances with care and circumspection, so that it may not abuse the liberties of those who are placed under its protection.[7]

In Sutherland : *Statutory Construction*, 3rd Ed., Vol. 3 at p. 77, it is observed as follows :

> "No statutory provisions are intended by the Legislature to be disregarded ; but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. In doing so they must necessarily consider the importance of the literal and punctilious observance of the provision in question to the object the Legislature had in view. If it is essential it is mandatory, and a departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of it."

Sutherland further says at the same page :

> "The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of or omission to adhere to, statutory directions. This determination involves a decision of whether or not the violation or omission is such

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1. (1821) 9 Price 301 at p. 310.
2. (1890) 25 Q. B. D. 232.
3. (1873) L. R. 8 Ch. App. 637 at p. 673.
4. (1897) A. C. 550.
5. Craies on *Statute Law*, 6th Ed., pp. 525-29.
6. Nobokisto, 8 W. R. (Cr.) 87 ; Ahmad, 11 W. R. (Cr.) 25 at p. 27; Madhub Chunder, 21 W. R. (Cr.) 13 at p. 20.
7. Beharee, 3 W. R. (Cr.) 23 at p. 26.

as to render invalid acts or proceedings pursuant to the statute, or rights, powers, privileges or immunities claimed thereunder. If the violation or omission is invalidating the statute is mandatory; if not, it is directory."

Craies on *Statute Law*, 6th Ed. at p. 63 says :

"When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute ; but those which are not essential, and may be disregarded without invalidating the thing to be done, are called directory."[1]

Construction favourable to accused in case of two possible constructions.

If the words used in a criminal statute are reasonably of two constructions, the construction which is favourable to the accused should be preferred; but in construing the relevant words, it is obviously necessary to have due regard to the context in which they have been used.[2] It is a well-settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature.[3] In applying a criminal statute and before convicting a person of a criminal offence, care must be taken not to go beyond the obvious intention of the Legislature.[4] An order of a penal nature must be clear and specific in its language and must not leave anything to presumption.[5]

8. Benefit of doubt.—Where the language of a penal statute is ambiguous, the benefit of doubt must go to the subject, because it is a well-established canon of interpretation that the provisions of a penal statute must be strictly construed, and if there is any ambiguity or donbt, the benefit of it must go to the subject. Therefore if a clause or expression in a penal statute is capable of being interpreted either in favour of or against the accused, the former interpretation ought to prevail.[6]

It is elementary that in dealing with a penal provision the rule of strict construction requires that the language shall be construed so that no

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1. Manglaram *v.* State of Rajasthan, A. I. R. 1970 Raj. 32 at pp. 34-35.
2. Alamgir *v.* State of Bihar, A.I.R. 1959 S. C. 436 at p. 439: 1959 S.C.J. 457: 1959 Cr. L. J. 527: 1959 M. L. J. (Cr.) 293: 1959 A.L.J. 417.
3. Tolaram Relumal *v.* State of Bombay. A. I. R. 1954 S.C. 496 at pp. 498-99: 1954 S. C. A. 965: 1954 S. C. J. 547: 1954 Cr. L. J. 1333: 56 B.L.R. 1206.
4. Shridhar *v.* State, A. I. R. 1954 H. P. 67 at p. 68: 1954 Cr. L. J. 1465.
5. Bishambar Dayal *v.* State, A.I.R. 1954 All. 183 at p. 184: 1953 All. W.R. (H. C.) 601: 1953 All. L. J. 661: 1954 Cr. L.J. 388: a case uuder the V. P. Flour, Rice and Dal Mills Control Order, 1948.
6. Joshep D'Silva *v.* Emperor, A. I. R. 1947 Bom. 310 at pp. 313, 316, 320: 48 Cr. L. J. 305: 229 I. C. 178: 49 Bom. L. R. 6. (F. B.); Emperor *v.* Tehl Ram, I. L. R. (1945) Lah. 291: A.I.R. 1947 Lah. 261; Madho Saran *v.* Emperor, I. L. R. (1944) All 42: A. I. R. 1943 All. 379: 45 Cr. L. J. 491: 1943 A. L. J. 511 (F.B); Bhai Lall Chand *v.* Emperor, A.I.R. 1942 Lah. 253: 43 Cr. L. J. 849: 202 I.C. 452: 44 P. L. R. 429; King *v.* Aung Nyun, A. I. R. 1940 Rang. 259: 42 Cr. L. J. 124 (F.B.); Parmanand *v.* Emperor, A. I. R. 1939 Lah. 81: 40 Cr. L. J. 497: 180 I. C. 835: 41 P. L. R. 187 (F. B.); Diwan Singh Maftoon *v.* Emperor, A. I. R. 1936 Nag. 55: 37 Cr. L. J. 474 (2): 19 N. L J. 84; Guranditta *v.* Emperor, 39 Cr. L. J. 970: A. I. R. 1938 Lah. 691: 40 P. L. R. 942.

cases shall be held to fall within it which do not fall within the reasonable interpretation of the enactment.[1]

The Court must not only look on the one side, at the mischief intended to be remedied, but also on the other side, it must consider that persons are not to be made subject to penalties unless the offence charged is strictly brought within the purview of the statute. No one can be brought within a statute unless the case falls within the letter and spirit of the statute.[2] A court is entitled and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to show that a particular provision ought not to be construed as it would be, if considered alone apart from the rest of the Act.[3] The Court should construe all the parts together so as to avoid inconsistencies between the different parts of the statute.[4] The Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it, is so clear that the case must necessarily be within it.[5]

Court bound to find out intention of Legislature.

It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and advance the remedy according to the real intention of the makers. It is, therefore, the duty of the Court to so construe the provisions of the two Acts so that effect could be given to both.[6]

9. Enunciation of law and definition.—Normally, the words used in a statute have to be construed in their ordinary meaning; but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words does not meet the ends of a fair and a reasonable construction. Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material. As Halsbury has observed the words "should be construed in the light of their context rather than what may be either their strict etymological sense or their popular meaning apart from that context".[7] As criminal justice requires clear demonstration of facts, it requires also clear enunciation of law, for no one can be convicted of a doubtful offence.[8] So the Law Commissioners responsible for the first draft of the Code remarked: "In criminal cases one with which we are now more immediately concerned, we think that the accused party ought always to have the advantage of a doubt on a point of law, if that doubt be entertained after mature consideration by the highest judicial authority, as well as of a doubt on a matter of fact. In civil suits which are

1. Dattatraya Malhar Bidkar *v.* Emperor, A.I.R. 1937 Bom. 28 at p. 30: 38 Bom. L. R. 1115.
2. Diwan Singh Maftoon *v.* Emperor, A. I. R. 1936 Nag. 55 at p. 62.
3. *Per* Lord Herschell in Colquhoun *v.* Books, (1890) 14 A. C. 493 at p. 506.
4. Deonandan Singh *v.* Ram Lakhan Singh, A.I.R. 1948 Pat. 225 at pp. 228-29: 2 D. L. R. 492: 49 Cr. L. J. 246 (F. B.).
5. Firm Khem Chand Ramdas *v.* Commissioner of Income-tax, A. I. R. 1934 Sind 46 at p. 51: 149 I.C. 1204: 28 S. L. R. 174.
6. Smt. Gulab Sundari Bapna *v.* State of Rajasthan, A.I.R. 1971 Raj. 1 at p. 4.
7. Sheikh Gulfam *v.* Sanat Kumar Gangauli, A.I.R. 1965 S.C. 1839 at p. 1845: (1965) 2 S.C. A. 156.
8. Imami, I.L.R. 35 All. 24.

actually pending, we think it, on the whole, desirable to leave to the Courts the office of deciding doubtful questions of law which have actually arisen in the course of litigation."[1] In criminal cases, therefore, the law must be precise and intelligible, and the facts proved must be clear and unequivocal. And so far as regards law, while it may be so, still there may be doubts and difficulties which it is the function of the rules to solve. Indeed, as human language is never so precise and inflexible as to admit of no misinterpretation, it is always necessary, and indeed desirable that these rules, which form, as it were, the Grammar of the Code, should be carefully observed, and for his purpose, it is necessary to examine the whole Code, analyse its scheme and study its vocabulary. Indeed, in order to facilitate this work the draftsmen have avowedly adopted a plan the object of which is to make the Code self-contained, so far as possible, regarding its construction.

Object of providing definitions in the Code.

In the first place, they have added definitions of terms used in the Code, the object of which is to provide a uniform nomenclature and thus avoid the perplexing variety of senses in which the same term may have been used in cognate enactments or popular parlance. "In our definitions," they observe, "we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning and no more than our own meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a very few students after long application. Yet, such definitions are found, and must be found in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them he will give a smoother and more attractive appearance to his workmanship; but in that case, he flinches from a duty, which he ought to perform, and which somebody must perform. If this is necessary but most disagreeable work be not performed by the law-giver once for all, it must be constantly performed in a rude and imperfect manner by every Judge in the Empire, and will probably be performed by no two Judges in the same way. We have, therefore, thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a Code."[2]

It would not be permissible for the Courts to read something in the section which it does not contain.[3]

Whether definitions in the Code are artificial.

When the Act itself provides a dictionary for the words used the Courts must look into that dictionary first for an interpretation of the words used in the statute. The Courts are not concerned with any presumed intention of the Legislature; its task is to get at the intention as expressed in the statute. An artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition ; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended. Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word

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1. Prefatory Address, p. xviii.
2. Prefatory Address, pp. xi and xv.
3. Ramkrushna Gangaram Rathi *v.* Kisan Zingraji Madke, A.I.R. 1971 Bom. 305 at pp. 307, 309

defined.[1] It is true that generally definitions in statutes or enactments are provided in order to give some artificial meaning to words or phrases used therein but it does not follow nor there is any such rule of law that once a phrase or word is defined in a statute or enactment that definition is necessarily artificial and something different to its natural or grammatical meaning.[2]

When a statute creates a special liability, the special definition of any term given in such a statute must supersede and prevail over the ordinary connotation of that term in which it is understood at common law.[3]

Legal fiction is a device generally employed to meet the exigencies of a critical situation. It is an enabling trick which can be justified only in so far as it succeeds in getting over a difficulty. A legal fixtion is rarely employed to operate harshly on any person.[4]

Where the Act itself provides a definition for the word used therein, the Court should look into the meaning assigned to the term by the Act itself for interpreting that word used in the statute. The Courts are not concerned with the presumed intention of the Legislature. The task of the Court is to get the intention of the Legislature as expressed in the statute itself.[5]

10. History of legislation.—It has been held that reference to the history of legislation is permissible but can only be made when reasonable doubt is entertained as to the construction of a statute. The proper course is, in the first instance, to examine the language of the statute, to interpret it, to ask what is the natural meaning, uninfluenced by any consideration derived from the previous state of the law. If this fails, resort might be had to extraneous aids to interpretation, e. g. the history of legislation, the analogous rules of English law and the underlying policy which the law was intended to promote or the mischief it was aimed to arrest. A court is bound to administer the law as enunciated by the Legislature and should neither enlarge nor restrict the sphere of its application.

Construction of a section of Penal Code.

The construction of (a section of) the Penal Code must be based on the meaning of the words used, to be gathered according to the ordinary rules of interpretation and in consonance with the generally accepted principles of exercise of criminal jurisdiction. A passage from the report of the Indian Law Commissioners quoted at page 274 of Ratanlal's *Law of Crimes* (18th Ed.) may be valuable as a matter of history but it cannot be a legitimate guide for the construction of the Penal Code today. The notions of criminal jurisdiction have very considerably changed during a period of nearly a century that has passed since the Penal Code was inscribed on the Statute Book. It is legitimate to construe the Code with reference to the modern needs wherever this is permissible unless

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1. Hariprasad Shivshankar Shukla *v.* A. D. Divelkar, A. I. R. 1957 S. C. 121 at pp. 126, 127 : 1957 S. C. A. 57 : 59 Bom. L. R. 384.
2. N. Baksi *v.* Accountant-General, Bihar, A. I. R. 1957 Pat. 515 at p. 524 : 1957 B. L. J. R. 299 : I. L. R. 36 Pat. 557.
3. Padam Chand Jain *v.* The Chief Controlling Revenue Authority, A. I. R. 1970 All. 644 at p. 646.
4. Miss Gurvinder Kaur *v.* Punjab University, A. I. R. 1971 Punj. 384 at p. 389.
5. Maharaja of Jaipur Museum Trust City Palace, Jaipur *v.* State of Rajasthan, A. I. R. 1971 Raj. 151 at p. 154.

there is anything in the Code or in any particular section of the Code to indicate the contrary.[1]

The decision to the contrary in *Bhima Shaw* v. *State*[2] can, therefore, be no longer regarded as good law.

Considerations in determining meaning of particular word.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament, it is permissible to consider two points, viz. (*i*) the external evidence derived from extraneous circumstances such as previous legislation and decided cases ; (*ii*) internal evidence derived from the Act itself.[3] Such topics as the history of the legislation and the facts which gave rise to the enactment may usefully be employed to interpret the meaning of the statute though they do not afford a conclusive argument.[4] The Parliamentary history of the enactment is not admissible to construe its meaning.[5] If there is any ambiguity, assistance may be legitimately taken from the history of the legislation as well as the circumstances under which necessity arose of the amendment.[6] In the matter of interpretation of a statute the history of the legislation and the surrounding circumstances, which existed at the time and demanded a change of law or the enactment of a new one, can all be taken into consideration.[7] In interpreting a statute, although it is useful to keep in mind the historical background, it does not necessarily help to determine the true meaning to be attached to the language employed in the statute.[8] In view of the clear language of Art. 285, consideration of history of this legislation would not be very material and courts should prefer to construe the Article on its language, as it stands, without reference to any extraneous consideration.[9] Although a survey of historical background is not permissible for the purpose of interpreting an Act, it is relevant for the purposes of showing the background against which the law

Historical survey when permissible in interpreting an Act.

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1. Mobarik Ali Ahmad *v.* State of Bombay, A. I. R. 1957 S. C. 857 at p. 871 : 1957 S. C. J. 111 : 1957 Cr. L. J. 1346 : 1957 M. L. J. (Cr.) 42.
2. I. L. R. (1956) Cut. 194 : 1956 Cr. L. J. 1208 : A. I. R. 1956 Orissa 177 (D. B.).
3. Henrietta Muir Edwards *v.* Attorney-General of Canada, A. I. R. 1930 P. C. 120 at pp. 120-21 : 58 M. L. J. 300 : 31 M. L. W. 601 : 126 I. C. 88, relied on in Mohindra Supply Co. *v.* Governor General in Council, 56 Punj. L. R. 199 : A. I. R. 1954 Punj. 211 (F. B.).
4. Emperor *v.* Benoari Lall Sarma, A. I. R. 1943 F. C. 36 at p. 70 : (1943) 6 F. L. J. (F. C.) 79 : (1943) 2 M. L.J. 207: 208 I.C. 564, relying on the observations of the Halsbury, L. C., in Powell *v.* Kempton Park Racecourse Co., (1899) A. C. 143 ; Subedar *v.* State, A. I. R. 1956 All. 529 : 1956 Cr. L. J. 1039.
5. R. M. D. Chamarbaugwalla *v.* Union of India, A. I. R. 1957 S. C 628 at p. 632 : 1957 S. C. A. 912 : 1957 S. C. J. 593 : (1957) 2 Andh. W. R. 76 : 59 Bom. L. R. 973 : (1957) 2 M. L. J. (S. C.) 76 : (1957) 1 M. L. J. (Cr.) 547.
6. Madan Singh *v.* Collector, Sikar, 1954 Raj. L. W. 1 : A. I. R. 1954 Raj. 104 at p. 114 (D. B.) ; Ramballav Dhandhania *v.* Gangadhar Nathmall, 97 Cal. L. J. 119 : A. I. R. 1956 Cal. 275 ; State *v.* Govindan Thambi, I. L. R. (1956) T. C. 1065 : 1956 Ker. L. T. 550 : 1957 Cr. L. J. 245 : A. I. R. 1957 T. C. 29 (D. B.) ; *see* also Manickam Pillai Subbayya Pillai *v.* Assistant Registrar, H. C., Kerala, 1958 Ker. L. T. 280 ; 1958 Ker.L.J. 322; A.I.R. 1958 Ker. 188.
7. Kunwar Murli Manohar *v.* State of U. P., A. I. R. 1957 All. 159 at p. 170 (D. B.) ; Alongavaram *v.* Municipal Council, Pollachi, I. L. R. (1957) Mad. 1020 : (1957) 2 Mad. L. T. 46 : 70 Mad. L. W. 517 : 1957 M. L. J. (Cr.) 324.
8. J. K. Trust, Bombay *v.* C. of I. T. and E. P. T., Bombay, A. I. R. 1958 Bom. 191 at pp. 192-93: 59 Bom. L. R. 1255 : (1958) 32 I. T. R. 32.
9. Corporation of Calcutta *v.* Union of India, A. I. R. 1957 Cal. 548 at p. 549 : I. L. R. (1958) 1 Cal. 404.

came to be enacted and the particular evil which it intended to remedy.[1]

In a matter of statutory interpretation it is legitimate to consider the state of law at the time of passing of the Act to be construed and the mischief and the defect for which the previous law did not provide and the remedy therefor intended in the new Act. The Court must adopt a construction that will suppress the mischief and advance the remedy.[2]

The rule of construction of statutes is that the Legislature is taken to be acquainted with the actual state of the law and therefore when an old statute is either incorporated in or is put in the same terms in a new statute it should be understood that the Legislature has accepted the interpretation which has been put upon it.[3]

If there is an ambiguity in the earlier ligislation on the same subject then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.[4]

The Crown may not plead history as a vindication of validity where statutes are concerned. But it is permissible, where events have occurred of which a court may take judicial notice, for the Court to look at the logic of the events for the purpose of obtaining an objective understanding of the scheme and framework of any enactment which has relation to those events.[5]

11. Reports of committees appointed by the State.—The pronouncements of committees having in charge the preparation of proposed laws, do not of course carry the weight of a judicial opinion, but are rightfully regarded as possessing very considerable value of an explanatory nature regarding the legislative intent where the meaning of a statute is obscure.[6]

A perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section.[7] The reports of the Indian Law Commissioners were referred to in some cases.[8]

The report of the Joint Committee is of no assistance in interpreting any Act and in finding out the intention of Parliament. The intention of Parliament should be inferred from the languages of the Act itself.[9]

12. Aid of English and American law. –Where a Court dealing with the problem of construing a specific statutory provision it would be

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1. Cherry Hosiery Mills, Ltd. *v.* S. K. Ghose, A. I. R. 1959 Cal. 397 at p. 399 : 63 C. W. N. 574.
2. Harak Singh *v.* Kailash Singh, A. I. R. 1958 Pat. 581 at p. 583 (F. B.); 1958 Bom. L. R. 545 : 1958 Pat. L. R. 285 : Mohammed Bin Salem *v.* Umaji, I. L. R. (1955) Hyd. 169 : A. I. R. 1955 Hyd. 113. (F. B.).
3. Panna Lal *v.* State of Delhi, A. I. R. 1954 Punj. 251 at p. 253 (D. B.): 56 Punj. L. R. 421.
4. *Per* Lord Sterndale, M. R., in Cape Brandy Syndicate *v.* Inland Revenue Commissioner, (1921) 2 K. B. 403 : cited with approval by Lord Buckmaster in Ormond Invesment Co. *v.* Betts, 1928 A.C. 143: and relied upon in Sher Khan *v.* State, A. I. R. 1958 All. 733 at p. 734 (F.B.): 1958 A. L. J. 495 : 1958 All. W. R. (H. C.) 576 : 1958 Cr. L. J. 1261.
5. Benoari Lal Sarma *v.* Emperor, A. I. R. 1943 Cal. 285 at p. 301: 44 Cr. L. J. 673 : 207 I. C. 481 (S. B).
6. Imhoff Berk Silk Dying Co. *v.* U. S., 43 Fed. (2) 836 and 837.
7. *In re* Reference under Sec. 213 of the Government of India Act, A. I. R. 1944 F. C. 73 at p. 77 : 1944 M. W. N. 631.
8. *See* Ghulet. (1884) 7 All. 44 at pp. 52, 53; Sheik Moosa *v.* Sheik Esia, (1884) 8 Bom. 241 at p. 246; Chunnilal Mancharam *v.* Manishkar Atmaram, (1893) 18 Bom. 616 at p. 625; Ramesh Chandra Sanyal *v.* Hira Mondan, (1890) 17 Cal. 852 at p. 859.
9. State of U. P. *v.* Bar Council of U. P., A. I. R. 1971 All. 186 at p. 188.

unreasonable to invoke the assistance of English decisions dealing with the statutory provisions contained in English law. As Lord Sinha has observed in delivering the judgment of the Privy Council in *Ramanandi Kuer* v. *Kalawati Kuer*,[1] "it has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded." If the words used in the Indian statute are obscure or ambiguous perhaps it may be permissible in interpreting them to examine the background of the law or to derive assistance from English decisions bearing on the point; but where the words are clear and unambiguous it would be unreasonable to interpret them in the light of the alleged background of the statute and to attempt to see that their interpretation conforms to the said background.[2]

Privy Council's view.

Where there is clear statutory provision it is not open to Courts in this country to look to English Common Law for guidance in matters covered by the mandatory statutory provision.[3]

If the terms are plain and unambiguous one cannot have resort to the position in law as it obtained in England or in other countries when the statute was enacted by the Legislature. Such recourse could be permissible only if there was any latent or patent ambiguity and the Courts were required to find out what was the true intendment of the Legislature. Where, however, the terms of the statute do not admit of any such ambiguity, it is the clear duty of the courts to construe the plain terms of the statute and give them their legal effect.

Recourse to be had if there is latent or patent ambiguity.

When the meaning of the sections is plain and unambiguous, hence there is no need to call into aid any of the rules of construction.[4]

As was observed by Lord Herschell in *Bank of England* v. *Vagliano Brothers*[5]:

> "I think the proper course is in the first instance to examine the language of the statute and to ask what its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then assuming that it was probably inteneded to leave it unaltered, to see if the words of the enactment will bear an interpretation in confirmity with this view.
>
> "If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decision...."

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1. 55 I. A. 18: I. L. R. 7 Pat. 221 : A. I. R. 1928 P. C. 2.
2. State of West Bengal *v.* B. K. Mondal & Sons, A. I. R. 1962 S. C. 779 at p. 786.
3. Hungerford Investment Trust Ltd., *v.* Haridas Mundhra, A. I.R. 1971 Cal. 183 at p. 195.
4. Commissioner of Income-tax, Assam and Nagaland *v.* G. Hyatt, A. I. R, 1971 S. C. 725 at p. 726.
5. (1891) A. C. 107 at p. 144.

This passage was quoted with approval by their Lordships of the Privy Council in *Norendranath Sircar* v. *Kamal Basini Dasi*,[1] while laying down the proper mode of dealing with an Act enacted to codify particular branch of the law.

Guiding principle.

It is therefore clear that in order to ascertain the true meaning and intent of the provisions, one has got to turn to the very terms of the statute itself, divorce from all considerations as to what was the state of the previous law or the law in England or elsewhere at the time when the statute was enacted. To do otherwise would be to make the law, not to interpret it.[2]

13. Proceedings in Parliament.—The speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted for interpreting a statute.[3] The Statement of Objects and Reasons appended to the Bill should be ruled out as an aid to the construction of a statute.[4] Though the Court may look at the background if it can take judicial notice of it, it is not permissible thus to look into the Statements of Objects and Reasons in order to discover a reasonable basis for classification in an Act.[5] Proceedings in the Legislature are not relevant for the interpretation of statutes, but may be referred to for ascertaining the background, that is to say, the reasons which impelled the Legislature to divide it into two classifications.[6] It is only when the terms of the statute are ambiguous or vague that resort may be had to proceedings of Parliament and statement of objects of the Bill for the purpose of arriving at the true intention of the Legislature,[7] the proceedings are not legitimate aids for the construction of a statute.[8] When relevant, the Court may, with great caution, look at the debate in Parliament. This principle would only apply where a question arises for the decision of the Court *de hors* the Act or the statute.[9]

Use of speeches in debate on Bills.

A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislators were in accord. The Court could only search for the objective intent of the Legislature primarily in the words used in the enactment, aided by such historical material as reports of statutory committees, preambles, etc.[10] If

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1. I. L. R. 23 Cal. 563 at p. 571.
2. *See* Gwynne *v.* Burnell, (1840) 7 Cl. & Fin. 572 at p. 696 and Kumar Kamalaranjan Roy *v.* Secretary of State, 66 I. A. 1 at p. 10: A. I. R. 1938 P. C. 281 ; Sales-tax Officer, Banaras *v.* Kanhiya Lal, A. I. R. 1959 S. C. 135 at pp. 139, 140: 1959 S. C. R. 1350.
3. State of Travancore-Cochin *v.* Bombay Co. Ltd., Alleppey, A. I. R. 1952 S. C. 366 at p. 368 : 1952 S. C. R. 1112.
4. Aswini Kumar Ghose *v.* Arabinda Bose, A. I. R. 1952 S. C. 369 at p. 378 : 1953 S. C. R. 1.
5. Madhosingh *v.* State of Rajasthan, A. I. R. 1954 Raj. 197 at p. 199 : I. L. R. (1954) Raj. 518.
6. Prativa Sasmal *v.* Agriculture Income-tax Officer, A. I. R. 1958 Cal. 585 at p. 588 : 1957 Com. Cas. 650: *see* Charanjit Lal *v.* Union of India, A. I. R. 1951 S. C. 41 : 53 Bom. L.R. 499.
7. Express Newspaper Ltd. *v.* Union of India, A. I. R. 1958 S. C. 578 at p. 622 : 1959 S. C. R. 12.
8. Administrator-General of Bengal *v.* Premlal Mullick, 22 I. A. 107 at p. 118 (P. C.): 22 Cal. 788 (P. C.), cited in State of T. C. *v.* Bombay Co. Ltd., A.I.R. 1952 S. C. 366 : 1952 Ker. L. T. 581 : 1952 S. C. R. 1112.
9. Commissioner of Labour *v.* A. G. G. Ltd., A. I. R. 1955 Bom. 363 at p. 367 (D. B.): I. L. R. (1955) Bom. 467 : 57 Bom. L. R. 367.
10. A. K. Gopalan *v.* State of Madras, A. I. R. 1950 S. C. 27 at p. 73: 1950 S. C. R. 88: 63 M. L. W. 638.

any difficulty or ambiguity arises in the interpretation of any section, assistance may be taken from the discussions in the Legislature as to the scope and intention of the legislation especially in respect of remedial statutes.[1] A statute, as passed by Parliament, is the expression of the collective intention of the Legislature as a whole, and any statement made by an individual, *albeit* a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute.[2] Reports of Select Committees and debates leading up to the passing of an Act cannot be used to construc the language of the enactment.[3]

Objects and Reasons.—It is not permissible in India to refer to the Statement of Objects and Reasons which accompanies the draft Bill when it is first introduced in the Legislative Body. Unlike the preamble, the headings and the marginal notes, the Statement of Objects and Reasons is no part of the Act as passed by the Legislature.[4]

Proceedings of registration or language of Minister—Use of.

It is well settled that proceedings of the Legislature cannot be called in aid for constructing a section.[5] "It is clear", observed Lord Wright in *Assam Railway and Trading Co. Ltd.* v. *Inland Revenue Commissioner*,[6] "that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible". The question whether the Statement of Objects and Reasons is admissible in evidence for construing the statute arose directly for decision in *Aswini Kumar Ghose* v. *Arabinda Bose*[7] and it was held that it was not.

Use of history of a legislation.

It was argued that the history of a legislation would be admissible for ascertaining the legislative intent when the question is one of severability. That is so as held by the Supreme Court in *R. M. D. Chamarbaugwalla's* case.[8] But the Statement of Objects and Reasons is not a part of the history of the legislation. It is merely an expression of what according to the mover of the Bill are the scope and purpose of the legislation. But the question of severability has to be judged on the intention of the Legislature as expressed in the Bill as passed, and to ascertain if the statement of the mover of the Bill is no more admissible than a speech made on the floor of the House.

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1. Deorajin Debi *v.* Satyadhyan Ghosal, A.I.R. 1954 Cal. 119 at p. 121 (D B.): 58 C. W. N. 64.
2. State of West Bengal *v.* Union of India, A.I.R. 1963 S. C. 1241 at p. 1247.
3. Hollinshead *v.* Hazleton, (1916) 1 A. C. 428; *see* also Administrator-General of Bengal *v.* Prem Lal Mullick, I. L. R. 22 Cal. 788 (P. C.); *In re* Lala Harikishan Lal, A. I. R. 1937 Lah. 497 (S. B.); A. K. Gopalan *v.* State of Madras, A. I. R. 1950 S. C. 27: 1950 S. C. R. 88: 63 M. L. W. 638; Debendra Nath Roy *v.* Jogendra Narain Deb, A. I. R. 1936 Cal. 593: 64 C.L.J. 212.
4. *In re* Lala Harikishan Lal, A.I.R. 1937 Lah. 497 at p. 499: I. L. R. (1937) Lah. 69; *see* also Shantha Nand Gir Chela *v.* Basudevanand, A. I. R. 1930 All. 225 (F. B.): 1930 A. L. J. 402; Ratansi Hirji *v.* Emperor, A.I.R. 1929 Bom. 274; Debendra Narain Roy *v.* Jogendra Narain Deb, A. I. R. 1936 Cal. 593: 64 C. L. J. 212; Midnapore Zamindary Co. Ltd. *v.* Kumar Chandra Singh, A. I. R. 1943 Cal. 544: 47 C. W. N. 733.
5. *Vide* Administrator-General of Bengal *v.* Prem Lal Mullick, 22 I. A. 107 at p. 118 (P. C.); Krishna Ayyangar *v.* Nellaperumal, 47 I. A. 33 at p. 42: A. I. R. 1920 P. C. 56.
6. 1935 A. C. 445 at p. 458.
7. 1953 S. C. R. 1 at p. 28: A. I. R. 1952 S. C. 369.
8. 1957 S. C. R. 930 at pp. 951-52: A. I. R. 1957 S. C. 628.

Use of Statement of Objects and Reasons.

It may be mentioned that there are observations in some of the judgments of the Supreme Court that the Statement of Objects and Reasons might be admissible not for construing the Act but for ascertaining the conditions which prevailed when the leg slation was enacted.[1]

14. Qualifying clause —The clause "unless there is anything repugnant in the subject or context" must always be understood to exist in the context of the definitions given in the Indian Penal Code.

A corporate body cannot be indicted for offences like treason, murder, bigamy, perjury, rape, etc. which can be committed only by human individuals or for offences which are compulsorily punishable with imprisonment. Despite the generality of the definition of a "person" given in Sec. 11 of the Indian Penal Code a corporate body or a company shall not be indictable for offences which can be committed only by a human individual or for offences which must be punished with imprisonment. The offence of cheating under Sec. 420, I. P. C., "shall be punished with imprisonment" and a company cannot be prosecuted for that offence, mandatorily involving a punishment of imprisonment.

It is an established principle of construction that statutory interpretation clauses or definition should be read subject to qualifications therein expressed. This is so even where the definition is exhaustive. So, where the defined word means or includes a certain thing, it may well be otherwise if the subject or context in any part of the statute so requires. Therefore, normally definitions are enacted subject to qualification such as "unless there is anything in the subject or context". But it is quite unusual to say that a statutory definition does not mean or include what it plainly means or includes, particularly when its application to the various provisions of the Act does not present much difficulty. So, in *Indian Immigration Trust Board of Natal* v. *Govindaswamy*,[2] the Judicial Commitee observed:

> "It is a novel and, to their Lordships, unheard of idea that an interpretation clause, which might easily have been so expressed as to cover certain sections and not to cover others should be, when expressed in general terms, divided up by a sort of theory of *applicando singula singulis*, so as not to apply to sections whose context suggest no difficulty in its application."

This criticism applies with even greater force to a contention that a statutory definition contained in an Act is too wide to apply to another part of that Act.[3]

Neither a narrow nor a liberal construction should be placed on exemption clause and it should be given its full and reasonable scope and amplitude so long as violence is not done to the language used and also

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1. *Vide* State of West Bengal *v.* Subodh Gopal, 1954 S. C. R. 587 at p. 628: A. I. R. 1954 S. C. 92 ; M. K. Ranganathan *v.* Government of Madras, (1955) 2 S. C. R. 374 at p. 385: A. I. R. 1955 S. C. 604; A. Thangal Kunju Musaliar *v.* M. Venkitachalam Potti, (1955) 2 S. C. R. 1196 at p. 1237: A. I. R. 1956 S. C. 246 and Commissioner of Income-tax, M. P. *v.* Smt. Sodra Devi, A. I. R. 1957 S. C. 832 at p. 839; Jia Lal *v.* Delhi Administration, A. I. R. 1962 S.C. 1781: (1963) 2 S C. R. 864.
2. A.I.R. 1920 P.C. 114 at p. 116.
3. Madhya Pradesh State Road Transport Corporation *v.* Industrial Court, A. I. R. 1971 M. P. 54 at p. 57.

the exemption should not be whittled down by importing limitation not inserted or contemplated by the Legislature.[1]

If company is criminally responsible for criminal act of agent.

It is not correct to say that in every case where an agent of a limited company acting in its business commits a crime, the company is automatically to be held criminally responsible. As adumbrated, a company cannot be indictable for offences like bigamy, perjury, rape, etc. which can only be committed by a human individual or for offences punishable with imprisonment or corporal punishment. Barring these exceptions, a corporate body ought to be indictable for criminal acts or omissions of its directors, or authorised agents or servants, whether they involve *mens rea* or not, provided they have acted or have purported to act under authority of the corporate body or in pursuance of the aims or objects of the corporate body. The question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of the offence disclosed by the allegations in the complaint or in the charge-sheet, the relative position of the officer or agent *vis-a-vis* the corporate body and the other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act. Each case will have necessarily to depend on its own facts which will have to be considered by the Magistrate or Judge before deciding whether to proceed against a corporate body or not.[2]

15. Title of chapter.—Besides definitions and illustrations, the framers of the Code have sub-divided the Code into chapters, prefaced by suitable headings which may be regarded as preambles to them, and reference to them is legitimate for their construction.[3]

It has, however, been recently held by the Calcutta High Court that the title of a chapter is not a determining factor regarding the interpretation of a section in that chapter, but the title certainly throws light on the meaning of the section, and where it is not inconsistent with the section, it should be presumed that the title correctly describes the object of the provisions of the chapter.[4]

It is true that for interpreting the provisions of a statute, the Statement of Objects and Reasons could not be strictly relevant, nor could it influence or decide the meaning of the provisions of the Act. However, it is equally a well-known method of trying to interpret a statute to see what is the mischief that was prevalent which was sought to be eradicated and what was the object in view of the Legislature, and to examine whether in the provisions of the statute that object has been carried out.[5]

The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the Legislature in

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1. Shree Sadul Textiles Ltd., Sriganganagar *v.* State of Rajasthan, A. I. R. 1971 Raj. 158 at p. 164.
2. State of Maharashtra *v.* Messrs. Syndicate Transport Co. (P.) Ltd., A. I. R. 1964 Bom. 195 at pp. 197 and 200: 66 Bom L. R. 197: 1964 Mah. L. J. 308.
3. Ram Shankar *v.* Ganesh. (1907) 29 All. 385 (F. B.); Hammer Smith Ry. Co. *v.* Brand, (1868) L. R. 4 H. L. 171: *see* also Bachhu *v.* Official Receiver, I. L. R. (1938) Mad. 1063: A. I. R. 1938 Mad. 449: 178 I. C. 135: 1938 M. W. N. 201: 47 M.L.W. 705.
4. Dwarika Prosad *v.* Dr. B. K. Roy Chaudhury, A. I. R. 1950 Cal. 349 at p 349: 5 D. L. R. (Cal.) 76: 85 C. L. J. 276.
5. Messrs. Chhotabhai Purushotam Patel *v.* State of Maharashtra, A. I. R. 1971 Bom. 244 at pp. 248-49.

passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt.[1]

16. Illustrations.—Besides definitions, the draftsmen have, for the same purpose, enlisted the aid of illustrations. The definitions were framed to expound the general terms used in the Code, and they are necessary for the elucidation of the sections generally. "The definitions and enacting clause contain the whole law. The illustrations make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effects would be on the events of common life."[2] And again: "The illustrations will lead the mind of the student through the same steps by which the mind of those who framed the law proceeded, and may sometimes show him that a phrase which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases. In the study of Geometry it is constantly found that a theorem, which read by itself, conveyed no distinct meaning to the mind, becomes perfectly clear, as soon as the reader casts his eye over the statement of individual cases taken for the purpose of demonstration. Our illustrations, we trust, will, in a similar manner, facilitate the study of the law."[3] "Thus the Code will be at once a statute book and a collection of decided cases. The decided cases in the Code will differ from the decided cases in the English law books in two most important points. In the first place, our illustrations are never intended to supply an omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the Judges, but by the Legislature, by those who make the law and who must know more certainly than any Judge can know what the law is which they mean to make."[4] It is not to be readily assumed that an illustration to a section is repugnant to it and rejected.[5] Although as pointed out by Lord Shaw in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*[6] illustrations to a section, unlike marginal notes, are to be considered as part of the section itself, and are to be accepted as being both relevant and valuable for the construction of the section, they merely exemplify the application of the rule contained in the section and do not control the plain meaning of the section itself. They are not to be regarded as exhaustive, but are not only intended as a guide to the working and application of the section to which they are appended.[7] It follows that if they are inconsistent with the section, it is the section that has to be followed, and the illustrations may be ignored.[8]

Purpose and object of illustrations.

An illustration to a statutory provision merely illustrates a principle and *ex-hypothesi* it cannot be exhaustive.[9]

1. *See* Maxwell on *Interpretation of Statutes*, 9th Ed., p. 54; Official Assignee of Bombay *v.* Chimniram Motilal, A.I.R. 1933 Bom. 51 at pp. 57, 58: 34 Bom. L. R. 1615: 57 Bom. 346: 142 I. C. 370.
2. Prefatory Address, p. xvi.
3. *Ibid.*, p. xv.
4. *Ibid.*, p. xvi.
5. Jumma Masjid, Mercara *v.* Kodimaniandra Deviah, A. I. R. 1962 S. C. 847 at p. 851: (1962) 2 S. C. A. 422: (1962) 1 Ker. L. R. 309.
6. 43 I. A. 256.
7. Chavadappa *v.* Emperor, A. I. R. 1945 Bom. 292 at p. 300: 4 Cr. L. J. 51: 221 I. C. 86: 47 Bom. L. R. 63.
8. Fakirappa, 15 Bom. 491 at p. 496; Govinda Pillai *v.* Thayammal, 28 Mad. 47 at p. 61; Kaylash *v.* Sonatun, 7 Cal. 132 at p. 135; Rino Subedar, 16 I.C. (S.) 753; Satish Chandra *v* Ramdyal, 48 Cal. 388 (S. B.).
9. Bama Jena *v* State, A. I. R. 1958 Orissa 106 at p. 108 : I.L.R. (1958) Cut. 131: 1958 Cr. L. J. 657.

17. Proviso.—The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.[1]

A proviso, according to the ordinary rules of interpretation of statutes qualifies whatever is stated in the main enactment and indeed forms a part of the subject-matter thereof.[2]

The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.

"It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso." Therefore it is to be construed harmoniously with the main enactment. (*Per* Das, C. J.) in *Abdul Jabar Butt* v. *State of Jammu and Kashmir*,[3] Bhagwati, J., in *Ram Narain Sons Ltd.* v. *Assistant Commissioner of Sales-tax*,[4] said:

> "It is a cardinal rule of interpretation that a proviso to a particular provision of a statute embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

Lord Macmillan in *Madras and Southern Mahratta Railway Co. Ltd.* v. *Bezwada Municipality*,[5] laid down the sphere of a proviso as follows:

> "The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms."

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear, it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that is its necessary effect.[6] A section or an enactment must be construed as a whole, each portion throwing light, if need be, on the rest. The sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso taken and construed together should prevail.[7] The general rule

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1. Madras and Southern Mahratta Railway Co. Ltd. *v.* Bezwada Municipality, A. I. R. 1944 P. C. 71 at p. 73: 48 C. W. N. 618: 1944 M.W.N. 564.
2. Harbans Lal *v.* State of Punjab, A. I. R. 1971 Punj. 379 at pp. 380, 381
3. 1957 S. C. R. 41 at p. 59: A. I. R. 1957 S. C. 281.
4. (1955) 2 S. C. R. 483 at p. 493: A. I. R. 1955 S. C. 765.
5. 71 I. A. 113 at p. 122: A. I. R. 1944 P. C. 71.
6. *Vide* Corporation of the City of Toronto *v.* Attorney-General of Canada, 1946 A. C. 32; Commissioner of Income-tax, Mysore, Travancore-Cochin and Coorg, Bangalore *v.* Indo-Mercantile Bank Ltd., A. I. R. 1959 S. C. 713 at pp. 717-18.
7. Inuganti Yogananda *v.* State of Andhra Pradesh, A. I. R. 1957 A. P. 463 at p. 465: (1957) 1 Andh. W. R. 192.

is that the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it. The position has been thus explained in *Clay Center State Bank* v. *McKelvie*[1]:

> "Its grammatical and legal scope is confined to the subject-matter of the principal clause....While it is sometimes used to introduce independent legislation, the presumption is that it is used in accordance with its primary purpose and refers only to the provision to which it is attached."

General rule for operation of proviso.

It is true that the aforesaid general rule is not always applicable, and all the provisions of the statute must be construed in such a way as to avoid any repugnancy or absurdity.[2] One does not construe a section in the light of a proviso. If anything, one may construe a proviso in the light of a section.[3] Before a proviso to a section can apply, the section itself must apply. But a Legislature may enact a substantial provision in the guise of a proviso and if the Court is satisfied that the language used in the so-called proviso is inapplicable to the section, then the Court must look on the proviso as a substantive provision enacted by the Legislature and give effect to it.[4]

Provisos are often inserted "to allay fears" or to remove misapprehensions.[5] A proviso carries special exceptions only out of the enacting clause and those who set up any such exception must establish it as being within the words as well as within the reason thereof.[6]

Use of provisos as saving clauses.

The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But, provisos are often added not as exceptions or qualifications to the main enactment but as saving clauses, in which cases they will not be construed as controlled by the section.[7]

There may be cases in which the language of the statute may be so clear that a proviso may be construed as a substantive clause. But whether a proviso is construed as restricting the main provision or as a substantive clause, it cannot be divorced from the main provision to which it stands as a proviso. It must be construed harmoniously with the main enactment.[8]

Where the words employed in the main part of a section or rule are capable of two meanings, the proviso may have repercussions on the

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1. 19 Fed. (2) 308, quoting from Crawford on the *Construction of Statutes* (1940 Ed.), p. 606.
2. Messrs. Gajo Ram Basant Ram *v.* State of Bihar, A. I. R. 1956 Pat. 113 at p. 114.
3. Shankar Iranna Gumdel *v.* Commissioner of Income-tax, Bombay, A.I.R. 1956 Bom. 280 at p. 281: 1956 I.T.R. 806.
4. Keshavlal Premchand *v.* Commissioner of Income-tax, Bombay, A. I. R. 1957 Bom. 20 at pp. 21, 22 (D. B.): I. L. R. (1957) Bom. 56: 58 Bom. L. R. 945: (1957) 31 I. T. R. 7; Commissioner of Income-tax *v.* P. Krishna, A.I.R. 1965 S. C. 59: (1964) 53 I. T. R. 176: (1964) 1 S. C. W. R. 760.
5. Madan Lal Fakirchand *v.* S. C. Sugar Mills Ltd., A. I. R. 1962 S. C. 1543 at p. 1552.
6. M. A. Mohamed *v.* R. T. A., A. I. R. 1958 Ker. 140 at p. 142 1957 Ker. L. J. 879: 1957 Ker. L. T. 829.
7. Shah Bhejraj Kuverji Oil Mills and Ginning Factory *v* Subhash Chandra, A. I. R. 1961 S. C. 1596 at p. 1600.
8. Income-tax Commissioner *v* Ajax Products Ltd., A. I. R. 1965 S. C. 1358 at p. 1363: (1965) 55 I. T. R. 741: (1965) 1 S.C J. 659; Commissioner of Income-tax *v.* Indo-Mercantile Bank Ltd., A.I.R. 1959 S. C. 713, followed in 1959 Ker. L. J. 477.

construction of the preceding words, but not otherwise.[1] Where there is no doubt or obscurity about the meaning of the words used, the task of interpretation can hardly be said to arise. If the words of a proviso are in themselves precise and unambiguous, then all that is necessary is to expound those words in their natural and ordinary sense. The words themselves alone, in such a case, best declare the intention of the Legislature.[2] A proviso which has the effect of saving parties from penal enactments should be liberally construed.[3]

18. Exceptions. –In a criminal or penal statute, an exception must receive a liberal construction, in favour of the defendant.[4] Generally, an exception is considered as a limitation only upon the matter which precedes it, but if it is clear from the legislative intent that it is considered a general limitation on the entire Act it will operate to restrict all provisions of the Act.[5]

19. Marginal notes and headings.—As pointed out by the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh*,[6] marginal notes in an Indian Statute, as in an Act of Parliament, cannot be referred to for the purpose of construing the statute.[7] The Supreme Court has stated the principle thus: "The marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous."[8] But as was observed by Collins, M. R., in *Bushell* v. *Hammond*,[9] "the side-note, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section". It is true that a marginal note is not strictly part of a section, but it is now well established that the Court may look and indeed should look at the marginal note in order to determine what is the drift of the section or what is being aimed at by the Legislature in enacting a particular section,[10] and it helps to elucidate and illumine the meaning of a section when there is any doubt about the meaning of the words used therein.[11] It is perfectly true that if the sections by themselves make the meaning of

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1. Mahade Aon *v.* Chairman of the Howrah Municipality, I. L. R. 37 Cal. 697 at p. 702.
2. Bajrang *v.* Crown, A. I. R. 1951 Nag. 124 at pp. 126-27: 1950 N. L. J. 258: I. L. R. (1950) Nag. 306: 5 D. L. R. (Nag.) 98; Hindustan Ideal Insurance Co. Ltd. *v.* Life Insurance Corporation of India, A. I. R. 1963 S. C. 1083: (1963) 2 S. C. R. 56.
3. Hutchinson *v.* Manchester, etc. Co., (1846) 153 E. R. 869.
4. Crawford's *Statutory Constructions*, p. 10.
5. Sutherland's *Statutory Constructions*, 3rd Ed., Vol. II, at pp. 474 and 475.
6. I.L.R. 26 All. 393 at p. 406: 31 I.A. 132 (P. C.).
7. Commissioner of Income-tax, Bombay *v.* Ahmedbhai Umarbhai & Co., Bombay, A. I. R. 1950 S. C. 134 at p. 141: 1950 S. C. R. 335.
8. Nalinakhya Bysack *v.* Shyam Sunder Haldar, A. I. R. 1953 S. C. 148 at p. 150: 1953 S. C. R. 533: 1953 S. C. A. 191: 1953 S. C. J. 201; *see* also Western India Theatres *v.* Municipal Corporation, Poona, A. I. R. 1959 S. C. 586: (1959) 2 S. C. R. Sup. 71: 61 B. L. R. 454; State *v.* Jamnabai, I. L. R. (1955) Bom. 514: 57 Bom. L. R. 278: 1955 Cr. L. J. 1052: A. I. R. 1955 Bom. 280 (D. B.): (1955) 1 S. C. R. 872: 1955 M. W. N. 707; Hubbalal *v.* State, Madh. B.L.J. 1954 H.C.R. 1442: Madh. B. L. R. 1955 Cr. 268: 1955 Cr. L. J. 476: A. I. R. 1955 M. B. 36 (D. B.): 1954 M. B. L. J. 1442; Lokanathan Srirangamma *v.* Gangola Narayanamma, 1956 Andh. W. R. 815: 1956 Andh. L. T. 755: A. I. R. 1956 Andh. 243 (F. B.); B. M. Desai *v.* V. Ramamurthy, (1958) 34 I. T. R. 409: 60 Bom. L. R. 1048: A. I. R. 1959 Bom. 89; Emperor *v.* Sadashiv, A.I.R. 1947 P. C. 82 at p. 84: 1947 M. W. N. 228, *per* Lord Thankerton; Kavasji Pestonji *v.* Rustamji Sorabji, Jamadar, A. I. R. 1949 Bom. 42 at p. 46: 50 B. L. R. 450.
9. (1904) 2 K. B. 563: 73 L. J. K. B. 1005.
10. M. S. Kumar & Co. *v.* Official Assignee of Bombay, A. I R. 1956 Bom. 38 at pp. 39, 40: I. L. R. (1955) Bom. 941: 57 Bom. L. R. 979.
11. N. K. Rajaraja Varman *v.* K. K. Krishnan Nair, A. I. R. 1958 Mad. 117 at p. 121: 69 M.L.W. 401: (1956) 2 M. L. J. 46.

the words used by the Legislature plain and explicit, marginal notes cannot be invoked for the purpose of adding to, subtracting or altering the words used by the Legislature. But when the words are ambiguous, there should be no objection to looking at the marginal note in order to understand the drift of the section.[1] Accordingly, in determining the scope of Sec. 18 of the Bhopal and Vindhya Pradesh Courts Act, 1950, its marginal note "Court of the District Judge" was utilized and it was held that "Court of the District Judge" in that section means "District Court" as defined in Sec. 2 (*iii*) of the Act.[2] When there is a definition of the term "representation" in the body of the Act itself, the Court cannot resort to a marginal note to another section to enlarge the scope of the definition for the purpose of construing Sec. 57.[3] The working of the rule now followed in England was thus stated by Lord Goddard, C. J.: "While the Court is entitled to look at the headings of an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to have a different effect to clear words of the section where there cannot be any doubt as to their ordinary meaning.[4] It is clear that the dropping of the word "previous" has been deliberate and the marginal note cannot govern the substantive provisions of Sec. 34 of Calcutta Port Act III of 1890.[5]

Marginal notes cannot govern substantive parts.

It is no doubt true that the marginal note cannot be relied upon as aid in interpretation of a section but it can certainly be referred to as indicating the drift of the section.[6]

Maxwell points out at page 45 that the rule regarding the rejection of marginal notes for the purposes of interpretation is now of imperfect obligation and the learned author cites with approval the language of Collins, M. R,, in *Bushell* v. *Hammond*[7]:

Marginal notes if to be rejected.

> "The side note, although it forms no part of the section is of some assistance, inasmuch as it shows the drift of the section."

Headings are not merely marginal notes. Headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections.[8] Though the heading of a section or a marginal note cannot control the clear language of the section, courts must consider the heading and the

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1. State of Bombay *v.* Heman Santlal Alreja, A. I. R. 1952 Bom. 16 at pp. 24-25: 53 Bom. L. R. 837; *see* Emperor *v.* Fulabhai Bhulabhai Joshi, A. I. R. 1940 Bom. 363: 42 Bom. L. R. 857.
2. Iftikharuddin *v.* Smt. Aisha Bi, A. I. R. 1956 Bhopal 69 at p. 71.
3. *In the matter of the Estate of* Saradambal Ammal, A. I.R. 1955 Mad. 448 at p. 448: 68 L. W. 363.
4. Rex *v.* Surrey Assessment Committee, (1948) 1 K. B. 28 at p. 32; *see* also the observations of Baron Channell in Eastern Companies, etc. Railways Companies *v.* Marriage, (1860) 9 H. E. C. 32: 131 E. R. 17; Sriranga-amma *v.* Narayanamma, A. I. R. 1956 Andh. W. R. 815: 1956 Andh. L. T. 755.
5. Nagendra Kumar Roy *v.* Commissioners for the Port of Calcutta, A. I. R. 1955 Cal. 56 at p. 59: 58 C. W. N. 527.
6. Govind Singh Ramsinghbhai Vaghela *v.* C. Subbarav, A. I. R. 1971 Guj. 131 at p. 144.
7. (1904) 73 L. J. K. B. 1005 at p. 1007.
8. Maxwell on *Inter retation of Statutes*, p 54; Malhar Stone Lime Co. Ltd., Calcutta *v.* State of Vindhya Pradesh, A. I. R. 1956 V. P. 46 at p. 47; Hindumull Dalichand *v.* Madras Kirana Merchants Association, (1957) 2 M. L. J. 416.

marginal note for the purpose of arriving at a conclusion as to what according to the Legislature was the purpose of enacting this section.[1] These marginal notes in modern statutes are assented to expressly or tacitly by the Legislature, and it was held that the marginal note inserted by or under the authority of the Legislature forms part of the Act and as such, like the headings of chapters or the headings of groups of sections, can properly be regarded as giving a *contemporanea expositio* of the meaning of a section when the language of the section is obscure or ambiguous.[2]

Marginal notes to the sections are, however, not to be referred to for the purpose of construction, unless they have been inserted with the assent of the Legislature.[3]

20. Saving clause.—A saving clause, as its name implies, is a clause which is inserted in a repealing statute in order to protect or save a person as regards rights which may have been acquired under the repealed statute. It does not give to a party any further right than he already had. Nor does it give retrospective effect to an enactment. To use it in determining the construction of the Act, or to extend it so as to give a wider scope to the Act, amounts to ignoring the very purpose for which a saving clause is inserted.[4]

An exception or a saving clause may be enacted in any part of a statute, either in the section to which the exception is sought to be made or in a separate section, part or chapter. The mere fact that a saving clause or execption enacted in a subsequent section controls and limits the operation of a former section cannot, therefore, render the subsequent section repugnant to the former section.[5]

21. Punctuation.—Prior to 1849 no punctuation normally appeared in the Acts on the Rolls of Parliament in England and it was therefore held that punctuation could not be relied on in construing a statute. But there is not in India any unpunctuated original Statute Book, and there is no reason why the punctuation of the editions of an Act issued by the Government of India should be disregarded.[6] The use of the word "which" twice in the first part of the sub-clause, read with the comma put after each, shows that the Legislature wanted these to be read as disjunctive and not conjunctive.[7]

22. Addition of words.—If the language of the enactment is clear and unambiguous it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the Legislature. The intention of the Legislature is to be gathered only from the words used by it and no such liberties can be taken by the Courts for effectuating a supposed intention of the Legislature.[8]

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1. Ramaben A. Thanawala, Baroda *v.* Messrs. Jyoti Ltd., Baroda, A. I. R. 1958 Bom. 214 at p. 216: 59 Bom. L. R. 67; *see* also Madanlal Fakirchand Dudhediya *v.* Changdeo Sugar Mills, Ltd., Bombay, I. L. R. (1958) Bom. 280: 60 Bom. L. R. 254: (1958) 28 Com. Cas. 312: A. I. R. 1958 Bom. 491; Bhinka *v.* Charan Singh, A. I. R. 1959 S. C. 960: 1959 A. L. J. 557.
2. Ram Saran Das *v.* Bhagwat Prasad, A. I. R. 1929 All. 53 at p. 58 (F. B): I. L. R. 51 All. 411: 1929 A. L. J. 290; *see* also Crawford's *Statutory Constructions*, 1940 Ed., Art. 207 at pp. 360 to 366.
3. Pitamber Govinda Bhavsar *v.* Abdul Gafur Abdul Rajak, A. I. R. 1972 Bom. 43 at p. 44.
4. Gulabchand Gambhirmal *v.* Khudi Lal Govindram Seksaria, A. I. R. 1951 M. B. 1 at pp. 7, 28 (F. B.) : I. L. R. (1952) M. B. 15; R. *v.* Justices of the West Riding of Yorkshire, (1876) 1 Q. B. D. 220.
5. Govindan Nair Neelakantan Nair *v.* Narayani Amma, A. I. R. 1955 T. C. 235 at p. 239 (F. B.): I. L. R. (1955) T. C. 147 : 1955 Ker. L. T. 309.
6. Taylor *v.* Charles Bleach, I. L. R. 39 Bom. 182 at p. 189.
7. A. K. Gopalan *v.* State of Madras, A. I. R. 1950 S. C. 27 at p. 45 : 63 L. W. 638.
8. Sri Ram Ram Narain Medhi *v.* State of Bombay, A. I. R. 1959 S. C. 459 at p. 470 : 1959 S. C. R. 489.

In *British India General Insurance Co. Ltd.* v. *Captain Itbar Singh*,[1] their Lordships of the Supreme Court thus observed:

> "The learned Solicitor-General concedes this and says that the only word that has to be added is the word 'also' after the word 'grounds'. But even this the rules of interpretation do not permit us to do unless the section as it stands is meaningless or of doubtful meaning, neither of which we think it is. The addition suggested will, in our view, make language used unhappy and further effect a complete change in the meaning of the words used in the sub-section."

23. Retrospective operation.—A statute ordinarily speaks from the date from which it is specified in the Act to come into operation or from the date when it receives assent where such assent is necessary and is prospective in its operation unless it, in clear terms, says that it will have retrospective effect or when such an intention can be unhesitatingly gathered and it is only then that vested rights might be impaired, otherwise vested rights would not be affected.[2] "No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."[3] There cannot be an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.[4] As the Supreme Court said, a legislation might be retrospective.[5] A change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.[6] Every legislation is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation.[7] Where vested rights are affected *prima facie*, it is not a question of procedure; and every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation.[8] There is a presumption that statutes are not intended to have retrospective effect, and accordingly a statute will be so construed as not to take away vested rights, unless a contrary construction is imposed by express words or necessary intent. This rule as to the construction of

Supreme Court's dictum.

Retrospective operation not to be readily presumed.

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1. A. I. R. 1959 S. C. 1331 at pp. 1334-35: (1960) 1 S. C. R. 168.
2. Salig Ram *v.* Emperor, A. I. R. 1943 All. 26 at p. 42 : I. L. R. (1943) All. 238 : 205 I. C. 113 : 44 Cr. L. J. 216: 1942 A. L. J. 686 (F. B.); *see* also Dr. Indramani Pyarelal Gupta *v.* W. R. Natu, A. I. R. 1963 S. C. 274: 65 B.L. R. 378; Income-tax Officer *v.* S. K. Habibullah, A. I. R. 1962 S. C. 918 : (1962) 44 I.T. R. 809.
3. Lord Wright in Athulumney, *In re*, (1898) 2 Q.B. 547 at pp. 551 and 552.
4. *Per* Lord Macnaghten in Colonial Sugar Refining Co. *v.* Irving, (1905) A.C. 369: 74 L. J. P. C. 369.
5. Sardar Inder Singh *v.* State of Rajasthan, A.I.R. 1957 S.C. 510 at p. 513: 1957 S. C. A. 635 : 1957 S. C. J. 376: 1957 S. C. R. 605.
6. Anant Gopal Sheorey *v.* State of Bombay, A. I. R. 1958 S. C. 915 at p. 917 : 1958 S. C. J. 1231 : (1958) 2 M. L. J. (S. C.) 207 : (1958) 2 Andh. W.R. (S.C.) 207 : 1958 M.L.J. (Cr.) 956.
7. Raj Rajendra Sardar Maloji Narsing Rao *v.* Shankar Saran, A. I. R. 1958 All. 775 at p. 786; Ch. Mukhtar Singh *v.* State of U.P., 1956 A. W. R. (H.C.) 643 : 1956 A. L. J. 878 : A. I. R. 1957 All. 297.
8. R. L. Reddy *v.* Provincial Government of C. P. and Berar, A. I. R. 1949 Nag. 146 at p. 148: I.L.R. (1949) Nag. 363.

statutes does not apply to statutes passed for the protection of the public.[1] An Act which affects the substantive law is not to be given a retrospective operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. If the intention is clear that it should have a retrospective operation, it should be so construed and, in order to ascertain the intention, it is legitimate to consider not only the language used in, but the object of, the enactment.[2]

A statute cannot be said to be retrospective "because a part of the requisites for its actions is drawn from a time antecedent to its passing".[3]

Retrospctive operation in pending cases.

A statute which takes away or affects substantive rights (like a right of action) is presumed not to apply to pending actions unless there is express enactment or necessary intendment.[4] The rule is that pending cases should be decided according to the law at the time of institution of the suit. Changes in the law during the pendency of the suit, unless purely procedural, do not affect its course or tenor. If there is ambiguity or equivocation, effect could not be given to the law. In the ultimate analysis, the matter is one of construction and if it was the intention of the Legislature that the provision of the Act should be applied to pending suits, they should be so applied.[5] This rule is qualified when during the pendency of proceedings new legislation is introduced and enforced which, among others, is either retrospective by specific provision in that new Act or takes away jurisdiction or special authority created by an earlier statute, and in such cases the pending proceeding would be governed by the modified or new law.[6] In the absence of clear words, a retrospective provision would not be held to be of wider amplitude than the prospective.[7] It is true that under the general principles of statutory construction when a law is altered during the pendency of an action the rights of the parties should be decided according to the law as it existed when the action was begun. But the new statute may either by express provision or by necessary implication, indicate a clear intention to affect pending actions.[8] Cases of hardship are no ground for adopting a construction that would affect vested rights unless there are express words taking away such rights.[9] Acts must not be interpreted in a greater retrospective sense than the language of the section compels one to do and it is no ground for holding that an Act has greater retrospectivity because the intention to give it some retrospectivity is quite clear.[10] The executive Government,

Executive Government cannot give retrospective operation.

1. Shreekant Pandurang Ketkar *v.* Emperor, A.I.R. 1943 Bom. 169 at pp. 172, 173 : 45 Bom. L. R. 323.
2. Fairey *v.* Southampton County Council, (1956) 2 All E. R. 843.
3. Maxwell on *Interpretation of Statutes*, 11th Ed., p. 211; *see* also State of Bombay *v.* Vishnu Ramchandra, A. I. R. 1961 S. C. 307; *vide* Sajjan Singh *v.* State of Punjab, A. I. R. 1964 S. C. 464 at p. 468 : 1964 S. C. D. 874.
4. Indramoni Nath *v.* Lokenath Barbhuiya, A.I.R. 1957 Assam 83 at pp. 97, 99: I.L.R. (1957) 9 Assam 118; M.L. Bagga *v.* C. Murhar Rao, I.L.R. (1956) Hyd. 58: A.I.R. 1956 Hyd. 35; Mohammed Bin Salem *v.* Umaji, I.L.R. (1955) Hyd. 169: A.I.R. 1955 Hyd. 113 (F.B.).
5. Harsukh Sarawgi *v.* Mashulal Khemani, A.I.R. 1957 Assam 22 at p. 28 (D.B.): I.L.R. (1957) 9 Assam 25.
6. Maharaja Probirendra Mohan Tagore *v.* Kusum Kumari Devi, 60 C. W.N. 551.
7. Kuppammal *v.* Vellingiri Gounder, A.I.R. 1957 Mad. 641 at p. 644: I. L. R (1957) Mad. 448 : (1947) 1 M. L. J. 293: 70 M. L.W. 11.
8. Kulamani Hota *v.* Parbati Debi, A.I.R. 1955 Orissa 77 at p. 79: 21 Cut. L. T. 507.
9. Smt. Haramani *v.* Dinabandu Misra, A.I.R. 1954 Orissa 54 at p. 57 (D. B.): 19 C. L. T. 387; Morvi Mercantile Bank Ltd. *v.* Union of India, A.I.R. 1965 S. C. 1954 at p. 1966: (1956) 2 S.C.A. 187; Amireddi Raja Gopala Rao *v.* Amireddi Sitharamamma, A.I.R. 1965 S.C. 1970.
10. Digambar Gopal *v.* Vithoba Jogu, A.I.R. 1954 Bom. 450 at p. 4 51 (D.B.): I.L.R. (1954) Bom. 671: 56 Bom. L.R. 385.

unlike the Legislature, cannot give retrospective effect when it exercises subordinate and delegated legislative powers unless expressly empowered to do so.[1]

Principles for determining retrospective operation.

The principles for determining the retrospective operation of a statute that repeals or alters the old law may be stated as follows: (1) Upon the presumption that the Legislature does not intend to enact what is unjust, every statute which takes away or impairs a vested right acquired under the existing law or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions or considerations already passed must be presumed to be intended not to have retrospective operation; (2) if there are words in the enactment which either expressly state or necessarily imply that the statute is to be given retrospective operation, then the Act should have retrospective operation even though the consequences may appear unjust and hard; (3) a statute is not to be construed to have a greater retrospective operation than its language renders necessary; and (4) as no person has a vested right in any course of procedure, alterations in procedure are to be retrospective, unless there is some good reason against it.[2] There can be no doubt that if a party to a civil action is deemed to have a right of appeal vested in him at the date of the institution of the suit, a similar right must be conceded to an accused person at the date when the criminal proceedings are instituted against him.[3]

Whether you believe religiously like Blackstone that the law declared by courts has a platonic or ideal existence before its declaration, or hold like Holmes that the common law is not a brooding omnipresence in the sky and that Judges do make law, prospective or overruling is not the substitution of one doctrine for an older and similarly rigid doctrine. It is mainly the enrichment of an existing and rather complex practice with regard to the effect of a new judicial decision by the addition of an alternative discretionary device to be employed in appropriate cases. It is an instrument to be used. And the justification for employing the device is no where better stated than by Chief Justice Hughes in *Chicot-County Drainage District* v. *Baxter State Bank*.[4] He said, that the actual existence of the law prior to the declaration of its unconstitutionality is an operative fact, and may have consequences which cannot justly be ignored, that the past cannot always be erased by a new judicial declaration, and that the effect of a subsequent ruling overruling a previous case may have to be considered in various aspects, such as justifiable reliance on overruled case, ability to effectuate the new rule adopted in the overruling case without giving it retrospective effect, and the likelihood that retrospective operation of the overruling decision will substantially burden the administration of justice. All cases where facts had occurred prior to the critical date, that is, all completed cases and also pending cases including the case in which the new rule is announced are governed by the old rule. Only future cases, viz. cases whose facts occur after the critical date will be governed by the new rule. This is the strict version of prospective overruling and it is this version that Subba Rao, J., adopted and applied in *Golaknath's* case.[5]

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1. Modi Food Products *v.* Commissioner, Sales-tax, A. I. R. 1956 All. 35 at p. 59 : (1955) 6 S.T.C. 287 (D.B.).
2. Banwari Gope *v.* Emperor, A.I.R. 1943 Pat. 18 at pp. 20, 21: 44 Cr. L.J. 273: 23 Pat. 175: 204 I. C. 451: 24 P.L.T. 50 (F. B.), relying on Colonial Sugar Refining Co. Ltd. *v.* Irving, (1905) A.C. 369: 74 L. J. P. C. 77 and Sadar Ali *v.* Doliuddin, 56 Cal. 512: A.I.R. 1928 Cal. 640: 32 C.W.N. 1130: 48 C.L.J. 150.
3. Banwari Gope *v.* Emperor, *supra*, at p. 22.
4. (1940) 308 U. S. 371.
5. A.I.R. 1967 S.C. 1643; V.N. Narayanan Nair *v.* State of Kerala, A.I.R. 1971 Ker. 98 at p. 126.

24. Repeal and amendment.—The effect of the repeal of an enactment is to obliterate it as completely from the records as if it had never been passed, and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law,[1] but to this rule an exception is provided by Sec. 6 of the General Clauses Act, 1897,[2] namely, that where an enactment is repealed unless a different intention appears, the repeal shall not affect the previous operation of the enactment repealed or anything done or suffered thereunder, nor will it affect any legal proceeding or remedy in respect of any right, privilege or liability or forfeiture under the repealed Act.[3] It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the Legislature is presumed to be acquainted with the construction which the courts have put upon the words, and when the Legislature repeats the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind.[2]

Legislature is presumed to be acquainted with the interpretation put by the Courts.

The Supreme Court has laid down that retrospective operation cannot be imputed to an amending Act unless such retrospective operation is given by the amending Act expressly or by necessary implication.[5] Whenever an amended Act has to be applied subsequent to the date of the amendment, the various unamended provisions of the Act have to be read along with the amended provisions as though they were part of it. This is for the purpose of determining what the meaning of any particular provision of the Act as amended is, whether in the unamended part or in the amended part. But it is not the same thing as saying that the amendment itself must be taken to have been in existence as from the date of the earlier Act. That would be imputing to the amendment retrospective operation which could only be done if such retrospective operation is given by the amending Act expressly or by necessary implication. Where what one is concerned with is not the meaning of any particular provision of the Act after amendment but the effect of the amending provision in their relation to, and effect on, other statutory provisions outside the Act, the amendment cannot obviously be treated as having been part of the original Act itself so as to enable the doctrine to be called in aid that a later Act overrides an earlier Act.

Supreme Court's verdict.

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1. *Per* Tyndall, C.J., in Kay *v.* Goodwin, (1830) 130 E. R. 1403, followed in Messrs. Chakko Bhai Ghelabhai *v.* State of Orissa, A.I.R. 1956 Orissa 7 at p. 12: I.L.R. (1955) Cut. 529: 21 Cut. L.T. 531: (1955) Cut. L.T. 529; Sadasheo Jagannath Barapatra *v.* Hemaji Hirman Bakde, 1958 Nag. L.J. 373: A.I.R. 1958 Bom. 507: 1959 B.L.R. 1147; *see* also Lachman Rao Krishnaji *v.* Balkrishna Rangnath, I.L.R. 36 Bom. 617; Digambar Paul *v.* Taffaruddi, A.I.R. 1934 Cal. 80 (2): 37 C.W.N. 1033: 149 I.C. 27.
2. Sadasheo Jagannath Barapatra *v.* Hemaji Hirman Bakde, *supra*.
3. Ramesh Chandra Bhattacharjee *v.* Nagendra N. Mullick, A.I.R. 1951 Cal. 435 at p. 438: 85 C.L.J. 324.
4. *Per* Venkatarama Ayyar, J., in Bengal Immunity Co. Ltd. *v.* State of Bihar, A. I. R. 1955 S. C. 661 at p. 749: 1955 S. C. A. 1140: 1955 S. C. J. 672: 1955 A. W. R. (S. C.) 422: (1955) 2 M.L.J. (S.C.) 168; Ram Sarup *v.* Munshi A.I.R. 1963 S. C. 553: 65 P. R. 531; Parshottam. Das Dalmia *v.* State of West Bengal, A. I. R. 1961 S.C. 1589: (1961) 2 A. W. R. (S.C.) 137: (1961) 2 S. C. J. 563.
5. Shri Ram Narain *v.* Simla Banking and Industrial Co., Ltd., A.I.R. 1956 S.C. 614 at p. 621: 1956 S.C.R. 603: 1956 S.C.A. 893: 1956 S.C.J. 379: 59 Bom. L.R. 1.

Courts of law are not in favour of holding that a statute or a section has been repealed by implication by subsequent legislation. The implied repeal may, however, be inferred if the special Act read as a whole is intended to be complete in itself.[1] Repeal by implication is the consequence of contradictory or inconsistent legislation.[2] It may be reasonably presumed that the Legislature does not usually intend to keep on the Statute Book enactments which are contradictory or in conflict with each other : the Legislature must also be presumed not to effect an important measure like the repeal or amendment of a law without expressing a clear and unambiguous intention to do so. Such an interpretation unless inevitable should be avoided. Any reasonable construction which offers an escape from implied repeal must be considered to be in consonance with the true intention of the Legislature.[3]

When repeal of an Act can be implied.

It is a well-recognised principle of interpretation of statutes that an enactment or rule having the force of law cannot be held to be repealed by implication by a later enactment or statutory rules unless the provisions of the earlier enactment or rule are plainly repugnant to those of the subsequent enactment or rule, and the entire subject-matter of the first is taken away by the subsequent. Repeal by implication is the consequence of contradictory inconsistent legislation and should not be imputed to legislation or rule-making authority unless one is driven to do so. Even when there is repeal or amendment of an Act or rule by necessary implication, the repeal need not extend to the whole of it, and the provisions of the earlier enactment may survive the repeal or amendment,[4] when the later of the two general enactments is couched in negative terms, it is difficult to avoid the inference that the earlier one is impliedly repealed by it. Again, if the co-existence of two sets of provisions would be destructive of the object for which the later was passed, the earlier would be repealed by the later.[5] It must be shown, for implied repeal, that there is a positive repugnancy between the provisions of the new law, and those of the old.[6] By introducing a new section the Legislature can repeal by implication other provisions in respect of that matter without expressly repealing those provisions.[7]

An amending Act may, either specially or by necessary implication, continue certain essential provisions in a repealed Act. This is particularly so when a repealing Act specifically states that the provisions of the repealed Act, shall to the extent of repugnancy be void. It is also clear that an inconsistency or repugnancy between two statutes necessary to override

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1. State of Madhya Bharat *v.* Mohanlal Motilal, 1957 Jab. L. J. 101 : 1957 Cr. L. J. 189 : A. I. R. 1957 M. B. 58 ; S. Baldev Singh *v.* Government of Pepsu, I. L. R. (1954) Patiala 105 : A. I. R. 1954 Pepsu 98 ; Banwari Lal *v.* State, 1956 Cr. L. J. 841 : A. I. R. 1956 All. 385 (D. B.); State *v.* Dina Nath, A.I.R. 1956 Punj. 85 at p.86 (D.B.) : 58 Punj. L. R. 79; 1956 Cr. L.J. 415; Jullundur Transport Cooperative Society *v.* State of Punjab, A. I. R. 1959 Punj. 34.
2. S. Baldev Singh *v.* Government of Patiala and East Punjab States Union, A. I. R. 1954 Pepsu 98 at p. 107.
3. Jullundur Transport Co-operative Society *v.* State of Punjab, *supra* at p. 36.
4. S. Baldev Singh *v.* Government of Patiala and East Punjab States Union, A. I. R. 1954 Pepsu 98 at p. 107 : I. L. R. (1954) Patiala 105.
5. Lal Mohan *v.* Ramanath, A. I. R. 1954 Tripura 17 at p. 20.
6. Banwari Lal *v.* State, *supra* at p. 391.
7. Jai Bir Singh *v.* Malkhan Singh, A. I. R. 1958 All. 364 at p.366 ; 1958 A. L. J. 256 : 1958 Cr. L.J. 591 : 1958 A. W. R. (H.C.)291 : *see* also Mahadeolal Kanodia *v.* Administrator-General, West Bengal, A. I. R. 1960 S. C. 936 ; State of Bombay *v.* M/s Supreme General Films Exchange Ltd., (1960) 3 S. C. R. 640 : A. I. R. 1960 S. C. 980.

or repeal the earlier one, must be such that the two cannot be reconciled nor can they stand together.[1] By an amendment the Legislature would not incorporate something in the Act which would be inconsistent with or repugnant to the object of the Act.[2] An alteration of the language of a principal statute by an amending Act must be deemed deliberate.[3] Where a rule or bye-law is made under an Act or a section of the Act, the repeal of that Act or section abrogates the rule or bye-law unless it is preserved by the repealing Act.[4]

When change of law to be inferred.

A legislative amendment of an enactment using a different phraseology from what is contained in the old Act naturally gives room to the inference that the law was intended to be changed. The rule is thus stated by Crawford in his book on *Statutory Constructions* at page 618 :

> "A change in the phraseology creates a presumption that the Legislature intended a change of meaning. Indeed, the mere fact that the Legislature enacts an amendment is of itself an indication of an intention as a general rule, to alter the pre-existing law."

Whether a change of language in an amended Act departing from the previous unamended Act is intended to effect an alteration of the law does not depend upon any presumption one way or the other, though it would be a sound rule of construction to hold that the change cannot be disregarded as a mere freak of the Legislature. In *Dickinson* v. *Fletcher*,[5] Brett, J., stated that when two statutes dealing with the same subject-matter use different language, it is generally a fair presumption that the alteration in the language used in the subsequent statute was intentional.

Privy Council's view.

But as the Judicial Committee said in *Casement* v. *Fulton*,[6] there are many instances to be found of the Legislature departing from language previously used for the purpose of conveying a certain meaning without intending to depart from that meaning. Cases of either description, those in which the Legislature was imputed with the design of enacting a different measure by adopting a different language from that previously employed and those in which the law was held to be the same before and after amendment in spite of dissimilar words abound in the Law Reports and the task of analysing them and evolving a settled rule of construction would be well nigh impossible.

It may however be stated that if the phraseology past and present is strikingly dissimilar and the requirements of the language demand a change of meaning, and the sense of the section requires it, the Court must give effect to it.[7]

When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately.[8]

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1. Commercial and Industrial Bank Ltd. *v.* Mir Sarfaraz Ali Khan, A.I.R. 1956 Hyd. 65 at p. 68 (F. B.): I. L. R. (1956) Hyd. 79.
2. State *v.* Ardeshir Hormusji Bhiwandiwala, A.I.R. 1956 Bom. 219 at p. 223 (D. B.): I. L. R. (1956) Bom. 321: 58 Bom. L.R. 662: 1956 Cr. L.J. 488.
3. Janardan *v.* Hiralal, 1957 M. P. L. J. 170 (Nag.).
4. Watson *v.* Winch, (1916) 1 K. B. 688: 85 L. J. K. B. 537, relied on in Government of Andhra (now Andhra Pradesh) *v.* East India Commercial Co. Ltd., 1957 Andh. L. T. 43 : (1957) 1 Andh. W. R. 144 : A.I. R. 1957 A. P. 83 (F. B.).
5. (1873) 9 C. P. 1 at p. 8.
6. (1845) 5 Moo. P. C. 130 at p. 141.
7. *See* Lord Howard *v.* I. R. C., (1948) 2 All E. R. 825 at p. 830.
8. D. R. Fraser & Co. Ltd. *v.* Minister of National Revenue, (1949) A. C. 24 (P. C.).

In the words of Cockburn, C. J., in *R.* v. *Price*[1] :

"When the Legislature in legislating *in pari materia* and substituting certain provisions for those which existed in an earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive."

In Halsbury the rule is stated thus[1] :

Halsbury's statement of law.

"The distinction to be drawn between statutes which codify and those which consolidate the law, is that in construing the latter there is a presumption that the law was not intended to be altered even if the words used are not identical; but this presumption must yield to plain words to the contrary. Where statutes are replaced by others which consolidate them with amendments, however, the same rules do not apply...."

Duty of Court.

It is not necessary that before a change of law is attributed to an amendment, the doctrine of "advancing the remedy and "suppressing the evil" should be resorted to. To speculate upon the objects and purposes of an amending enactment is not the province of Court. If the amendment makes it indubitably clear that a change of law has resulted, it would not be proper for the Court not to give effect to it on some suppositional reasoning. By so doing the Court will be stepping out of its jurisdiction.[3]

The general rule is that if there is a special provision relating to a particular thing then the general provisions do not apply, the special excluding the general.[4] Specific provision will prevail over general provision, unless on a consideration of the statute in its entirety a contrary intention of the Legislature is indicated as contained in the maxim *generalia specialibus non derogant*.[5] The application of the rule of implied repeal to general and special enactments is governed by the following principles:

(1) The general Act should be construed as not repealing a particular one that is directed towards a special object or class of objects and more particularly so when the new Act is couched in affirmative language and the two can stand together; and

(2) When there is something in the nature of a general law which makes it unlikely that an exception was intended as regards the special Act, then the general law will be taken to have repealed the special one.[6]

If a clause in an Act is repealed, it may be said that the clause is to be taken as if it had never existed. But it cannot be said that the whole Act must be read as if that clause had never been enacted.[7] In considering the effect of a repeal of a section it is necessary to consider the nature of the repeal.[8]

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1. (1870) 6 Q. B. 411 at p. 416.
2. Volume 36, Simond's Edition, p. 406.
3. S. V. Natesa Mudaliar *v.* Sri Dhanapal Bus Service Privat Ltd., Kancheepuram, A. I. R. 1964 Mad. 136 at pp. 142-43 (F. B.) : (1962) 2 M. L. J. 23 : I. L. R. (1964) 1 Mad. 288.
4. Jai Bir Singh *v.* Malkhan Singh ; A. I. R. 1958 All. 364 at p. 366: 1958 A. L. J. 256 : 1958 Cr. L. J. 591: 1958 A. W. R. (H. C.) 291 : Kutumbayya *v.* The Municipal Council, Vijayawada, (1958) 2 Andh. W. R. 559.
5. Anand Reddi *v.* State of Andhra Pradesh, A.I.R. 1955 A.P. 144 at p. 146 : (1959) 1 Andh. W. R 174 : 1959 Cr. L. J. 300.
6. State of Madhya Bharat *v.* Mohanlal Motilal, 1957 Jab. L. J. 101 : 1957 Cr. L. J. 189: A. I. R. 1957 M. B. 58 (D. B.).
7. Craies' *Statute Law*, 5th Ed., p. 382.
8. Smith *v.* London Transport Executive, (1949) 2 All. E. R. 295 at p. 304 : 1949 Ch. 685 : 65 T.L.R. 538.

25. Specific offence.—The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions, one covering a large number of matters in general and another to only some of them his intention is that these later directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty* v. *Solly*,[1] Romilly, M. R., mentioned the rule thus:

> "The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

Guiding principle.

The rule has been applied as between different provisions of the same statute in numerous cases some of which only may be mentioned: *De Winton* v. *Brecon*,[2] *Churchill* v. *Crease*,[3] *United States* v. *Chase*,[4] and *Carroll* v. *Greenwich Ins. Co.*[5] Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision.[6]

Again, it will be observed that the Code first defines offences generally. It then sets out other offences which, though falling into the category of general offences so defined, are distinguished from them by the presence of special circumstances which call for lighter or graver penalties. In such cases, it is the specific section dealing with the specific offence that ought to be requisitioned, and it would be wrong to resort to the general section merely because all its ingredients are present in a particular case.[7] For instance, a man clubs another man to death. Here the offender has certainly committed hurt; but it is not all, for he may have committed grievous hurt, or grievous hurt with a dangerous weapon or culpable homicide not amounting to murder, or even murder deserving the extreme penalty of the law. All such offences are of the same kind, but they differ in their characteristics and gravity, so as, in fact, to form distinct and different offences Their discrimination is no doubt the outcome of comparatively modern refinement, but nevertheless it is one which marks the different grades of criminal responsibility which always existed, though it was not always recognised.

Example.

Construction of Penal Acts

26. Strict construction.—Lastly, as all penal laws affect the liberty of the subject they have to be construed strictly.[8] All penal enactments, as a

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1. (1859) 53 E. R. 1032 quoted in Craies on *Statute Law* at p. 206, 6th Ed.
2. (1858) 28L. J. C. H. 598.
3. (1828) 5 Bing. 177.
4. (1889) 135 U. S. 255.
5. (1905) 199 U. S. 401.
6. J. K. Cotton Spinning and Weaving Mills Co. Ltd. *v.* State of U. P., A. I.R. 1951 S. C. 1170 at pp. 1174-75 : (1961) 3 S. C. R. 185.
7. Kuloda Prasad, 11 C. W. N. 100 : 5 C. L. J. 47.
8. Patandin, 2 A. L. J. 26; Birajpal, 7 A. L. J. 180; Reg. *v.* Bhista Bin Madanna, 1 Ind. Jur. 245: I. L. R. 1 Bom. 308; *In re* Ganesh Narayan Sathe, I. L. R. 13 Bom. 600; Kala Lalang, I. L. R. 8 Cal. 214; Kazi Zeamuddin 28 C. 504; Bissumbhar, 5 C. W. N. 108; Sheodin, I. L. R. 10 All. 15; High Court Bar Association *v.* Emperor, I. L. R. (1941) Lah. 786 : A. I. R. 1941 Lah. 301 : 43 Cr. L. J. 765; Baldeo Raj *v.* Crown, 42 P. L. R. 25; Jugal Singh *v.* Emperor, A. I. R. 1943 Pat. 315 at p. 317: 44 Cr. L. J. 745; Dattatraya *v.* Emperor, 1937 Bom. 28 : 38 Cr. L. J. 45 : 38 Bom. L. R. 1115; Parmanand *v.* Emperor, 41 P.L. R. 137: A. I. R. 1939 Lah. 81 : 40 Cr. L. J. 497 : 180 I. C. 835 (F. B.); Juggomohan Bakshee *v.* Roy Mothoora-nath Chowdhry, 7 W. R. 18 (P.C.

rule, are interpreted in an atmosphere free from all bias and, if necessary, where there is an ambiguity, in favour of the subject.[1] Nothing should be assumed to exist which does not appear. If a section is ambiguous or susceptible of another construction, the construction more favourable to the accused should be adopted.[2]

What strict construction implies.

When it is said that all penal statutes are to be construed strictly it only means that the Court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt the construction favourable to the subject should be preferred.

Primary test.

But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the Court is bound to accept the expressed intention of the Legislature.[2]

It should not be forgotten that it is the duty of tribunals to interpret the law and not to make it. They have defined rules embodied in a Code and it is their duty to follow them. If there are any lacunae in the law, it is no part of their functions to supplement them for hard cases make bad law. As their Lordships of the Privy Council observed: "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."[4]

Maxwell's view.

The correct attitude of the mind in dealing with crimes should be that which Maxwell has well summarised. He says: "Penal laws must be construed strictly. But it is the paramount duty of the judicial interpreter to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object. The rule of strict construction does not, indeed, require or sanction that suspicious scrutiny of the words, or those hostile conclusions from their ambiguity or from what is left unexpressed, which characterise the judicial interpretation of affidavits in support of *ex parte* applications, or of a Magistrate's convictions where the ambiguity goes to jurisdiction. Nor does it allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested for the purpose of withdrawing from the operation of the statute a case which falls both within its scope and the fair sense of its language. This would be to defeat, not to promote, the object of the Legislature, to misread the statute and misunderstand its purpose. A court is not at liberty to put limitations on general words which are not called for by the sense,

Guiding principles for Courts.

or the objects or the mischief of the enactment and no construction is admissible which would sanction an evasion of an Act. But the rule of strict construction

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1. Madho Saran Singh *v.* Emperor, A.I.R. 1943 All. 379 at p. 388: I. L. R. (1944) All. 42: 212 I. C. 83: 45 Cr. L. J. 491 : 1943 A. W. R. 332 : (1943) A. L. J. 511.
2. *Ibid.*; Jugal Singh *v.* Emperor, A. I. R. 1943 Pat. 315 at p. 317: 44 Cr. L. J. 745; Bhai Lal Chand *v.* Emperor, A.I.R. 1942 Lah. 253 at p. 254 : 44 P.L.R. 382 : 203 I. C. 404; Parmanand *v.* Emperor, 1939 Lah. 81 : 40 Cr. L. J. 497.
3. M. V. Joshi *v.* M. U. Shimpi, (1961) 3 S. C. R. 986 at pp. 993, 994.
4. Gokul Mandar *v.* Pudmanand, I. L. R. 29 Cal. 707 at p. 715 (P. C.); Kari Singh, I. L. R. 40 Cal. 433; Barendra K. Ghose, I. L. R. 52 Cal. 197 (P. C.).

requires that the language shall be so construed that no cases shall be held to fall within it, which do not fall both within the reasonable meaning of its terms and within the meaning and scope of the enactment. To determine that a case is within the intention of a statute, its language must authorise the Court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented it is not competent for a court to extend them."[1]

Province of Court to place rational construction.

In other words, while it is in the province of the Court to place a rational construction on the law, it is no part of its function to gloss over an ambiguity, inconsistency or confusion which is plainly apparent and not obviously reconcilable. It is then the duty of the Legislature to amend the law. It is no part of the Judge to blink it. So James, L. J., in delivering the judgment of the Privy Council, said: "No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included, if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair commonsense meaning of the languages used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."[2] So in another case, Willis, J., observed: "I quite agree that criminal enactments are not to be extended by construction when an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question, and makes it criminal".[3]

Strict construction when permissible.

When it is said that a penal statute must be construed strictly, what it implies is that nothing is to be regarded as within the meaning of the statute which is not within the letter—which is not clearly and intelligibly described in the very words of the statute itself.[4] "It would be extremely wrong that a man should, by a long train of conclusions be reasoned into a penalty when the express words of the Act of Parliament do not authorize it."[5] The full definition of every crime contains expressly

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1. *Per* Lord Tentereden in Proctor *v.* Mainwaring, (1819) 3 B. & Ald. 145; Maxwell on the *Construction of Statutes*, Chap. X (9th Ed.), 268; *see* also Juggomohun Baxshee *v.* Roy Mothooranath Chowdbry, 7 W.R. 18 (P.C.); Nga Po Cheih, 13 I. C. (R.) 390.
2. Dyke *v.* Elliot, "The Gauntlet", L. R. 4 P. C. 184 at p. 191: 26 L. T. 451.
3. Britt *v.* Robinson, (1870) L. R. 5 C. P. 503 at pp. 513, 514.
4. Kola, I. L. R. 8 Cal. 214, following Lord Huntingtower *v.* Gardiner, 1 B. & C. 297 at p. 299; Rex *v.* Bond, 1 B. & Alder. 390 at p. 392; High Court Bar Association *v.* Emperor, A. I. R. 1941 Lah. 301 at p. 303: I. L. R. (1941) Lah. 796: 43 Cr. L. J. 765.
5. *Per* Abbot, J., in Rex *v.* Bond, *supra*; Deumal, 3 S. L. R. 66: 3 I. C. 886.

or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is proved or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.[1] In construing a section of a penal Act, which casts upon the accused the burden of proving his innocence, the Court must act strictly,[2] although a penal statute has got to be construed strictly beneficial construction to promote its object is not excluded.[3]

Caution.

It is said that penal statutes must be construed strictly. In *Tuck* v. *Priester*,[4] Lord Esher, M. R., said with reference to Sec. 6 of the Copyright Act, 1862: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction." "Unless penalties are imposed in clear terms they are not enforceable. Also where various interpretations of a section are admissible it is a strong reason against adopting interpretation if it shall appear that the result would be unreasonable or oppressive."[5]

Applicability of the rule of strict construction.

And Blackburn, J., said: "When the Legislature imposes a penalty, the words imposing it must be clear and distinct."[6] But this rule must be read as applicable, if at all, only to penalties of a quasi-public character, and not to acts creating penalties for infractions of the general law which are in the nature of purely civil remedies.[7] The rules laid down in *Heydon's* case,[8] for the construction of obscurely penned statutes, are there said to apply to "penal" as well as to other statutes. In *Attorney-General* v. *Sillen*,[9] Pollock, C. B., said: "All the penal statutes there alluded to, and in all the places where that doctrine is to be met with, are statutes which create some disability or forfeiture; none of them are statutes creating a crime, and I think it is altogether a mistake to apply the resolutions in *Heydon's* case to a criminal statute which creates a new offence. The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the true construction of the statute? I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law." This rule is said to be "founded on the tenderness of the law for the right of individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department, for it is the Legislature, not the Court, which is to define a crime and ordain its punishment".[10] As to enactments creating crimes, the rule was adopted in *favorem vitae* in respect of treason and capital felonies and extended to

True construction of the statute.

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1. Stephen, J., in Reg. *v.* Tolson, (1889) 23 Q.B. D. 168: 60 L. T. 899, followed in Arab Mihan *v.* Emperor, A. I. R. 1942 Sind 167 at p. 168: I. L. R. (1942) Kar. 284: 203 I. C. 609: 44 Cr. L. J. 123.
2. Emperor *v.* Nathalal Vanmali, A. I. R. 1939 Bom. 339 at p. 340: I.L.R. (1939) Bom. 434: 40 Cr. L.J. 891: 184 I.C. 252: 41 Bom. L. R. 548.
3. Barikrao Bhaddoo Kunbi *v.* Emperor, A. I. R. 1943 Nag. 139 at p. 140: I.L.R. (1943) Nag. 358: 44 Cr. L. J. 421: 205 I. C. 564: 1943 N. L. J. 130.
4. (1887) 19 Q.B.D. 629 at p. 638, followed in Hildesheimer *v.* Faulkner, (1901) 2 Ch. 552 at p. 561, and by Upjohn, J., in London and County Commercial Properties Investments *v.* Attorney-General, (1943) 1 W. L. R. 312.
5. Attorney-General *v.* Till, (1910) A. C. 50 at p. 51, *per* Lord Soreburn, L. C.; I.R.C. *v.* Hinchy, (1959) 2 Q. B. 357.
6. Willis *v.* Thorp, (1875) L. R. 10 Q. B. 383 at p. 386.
7. *See* Huntington *v.* Attrill, (1893) A.C. 150.
8. (1584) 3 Co. Rep. 8.
9. (1864) 2 H. & C. 431 at p. 509.
10. U. S. *v.* Wiltberger, (1820) 5 Wheat. (U.S.) 76 at p. 95, *per* Marshall, C.J.

misdemeanours. So penal statutes were strictly construed when many comparatively minor offences were formerly capital or rendered convicts liable to transportation.

English law.

The question was of more importance in days when there was a disposition to introduce that species of criminal equity[1] which led to the dissolution of the Court of Star Chamber.

Blackstone lays down the rule thus[2]: "The Law of England does not allow of offences by a construction, and no cases shall be holden to be reached by penal laws but such as are within both the spirit and the letter of such law." The doctrine upon which must be based the *ratio decidendi* of cases put upon constructive fraud (viz. estoppel by conduct), constructive notice, or constructive trusts, is inapplicable to the interpretation of a statute, and especially inapplicable to enactments dealing with crime or imposing penalties. For there is no estoppel with relation to the construction of any instrument, though in particular cases the parties may be bound to adopt, for the purpose of regulating the rights or obligations under the instruments, a construction other than the true legal construction.

Relaxation of rule of strict construction.—The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. "All modern Acts are framed with regard to equitable as well as legal principles."[3] "A hundred years ago," said the Court in *Lyons*' case,[4] "statutes were required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the Legislature." Therefore, "although the common distinction," as Pollock, C. B., said in *Nicholson* v. *Fields*,[5] "taken between penal Acts and remedial Acts that the former are to be construed strictly and the others are to be construed liberally, is not a distinction perhaps, that ought to be erased from the mind of a Judge," yet the distinction now means little more than "that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the Courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, forced construction, or equitable interpretation to exonerate parties plainly within their scope."[6]

Reasonable construction.

In *Stephenson* v. *Higginson*,[6] the rule was thus stated by Lord Truro: "In construing an Act of Parliament, every word must be understood according to the legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense. That is the general

Every word in the Act to be understood according to legal meanings.

1. *See* Co. Litt. (ed. Thomas), Vol. 1, p. 29, note Q; *cf.* Brandling *v.* Barrington, (1827) 6 B. & C. 467 at p. 475, *per* Lord Tenterden, C. J.
2. 1 Bl. Comm. 88 (ed. Hargr.).
3. Edwards *v.* Edwards, (1876) 2 Ch. D. 291 at p. 297, *per* Mellish, L.J., quoted with approval by Lord Cozens-Hardy, M. R., *In re* Monolithic Building Co. Ltd., (1915) 1 Ch. 643 at p. 665.
4. (1858) Bell. C. C. 38 at p. 45.
5. (1862) 7 H. & N. 810 at p. 817; *cf. Ex parte* Mann, (1890) 11 N. S. W. L.R. 348, where this rule was applied to a revenue Act.
6. Sedgwick, *Statutory Law*, 2nd Ed., p. 282, cited in Attorney-General *v.* Sillem, (1864) 2 H. & C. 431 at p. 531 by Bramwell, B., who there calls it "a passage in which good sense, force and propriety of language are equally conspicuous, and which is amply borne out by the authorities, English and American, which are cited in support of it".
7. (1852) 3 H. L. C. 638 at p. 686; *see* 48 Harv. L. R. 748.

rule, but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense must plainly appear." In *Dickinson* v. *Fletcher*,[1] Brett, J., put the rule thus: "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty." This principle of construction is thus accurately stated by Sedgwick[2]:

Statute to be fairly construed and faithfully applied according to intent of Legislature.

> "The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the Legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the Courts inclining to mercy."

Benefit of doubt when available.

Where an enactment imposes a penalty for a criminal offence, a person against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise on the construction of the enactment.[3] "Where there is an enactment which may entail penal consequences, you ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language."[4] On the other hand, as said by A. L. Smith, L. J., in *Llewellyn* v. *Vale of Glamorgan Ry.*,[5] "when an Act (imposing a penalty is open to two constructions, that construction ought be adopted which is the more reasonable and the better calculated to give effect to the expressed intention, which in this case is that the penalty shall be paid". And while it is probably true that the principles of construction have been somewhat relaxed in formality nowadays, yet at the same time strictness of statement is still valuable, especially in a case where the result may be highly penal[6] and the procedure indicated by a penal Act must be closely followed.[7]

27. Operation of statute not to be narrowed by strict construction.—But penal statutes must never be construed so as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation would comprehend. The Judicial Committee in *The Gauntlet*,[8] said:

Privy Council's view.

> "No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a

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1. (1873) L. R. 9 C. P. 1 at p. 7.
2. *Statutory Law*, 2nd Ed., p. 287, cited with approval by Bramwell, B., in Foley *v.* Fletcher, (1858) 3 H. & N. 769 at p. 781.
3. London County Council *v.* Aylesbury Dairy Co., (1898) 1 Q.B. 106 at p. 109, *per* Wright, J.; R. *v.* Chapman, (1931) 2 K.B. 606 at p. 609, ambiguity in Sec. 2 of the Criminal Law Amendment Act, 1922, accordingly held that the accused was entitled to the benefit of the doubt. *See* also London and County Commercial Properties Investments *v.* Attorney-General, (1953) 1 W. L. R. 312 at p. 319; R. *v.* Wibledon, JJ., *Ex parte* Derwent, (1953) 1 Q. B. 380.
4. Rumball *v.* Schmidt, (1882) 8 Q. B. D. 603 at p. 608, *per* Huddleston, B.
5. (1898) 1 Q. B. 380.
6. Cotterill *v.* Lempriere, (1890) 14 Q.B.D. 634 at p. 637, *per* Coleridge, C. J.; *cf.* R. *v.* Brittleton, (1884) 12 Q. B. D. 266 at p. 269.
7. *See* Smith *v.* Wood, (1889) 24 Q. B. D. 23 at p. 28.
8. (1872) L. R. 4 P. C. 184 at p. 191.

casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included,[1] and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

When large enough words are used, a prohibition may be extended so as to apply to something which has come into existence since the passing of the Act. Thus, in *Graves* v. *Ashford*,[2] it was held that the piracy of a picture by means of photography was within the Copyright Acts.[3] Passed for the protection of artists and engravers, although photography was an unknown art at the time those statutes were passed. But in *R.* v. *Smith*,[4] the question arose whether a person could be convicted under Sec. 91 of the Larceny Act, 1861, on receiving a chattel, "knowing the same to have been feloniously stolen," where the stealing of partnership property had been committed by a partner in a firm. The offence of larceny by a partner was not made felony until the passing of the Larceny Act, 1868; consequently the question was whether the Act of 1861 could be extended by implication so as to embrace an offence which was not felony at the time the Act was passed, and the Court held that it could not be so extended. This decision was approved and followed in *R.* v. *Streeter*[5] where it was held that a man jointly indicted with a married woman for receiving goods stolen by the woman from her husband was not liable to conviction under Sec. 91 of the Act of 1861, because the larceny by the wife was not a felony at common law or under the Act of 1861, but was a new felony created by Secs. 12, 16 (*g*) of the Married Women's Property Act, 1882. In *R.* v. *Payne*,[6] a man indicted under similar circumstances was held liable as for a common law misdemeanour. A conviction in such a case cannot however be upheld unless there is evidence to show that the money had been taken by the wife in such circumstances as would support a prosecution and conviction of her for stealing the money.[7]

Example.

28. Beneficial construction.—Where the language is ambiguous, the benefit of the doubt must go to the subject. In construing provisions of penal statutes, it is well established that the said provisions must be strictly construed, and if there is any ambiguity or doubt, the benefit of the ambiguity or doubt must be given to the subject. When a clause or expression in a penal statute is capable of being interpreted either in favour

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1. In Jenkinson *v.* Thomas, (1792) 4 T.R. 665 at p. 666, Lord Kenyon said: "We must not extend a penal law to other cases than those intended by the Legislature, even though we think they come within the mischief intended to be remedied."
2. (1867) L. R. 2 C. P. 410; Taylor *v.* Goodwin, (1879) 4 Q. B. D. 228; Attorney-General *v.* Edison Telephone Co., (1880) 6 Q. B. D. 244; Postmaster-General *v.* National Telephone Co., (1907) 1 Ch. 621; Contrast Hanfstaengl *v.* Empire Palace, (1894) 2 Ch. 1 at p. 8.
3. 8 Geo. 2, c. 13; 7 Geo. 3, c. 38 and 17 Geo. 3, c. 57.
4. (1870) L. R. 1 C. C. R. 266.
5. (1900) 2 Q. B. 601.
6. (1906) 1 K. B. 97, and *see* R. *v.* Garland, (1910) 1 K. B. 154.
7. R. *v.* Creamer, (1919) 1 K. B. 564; Craies on *Statute Law*, by S. G. G. Edgar, 6th Ed., at pp. 529 to 534.

of or against the accused, the former interpretation ought to prevail. It is elementary that in dealing with a penal provision the rule of strict construction requires that the language shall be construed so that no cases shall be held to fall within it which do not fall within the reasonable interpretation of the enactment.[1] The Court must not only look on the one side, at the mischief intended to be remedied, but also on the other side, it must consider that persons are not to be made subject to penalties unless the offence charged is strictly brought within the purview of the statute. No one can be brought within a statute unless the case falls within the letter and spirit of the statute.[2] A court is entitled and indeed bound when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to show that a particular provision ought not to be construed as it would be, if considered alone apart from the rest of the Act.[3] The Court should construe all the parts together so as to avoid inconsistencies between the different parts of the statute.[4] The Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it.[5]

29. Construction of criminal statutes today.—"The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language and criminal statutes with a more rational regard to the aim and intention of the Legislature than formerly...."[6] All statutes whether penal or not are now construed by substantially the same rules. The principle of construction that penal statutes should be strictly construed is contained in many decisions.[7] The distinction between a strict and a liberal interpretation has today worn thin. As the Privy Council said in *The Gauntlet*,[8] "No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used. Where the thing is brought within the words and within the spirit, then a penal enactment is to be construed like any other instrument according to the fair common sense and meaning of language used." "If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence,

Privy Council's view.

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1. Dattaraya Malhar Bidkar *v.* Emperor, A.I.R. 1937 Bom. 28 at p. 30: 38 Bom. L. R. 1115.
2. Dewan Singh *v.* Emperor, A. I. R. 1936 Nag. 55 at p. 62.
3. *Per* Lord Herschell in Colquhoun *v.* Brooks, (1887) 1 A. C. 493.
4. Deonandan Singh *v.* Ram Lakhan Singh, A. I. R. 1948 Pat. 225 at pp. 228, 229: 2 D. L. R. 492 : 49 Cr. L. J. 246 : I. L. R. 27 Pat. 52 (F. B.).
5. Firm Khem Chand Ramdas *v.* Commissioner of Income-tax, A. I. R. 1934 Sind 46 at p. 51 : 28 S. L. R. 174 : 149 I. C. 1204.
6. Maxwell, *Interpretation of Statutes*, 9th Ed., p. 288, cited in State *v.* Hathiwala Textile Mills, A. I. R. 1957 Bom. 209 at p. 211: 59 Bom. L. R. 184 : 1957 Cr. L. J. 957.
7. *See*, for instance, State Government, M. P. *v.* Maganbhai Dasaibhai, A.I.R. 1954 Nag. 41 at p. 42: I.L.R. (1953) Nag. 501 : 1953 Nag. L. J. 514 : 1954 Cr. L. J. 89 (D. B.).
8. (1872) 4 P. C. 184 : 17 E. R. 373,

I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law."[1] Lord Coleridge, J., in *Attorney-General* v. *Beauchamp*,[2] said (at p. 655 of the K. B. report): "Unquestionably, when one is construing a penal statute, the first thing is to construe it according to ordinary rules of grammar, and if a construction which satisfies those rules makes the enactment intelligible, and especially if it carries out the obvious intention of the Legislature as gathered from a general perusal of the whole statute, that grammatical construction ought not to be departed from." Following the two last cited English cases, the Court of Criminal Appeal held in *R.* v. *Oakes*[3] that the construction of a criminal statute must avoid unintelligible and absurd results.

Modern trend of interpretation adopted by Indian decisions.

Indian decisions have adopted the modern trend of interpretation. The intention of the Legislature must govern in the construction of penal statute as much as in any other statute.[4]

In the interpretation of a penal statute the subject should be held to be free unless he can be found to be guilty according to the clear and unambiguous language of the statute. Courts cannot assume that the Legislature intended to punish and then give a forced interpretation to the section in an Act to carry out the supposed intention.[5]

In the case of statutes of a penal character which create certain offences for the first time, no proceedings under them are generally maintainable in respect of acts done before the commencement of the statute, unless the statutes include such acts by express provision or necessary intendment. This is for two reasons: (1) an act not an offence under the law prevailing at the time it was done cannot become so by virtue of operation of some statute which itself came into operation later; (2) the element of *mens rea*, an essential constituent of offences unless specifically excluded, would be lacking because one cannot have a criminal intention in doing an act which was not a crime at the time at all.[6]

30. Literal interpretation.—The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislatures their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation.[7] It is clear that unless there is any such ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are

1. *Per* Pollock, C.B., in Attorney-General *v.* Sillem, (1864) 2 H. & C. 431: 159 E. R. 178.
2. (1920) 1 K. B. 650: 89 L. J. K. B. 219: 122 L. T. 527: 84 J. P. 41.
3. (1959) 2 All E. R. 92.
4. State *v.* Hyder Ali, A. I. R. 1955 Hyd. 128 at p. 140: I. L. R (1955) Hyd. 214 (F. B.).
5. Bansraj *v.* State, A. I. R. 1956 All. 27 at pp. 29, and 30 (D. B.): 1955 A. L. J. 704 : 1955 A. W. R. 697: 1956 Cr. L. J. 6.
6. S. Ganesan *v.* A. K. Joscelyne, A. I. R. 1957 Cal. 33 at p. 38 (D. B.): (1957) 27 Com. Cas. 114.
7. Jugal Kishore Saraf *v.* Messrs. Raw Cotton Co. Ltd., A. I. R. 1955 S. C. 376 at p. 381: (1955) 1 S.C.R. 1369 : 1955 S. C. A. 440: 1955 S. C. J. 371 : 1955 Andh. W. R. (S. C.) 220: (1955) 1 M. L. J. (S. C.) 220: 1955 M.W.N. 421; *see* Navinchand *v.* Commissioner of Income-tax, Bombay, 56 Bom. L.R. 795: A.I.R. 1954 Bom. 550; Sulakhan Singh *v.* Central Bank of India, Ltd., 55 Punj. L. R. 348 : A. I. R. 1954 Punj. 66 (D. B.) ; *see*

ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice.[1]

Literal interpretation is not always the only interpretation.

If the language used is capable of only one construction and fails to carry out the intention of Parliament when making the amendment, the amendment may have to be struck down if it contravenes a constitutional provision. Further, a literal interpretation is not always the only interpretation of a provision in a statute and the Court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law-making body which may be apparent from the circumstances in which the particular provision came to be made. Therefore, a literal and mechanical interpretation is not the only interpretation which Courts are bound to give to the words of a statute; and it may be possible to control the wide language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and the circumstances in which it might have been enacted.[2]

Dictionary meanings, however helpful in understanding the general sense of the words, cannot control where the scheme of the statute or the instrument considered as a whole clearly conveys a somewhat different shade of meaning. It is not always a safe way to construe a statute or a contract by dividing it by a process of etymological dissection and after separating words from their context to give each word some particular definition given by lexicographers and then to reconstruct the instrument upon the basis of those definitions. What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject-matter, the purpose or the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved. Words are after all used merely as a vehicle to convey the idea of the speaker or the writer and the words have naturally, therefore, to be so construed as to fit in with the idea which emerges on a consideration of the entire context. Each word is but a symbol which may stand for one or a number of objects. The context, in which a word conveying different shades of meanings is used, is of importance in determining the precise sense which fits in with the context as intended to be conveyed by the author.[3]

Ambiguous words in a statute should be construed in a sense which will carry out the purpose of the Act and not in a way

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also Nokes *v.* Doncaster Amalgamated Collieries, (19) A.C. 1014: (1940) 3 All E. R. 549, *per* Lord Simon, L. C.; Om Prakash *v.* State, 1955 A. L. J. 224: 1955 Cr. L. J 754: A. I. R. 1955 All. 275; Sashi Bhusan Rai *v.* Bhumeshwar Raj, 33 Pat. 1009: 1955 B. L. J. R. 64: A. I. R. 1955 Pat. 124 (D. B.); Ghumand Singh *v.* State, I. L. R. (1954) Patiala 585 : 1955 Cr. L. J. 560: A. I. R. 1955 Pepsu 43 (D. B.); Bata Krishna Barman *v.* Assistant Secretary, Government of Bengal, 61 C. W. N. 459; Alangaram Chetti *v.* Municipal Council, Pollachi, I. L. R. (1957) Mad. 1020: 70 M. L. W. 517: (1957) 2 M. L. J. 56: 1957 M. L. J. (Cr.) 324; Hyderabad (Sindh) Electric Supply Co. *v.* Union of India, 61 Punj L. R. 21 : A. I. R. 1959 Punj. 199.

1. Commissioner of Income-tax, M.P. and Bhopal *v.* Smt. Sodra Devi, A.I.R. 1957 S.C. 832 at p. 835: (1957) 32 I. T. R. 615: 1958 S. C. J. 1.
2. R. L. Arora *v.* State of Uttar Pradesh, A. I. R. 1964 S. C. 1230 at pp. 1236, 1237; *see* also Kanwar Singh *v.* Delhi Administration, A. I. R. 1965 S. C. 871.
3. Deputy Chief Controller of Imports and Exports *v.* K. T. Kosalram, A.I.R. 1971 S. C. 1283 at pp. 1289, 1290.

Ambiguous words to be construed to carry out purpose of Act and not go beyond it.

which will travel beyond it.[1] Where the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers.[2] The words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular sense, as in the subject or in the occasion on which they are used, and the object to be attained.[3] If the terms are plain and unambiguous the Courts cannot have resort to the position in law as it obtained in England or in other countries when the statute was enacted by the Legislature. Such recourse would be permissible only if there was any latent or patent ambiguity and the Courts were required to find out what was the true intendment of the Legislature. Where, however, the terms of the statute do not admit of any such ambiguity, it is the clear duty of the Courts to construe the plain terms of the statute and give them their legal effect.[4] Where the meaning of the statute is clear on the face of it and capable of only one meaning, effect must be given to it even though it is absurd or mischievous[5] or hardship or inconvenience cannot alter the meaning employed by the Legislature if such meaning is clear on the face of the statute,[6] and regardless of consequences.[7] A court can only take the words as they are written in the statutes.[8] In order to ascertain the true meaning and intent of the provisions, one has got to turn to the very terms of the statute itself, divorced from all considerations as to what was the state of the previous law.[9] If the words used in a criminal statute are reasonably capable of two constructions, the construction which is favourable to the accused should be preferred; but in construing the relevant words, it is obviously necessary to have due regard to the context in which they have been used.[10] Where

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1. Biswambhar Singh *v.* State of Orissa, A.I.R. 1954 S.C. 139 at p. 146: 1954 S. C. J. 219.
2. Mangoo Singh *v.* Election Tribunal, Bareilly, A. I. R. 1957 S.C. 871 at p. 874: 1957 A. W. R. (H.C.) 722.
3. Workmen of Dimakuchi Tea Estate *v.* Management of Dimakuchi Tea Estate, A.I.R. 1958 S. C. 353 at p. 356; R. *v.* Hall, (1822) 1 B. & C. 124 at p. 136: 107 E. R. 47; River Wear Commissioners *v.* Adamson, (1877) 2 A.C. 743: 47 L.J.Q.B. 193; State *v.* Bhaishankar Uttamrai, I.L. R. (1956) Bom. 511: 58 Bom. L. R. 435 : 1956 Cr. L. J. 1186: A. I. R. 1956 Bom. 660 (D.B.).
4. Sales-tax Officer, Banaras *v.* Kanhaiya Lal Mukund Lal Saraf, A. I. R. 1959 S.C. 135 at p. 139: (1959) 1 Andh. W.R. (S.C.) 35: (1959) 1 M. L. J. (S. C.) 35: Amasinghji *v.* State of Rajasthan, (1955) 2 S. C. R. 303: 1955 S. C. A. 766: 1955 S.C.J. 523: A. I. R. 1955 S.C. 504; Kifayatullah Khan *v.* Registrar of Co-operative Societies, I. L. R. (1956) Hyd. 368: A.I.R. 1956 Hyd. 129 (D.B.); Mangaram & Co. *v.* Kher, I. L. R. (1956) M.B. 307: 1956 M.B. L.J. 609: A.I.R. 1956 M.B. 183 (D.B.); D. D. Krishnaswami Iyengar *v.* A. C. Verranna Chetty, (1956) 2 M. L. J. 4; Kanak Sundar *v.* Ram Lakhan, I. L. R. 35 Pat. 499: 1956 B.L. J. R. 523: A.I.R. 1956 Pat. 325; Ramswaroop Das *v.* State of Bihar, I.L. R. 35 Pat. 792: 1956 B. L.J. R. 600: A.I.R. 1957 Pat. 190 (D. B.) ; Jairamdas *v.* Regional Transport, 1957 Raj. L. W. 477 : A. I. R. 1957 Raj. 312 (F.B.); State of Manipur *v.* Nongthombam Amubi Singh, A.I.R. 1957 Manipur 1.
5. State of Manipur *v.* Nongthombam Amubi Singh, A.I.R. 1957 Manipur, 1 at p. 3.
6. Ramswaroop Das *v.* State of Bihar, A.I.R. 1957 Pat. 190 at p. 191: 1956 B. L. J. R. 609.
7. Sundar Das Bhasin *v.* Regional Settlement Commissioner, Jaipur, A. I. R. 1959 Raj. 102 at p. 105 : 1959 Raj. L. W. 552: I. L.R. (1959) 9 Raj. 76.
8. Madras Pencil Factory *v.* R.P. F. Commissioner, A.I. R. 1959 Mad. 235 at p. 238.
9. Sales-tax Officer, Banaras *v.* Kanhaiya Lal Mukund Lal Saraf, A.I.R. 1959 S. C. 135 at p. 140: 1959 S. C. J. 53: (1959) 1 Andh. W.R. (S. C.) 35:
10. Alamgir *v.* State of Bihar, A.I.R. 1959 S. C. 436: 1959 S.C.J. 457: 1959 Cr. L. J. 527: 1959 M. L. J. (Cr.) 293.

a case falls within the plain meaning of a provision of law, its application thereto cannot be denied on any *a priori* considerations as to the supposed intentions of the Legislature. Even though the Court is satisfied that the Legislature had not contemplated a particular consequence while enacting a law, the Court is still bound to give effect to its clear language.[1] Where the words of the statute are susceptible to an ambiguity, and two interpretations are possible, and the one leads to injustice and the other avoids it, then the Court would be justified in choosing the interpretation which avoids the anomaly or injustice.[2] A very strong case of injustice arising from giving the language of an Act, its natural meaning must be made out before the Court will construe a statute in a way contrary to the natural meaning of the language used.[3]

Indian enactments have departed in many particulars from English law.

Indian enactments, while embodying to a large extent the rules of English law on the subject, have yet departed in many particulars from these rules and the Indian Legislature has evolved an independent system of its own purporting to be self-contained.[4] Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of the statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded.[5]

Statutory definitions when may be useful guide.

It may be permissible to look to the dictionary meaning of the term in the absence of any definition thereof in the relevant statutes.[6] Whenever there is a conflict of opinion as to the ordinary import of an expression used in a statute standard dictionaries may form guides in ascertaining the meaning of such an expression.[7] Where a statutory definition of a word exists, it is not permissible to ascribe to it a different meaning even if it be the dictionary meaning unless the interpretation according to the definition clause gives rise to any absurdity or impossibility.[8] General or comprehensive words should receive their full and natural meaning unless they are

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1. Jairamdas *v.* Regional, Transport A.I.R. 1957 Raj. 312 at p. 316: 1957 Raj. L. W. 477 (F. B.).
2. Sunder Das Bhasin *v.* Regional Settlement Commissioner, Jaipur, A. I. R. (1959) 9 Raj. 103 at p. 105: 1959 Raj. L. W. 562: I. L.R. (1959) 9 Raj. 76; *see* also Holmes *v.* Rural Dt. Council, (1949) 2 K. B. 1 and Simmes *v.* Registrar of Probates, (1900) A.C. 323.
3. *Per* Cave, J., in Hall, *In re*, (1888) 21 Q. B. D. 137 at pp. 141, 142, relied on in Mahenderjee *v.* L. Ram Naidu, A.I.R. 1957 Hyd. 27 at p. 29 (D.B.) : I. L. R. (1956) 1 Hyd. 624.
4. Kurrutulain Bahadur *v.* Nazhat-ud-Dowla Abbas Hossain Khan, (1906) 32 I. A. 244: 33 Cal. 116: 1 C.L. J. 594: 9 C. W. N. 938.
5. Ramanandi Kuer *v.* Kalawati Kuer, A.I.R. 1928 P.C. 2 at p. 4: 55 I.A. 18: 26 A. L. J. 85: 30 Bom. L. R. 227: 47 C. L. J. 1: 32 C. W. N. 402: 54 M. L. J. 281: 1928 M. W. N. 282: 7 Pat. 221: 9 P.L.T. 97: 107 I. C. 14; Madanlal Fakirchand Dudhediya *v.* Changdeo Sugar Mills Ltd., Bombay, I.L.R. (1958) Bom. 250: 60 Bom. L.R. 254: (1958) 28 Com. Cas. 312: A.I.R. 1958 Bom. 491.
6. Commissioner of Income-tax West Bengal *v.* Benoy Kumar Sahas Roy, A. I. R. 1957 S. C. 768 at p. 772: 1957 S. C. J. 740: (1957) 2 M. L. J. (S.C) 145: 32 I.T.R. 466; R. *v.* Peters; (1886) 16 Q.B.D. 636 at p. 647: 55 L.J.M.C. 173, *per* Lord Coleridge; Camden (Marquiss) *v.* I.R.C., (1914) 1 K. B. 641 at p. 647: 83 L.J.K.B. 509, *per* Cozens-Hardy, M.R.; Cantonment Board, Poona *v.* Western India Theatres, Ltd., I.L.R. (1954) Bom. 647: 56 Bom. L.R. 45: A.I.R. 1954 Bom. 261 (D.B.); Krishna Mills Ltd. *v.* State, A.I.R. 1956 Ajmer 78: 1956 Cr. L.J. 1379; Ramchandra Mardaraj Deo *v.* Commissioner of Income-tax, I.L.R. (1955) Cut. 391: A.I.R. 1955 Orissa 116: (1955) 27 I. T. R. 667 (D.B).
7. Smt. Jyotikana *v.* Commissioner of Income-tax, Assam, A.I.R. 1954 Assam 113 at p. 125: (1954) 26 I.T.R. 424 (S.B.).
8. Anglo-India Jute Mills Co. *v.* S. K. Dutt, A.I.R. 1956 Cal. 450 at p. 452: (1956) 30 I.T.R. 525.

clearly restrictive in their intendment.[1] But when the context and the object and mischief of the enactment do not require restricted meaning to be attached to words of general import, it becomes the duty of the Court to give these words their plain and ordinary meaning.[2]

The statute itself provides a dictionary and in that statutory dictionary, meaning assigned to the word "landlord" is such that it would undoubtedly include a "rent collector". According to the rule of interpretation of statutes, this meaning will have to be assigned while construing the provisions for the purposes of the Act unless the Courts give another meaning finding that this dictionary meaning is repugnant to the subject or context.[3]

Acts to be construed ordinarily in natural sense.

Where a word is used *simpliciter*, unless there is something else in the context or other parts of the section which suggests a limited meaning, a word apparently used in the general sense should not be understood as limited to a particular meaning.[4] Words which are general and not express and precise should be construed with reference to the subject-matter of the legislation and limited to it ; for instance, the word "person" used in many enactments would, according to the circumstances in which it is used, include or not include corporation.[5] Every expression used in the statute must be construed ordinarily in its natural sense and general words should be given general meaning unless the context otherwise indicates.[6]

An interpretation would not mean adding something in the statute. It is a well-known principle of interpretation that nothing is to be added to a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express.[7]

Supreme Court's dictum.

Consideration of possible anomalies is not a ground for construing the plain words of a statute in a manner opposed to their plain meaning[8] or to cut down the plain meaning.[9] Where the language is clear, no extraneous considerations are admissible even though the result of the construction be unreasonable;[10] nor can the Court strain the meaning even if it considers the provision ill-drafted or concern itself with the policy or result of the construction.[11] As the Supreme Court said in *N. T. Veluswami Thevar* v. *G. Raja Nainar*,[12] if on

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1. State of Bombay *v.* Ali Gulshan, A.I.R. 1955 S.C. 810 at p. 812 : (1955) S. C. J. 822.
2. Lilavaty Bai *v.* State of Bombay, A.I.R. 1957 S.C. 521 at p. 529: 1957 S. C. A. 465: 1957 S. C. J. 557: 59 Bom. L. R. 934.
3. Faizubhai Mahmadbhai *v.* Balkrishna Naradlal Bhatt, A. I. R. 1972 Guj. 9 at p. 15.
4. Dwarkadas Agarwall *v.* Dharam Chand Jain, A. I. R. 1954 Cal. 583 at p. 586 (D.B.): 58 C. W. N. 517 : (1954) 24 Com. Cas. 283.
5. Juwansinhji Balvirisinhji *v.* Members of the Tribunal, A. I. R. 1957 Bom. 182 at p. 185 : I. L. R. (1957) Bom. 459 : 59 Bom. L. R. 287.
6. Hyderabad (Sind) Electric Supply Co. *v.* Union of India, A. I. R. 1959 Punj. 199 at p. 202: 61 Punj. L.R. 21.
7. Gram Panchayat, Mirthal *v.* Land Acquisition Collector, A. I. R. 1972 P. & H. 36 at p. 38.
8. Umesh Jha *v.* State, A. I. R. 1956 Pat. 425 at p. 427 : I. L. R. 35 Pat. 385 : 1956 B. L. J. R. 229 ; Kanak Sunder *v.* Ram Lakhan, I. L. R. 35 Pat. 499: 1956 B. L. J. R. 523 : A. I. R. 1956 Pat. 325; Srinivasacharyalu *v.* Hanumantha Rau, (1954) 2 M. L. J. (Andh.) 119 : 1914 M. W. N. 915 (Andh.) : A. I. R. 1955 A. P. 10.
9. Yarlagadda Sivaram Prasad *v.* Majathi Pata Raju, I.L.R. (1957) A. P. 700 : 1958 Andh. L. T. 50.
10. Kanak Sunder *v.* Ram Lakhan, A. I. R. 1966 Pat. 325 at p. 333.
11. Kifayatulla Khan *v.* Registrar of Co-operative Societies, A. I. R. 1956 Hyd. 129 at p. 130: I. L. R. (1956) Hyd. 368 (D. B.).
12. A. I. R. 1959 S. C. 422 at pp. 427, 428 : 1959 S. C. A. 424 : (1959) 2 M. L. J. (S. C.) 48 : (1959) 2 Andh. W. R. (S. C.) 48.

its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the Legislature to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is Court's duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies.

Interpretation of same words used in different Acts and also different parts of the same Act.

Frequently the same word or expression occurs in different parts of the same statute or even in the same section and the question of interpretation arises whether such a word or expression should be construed in the same sense throughout the statute or the section. "It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act."[1] The above rule of construction is only one element in deciding the true import of the enactment and to ascertain this one must discern the purpose behind the particular provision and its setting in the scheme of the statute. "The presumption," says Craies, "that the words are used in the same meaning is, however, very slight, and it is proper if sufficient reason can be assigned to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act".[2] And Maxwell observes on page 322 of his *Interpretation of Statutes*, 10th Edition, as follows : "But the presumption is not of much weight. The same word may be used in different senses in the same statute, and even in the same section".[3] Where the same word,[4] or the same expression,[5] is used in an Act, it is reasonable to presume that the same words or phrases are used in different parts of the same statute, they would ordinarily receive the same meaning, unless the context or the object requires otherwise.[6] And this presumption extends to technical expressions occurring in different parts of the same statute.[7] Where in a particular place it is necessary to use the same term in a different sense from that which it bears in the rest of the Act, a special definition is added such as in the explanation to Sec. 203, I. P. C.[8] Identical expressions used in an enactment will ordinarily carry the same meaning.[9] But the principle raising the presumption is very light as words or expressions may be used in the same Act or even in the same section in different senses,

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1. Maxwell's *Interpretation of Statutes*, 10th Ed., p. 522.
2. *Statute Law*, 5th Ed., p. 159 ; *see* also Anand Nivas (P.) Ltd. *v.* Anandji, A. I. R. 1965 S. C. 414.
3. Cited in Shamrao Vishnu Parlekar *v.* District Magistrate, A. I. R. 1957 S. C. 23 at pp. 26, 27: 1956 S. C. R. 644 : 1956 S. C. A. 1132 : 1956 S. C. J. 710 : 1957 A. L. J. 33 : 1957 B. L. J. R. 1 : 59 Bom. L. R. 83: 1967 M. P. C. 35 : (1957) M. L. J. (Cr.) 23.
4. Begum Noor Banoo *v.* Custodian, Evacuee Property, Hyderabad, A. I. R. 1956 Hyd. 56: I. L. R. (1955) Hyd. 818 (D. B).
5. Motilal Surajmal Joshi *v.* Mohamed Shafi, A. I. R. 1956 Nag. 179: I. L. R. (1956) Nag. 132 : 1956 Nag. L. J. 121.
6. Kamleshwar Singh *v.* Dharamdeo Singh, A.I.R. 1957 Pat. 375 at p. 378: 1957 B.L.J. R. 527 : 1957 Cr. L. J. 879 : 1957 Pat. L. R. 273; Gajadhar Singh Radha Kishen Singh *v.* Emperor, 1946 N. L. J. 161 : 47 Cr. L. J. 383 : 223 I. C. 227 : A. I. R. 1946 Nag. 200 ; K. M. Narayana Rao *v.* Assistant Registrar, Co-operative Society, (1958) 2 Andh. W. R. 362 ; Gulaher Ahmed *v.* Election Tribunal, Chhatarpur, 1958 M. P. L. J. 150 : 1958 Jab. L. J. 168 : 1958 M. P. C. 135 : A. I. R. 1958 M. P. 224.
7. V. M. Patel *v.* Inspector of Factories, A. I. R. 1958 Ker. 237 at p. 240: 1958 Ker. L. T. 161 : 1958 Ker. L. J. 43 : 1958 Cr. L J. 1026 : 1958 M. L. J. (Cr.) 241.
8. Begum Noor Banoo *v.* Custodian, Evacuee Property, Hyderabad, A. I. R. 1956 Hyd. 56 at p. 59 ; *see* also Malik Mohammad Jalil *v.* Assistant Custodian, 1958 A. L. J. 403 : 1958 A. W. R. (H. C.) 516 : A. I. R. 1958 All. 679.
9. Raja V. V. Muvva Gopalakrishna *v.* Raja V. V. Sarvagna Krishna, A. I. R. 1955 Andh. 264 at p. 272: 1955 Andh. W. R. 590.

the reason being that words and expressions take their colour from the context in which they appear.[1] In *K. N. Guruswamy* v. *State of Mysore*,[2] the Supreme Court said : "The same word appearing in the same section of the same set of rules must be given the same meaning unless there is anything to indicate the contrary."

Normally, when different expressions are used in a statute (or Articles of Association), they are intended to connote different things.[3] Unless there is something in the context to indicate the contrary, the ordinary presumption is that the same expression used in different sections of an Act has the same meaning.[4]

When words ought to be interpreted by the ordinary and natural meaning.

It is however a well-known rule of construction that if there is nothing to modify or qualify the language which the statute contains it must be construed in the ordinary and natural meaning of the words,[5] and no words should be added to a statute nor anything be imported into it on the basis of a speculation as to the intention of a Legislature.[6] Words of an Act of Parliament must be construed so as to give sensible meaning to them.[7] Where there is virtually a definition clause, one must assume that words so defined are used in the same sense throughout the statute unless there are indications specifically to the contrary.[8] A court cannot add to the words of a statute or read more in the words than is meant, for that would be legislating and not interpreting a legislation.[9] When the provisions of a section are clear and unambiguous, it is not permissible to add to, or subtract from, the express words used therein.[10]

Courts not to impose superiority to Legislature.

It is one of the principles of construction that Courts cannot impute superfluity to Legislatures and that they should give a meaning to every word used in an Act of Parliament.[11] In construing a statutory provision, every word occurring therein must be given its proper meaning.[12]

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1. Ram Narain *v.* State of U. P., 1956 S. C. R. 664 : 1956 S. C. A. 1114 : 1956 S. C. J. 725 : I. L. R. (1956) 2 All. 695 : 1957 A. L. J. 8 : 1957 A. W. R. (H. C.) 63 : 1957 B. L. J. R. 52 : 1957 M. P. C. 21 : A. I. R. 1957 S. C. 18 ; Hyderabad (Sindh) Electric Supply Co. *v.* Union of India, A. I. R. 1959 Punj. 199 at p. 503: 61 Punj. L. R. 21.
2. A. I. R. 1954 S. C. 592 at p. 595 : (1954) S. C. J. 644, a case involving the interpretation of rules I-1 and II-10 of the Mysore Excise Act (V of 1901).
3. East and West Insurance Co. Ltd. *v.* Kamala Jayantilal Mehta, A. I. R. 1956 Bom. 537 at p. 543 (D. B.): I. L. R. (1956) Bom. 619 : 58 Bom. 660.
4. Govindan Nair Neelakantan Nair *v.* Narayani Amma, A. I. R. 1955 T. C. 235 at p. 238 (D. B.): I. L. R. (1955) T. C. 147 : 1955 Ker. L. T. 309.
5. Dr. Ishwari Prasad *v.* Registrar, Allahabad University, A. I. R. 1955 All. 131 at p. 137 : 1955 A. L. J. 244.
6. Registrar, University, Allahabad *v.* Dr. Ishwari Prasad, A. I. R. 1956 All. 603 at p. 609 (D. B.).
7. Avtar Singh *v.* State of Punjab, A. I. R. 1965 S. C. 666 at p 668.
8. Anglo-Indian Jute Mills Co. *v.* S. K. Dutt, A. I. R. 1956 Cal. 450 at p. 452: (1956) 30 I. T. R. 525.
9. Mahesh Chandra *v.* Tarachand Modi, A. I. R. 1958 All. 374 at p. 386 (F. B.) : I. L. R. (1958) 2 All. 817.
10. Yarlagaddo Sirarama Prasad *v.* Majothi Pota Raja, I. L. R. (1957) A. P. 700: 1958 Andh. L. T. 50.
11. Kanpur Textile Finishing Mills *v.* Regional Povident Fund Commissioner, A.I.R. 1955 Punj. 130 at p. 132 (D. B.) : 57 Punj. L. R. 159: Dictcher *v.* Denison, (1858) 11 Moo. P. C. 324 at p. 337; Auchterarder Presbytery *v.* Lord Kinnoull, (1839) 6 Cl. & Fin. 646: 7 E.R. 841; State *v.* Jujarsingh, I. L. R. (1958) 8 Raj. 445: 1958 Raj. L. W. 264: A.I. R. 1959 Raj. 80.
12. B. Veeraswamy *v.* State of Andhra Pradesh, A. I. R. 1959 A. P. 415 at p. 416; (1959) 1 Andh. W. R. 308.

Same words in different Acts if to have same meaning.

Not infrequently, the same word or expression is used in different statutes and it does not follow that the same word or expression bears the same meaning in the different statutes. The Supreme Court has laid down that it is no sound principle or construction to interpret expressions used in one Act with reference to their use in another Act. The meaning of words and expressions used in an Act must take their colour from the context in which they appear.[1] But it was said in *Chaparala Krishna Brahman* v. *Guduru Govardhanaiah*[2] that for ascertaining the meaning of a word in a particular statute, it would be legitimate to examine the sense in which it is used in other enactments and if the context and the circumstances justify it, the Court may assume that the word is used in the same sense but not otherwise: this view can no longer be regarded as correct. In construing the words used in the provisions of different statutes, particularly a penal statute, regard must be had to the intendment of each of those provisions.[3] If a statutory meaning is attached to certain words in a prior Act, there is a presumption of some force that the Legislature intended that they should have the same signification when used in a subsequent Act in relation to the same subject-matter.[4]

It is undesirable to construe sections of a particular Act in the light of decisions given on the interpretation of other Acts.[5] A statute must be expounded "according to the intent of them that made it".[6] In *Firm Ganga Ram Kishore Chand* v. *Firm Jai Ram Bhagat Ram*,[7] Tek Chand, J., observed: "In interpreting the meaning and words of an expression it is useful to examine them in the light of the object and purpose of the statute. It will serve no useful purpose, therefore, to seek help from authorities under the pre-emption law, the object and intention of which is totally different...." In construing an Act one has to bear in mind the scheme of the Act and the purpose for which the Act was passed. It is sometime dangerous to construe the language of one Act having regard to the construction placed by the Court on the language of another enactment.[8]

Legislature presumed to know judicial interpretation.

Once the Legislature uses words which have received judicial interpretation, the presumption is that Parliament in subsequent statutes so used them unless there is anything in the Acts to show that the Legislature did not mean so to use them. Change of language arising from the omission in a later statute of words which occurred in an earlier statute makes no difference if the omitted words in the earlier statute were unnecessary.[9]

A statute should not be so construed as to make the meaning absurd or unworkable.[10] The mere fact that the results of a statute

1. Ram Narain *v.* State of U. P., A. I. R. 1957 S. C. 18 at p. 23: 1956 S. C. R. 664: 1956 S. C. A. 1114: 1956 S. C. J. 725: I. L. R. (1956) 2 All. 695: 1957 A. L. J. 1: 1957 A. W. R. (H. C.) 63: 1957 B. L. J. R. 52: 1957 M. P. C. 21.
2. A. I.R. 1954 Mad. 822 at p. 824 : (1954) 2 M. L. J. 332: 1954 M. W. N. 313: 1954 Cr. L. J. 1283: I. L. R. (1954) 25 Mad. 407.
3. Nizam *v.* State, I. L. R. (1955) Hyd. 241 (D. B.).
4. National Planners Ltd. *v.* Contributories, etc., A. I. R. 1958 Punj, 230 at p. 232: 60 Punj. L. R. 187 (F. B.).
5. Calcutta City Bank, Ltd., *In re*, A. I. R. 1957 Cal. 508 at p. 509 : 62 C.W.N. 39.
6. Firm Ganga Ram Kishore Chand *v.* Firm Jai Ram Bhagat Ram, A.I.R. 1957 Punj. 293 at p.295: 59 Punj. L. R. 315.
7. A.I.R. 1957 Punj. 293 at p. 296 : 59 Punj. L. R. 325.
8. Anglo-French Drug Co. (Eastern), Private Ltd. *v.* R.D. Tinaikar. A.I. R. 1959 Bom. 21 at p. 23 : 59 Bom. L. R. 1019.
9. Mohindra Supply Co. *v.* G.-G. in Council, A. I.R. 1954 Punj. 211 at pp. 523-524 (F. B.) : 56 Punj L. R. 199.
10. Durga Prosad Khaitan *v.* C. T. O., A. I. R. 1956 Cal. 596 at p. 599 : (1957) 8 S. T. C. 105.

may be unjust or absurd does not entitle the Court not to give it effect, but if there are two different interpretations of the words in an Act the Court will adopt that which is just, reasonable and sensible rather than that which is none of these things.[1] When two or more words which are susceptible of analogous meaning are coupled together *noscuntur a sociis*, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general.[2] The Judicial Committee of the Privy Council also expressed itself in similar terms: "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them."[3] This rule was applied by the Supreme Courts in *M. K. Ranganathan* v. *Government of Madras*.[4] The ordinary rule that words in a statute should be construed according to their plain, literal and grammatical meaning cannot apply if it leads to startling and absurd results which were not contemplated and which would frustrate the very purpose of the Act.[5]

Interpretation not to lead to absurdity.

In the matter of interpretation of a statute, the Courts are not free to put their own interpretation on the statute for the purpose of removing anomalies. This is the function of Legislature. The Courts are required to interpret the statutes as they are; and if there is no ambiguity in the language used, effect must be given to the clear terms of the statute. The second limitation on the Court is that the interpretation by the Courts of the statute in any particular manner should not render any part of the statute otiose.[6]

Intention of the Legislature is at times a slippery footing, particularly when it has to be based on a speculative opinion as to what the Legislature probably meant. But where the sense and reason of the law, which is the soul of the law—*quia ratio legis est anima legis*—is clearly ascertainable, the Courts must choose a construction, consistent with the smooth working of the remedy provided by the statute.[7] Policies of statutes are relevant for their proper construction. But within the broad framework of the main purpose and policy of the statute construction is largely, fundamentally and primarily a matter of interpretation of the words used in the statutes. Ideas of policy gathered from extraneous sources, extraneous to the text of the statute and its preamble are neither conclusive nor convincing if the actual language subject to interpretation leaves no room for doubt.[8] It is true that in construing a statutory provision the other provisions of the statute should also be looked into and the statute construed as a whole. Wide general words have sometimes been construed in a restrictive manner in view of the context. Thus, there is abundant authority for the view that general words of a particular provision of a statute may

Construction consistent with smooth working of remedy.

Policies of statutes if relevant for proper construction.

Statute to be construed as a whole.

1. Kureti Venkataratnam Das *v.* Vijayawada Municipality, (1956) Andh. L. T 450: 1956 Andh. W. R. 306.
2. *See* Maxwell on *Interpretation of Statutes*, 10th Ed., p. 332.
3. Angus Robertson *v.* George Day, (1879) 5 A. C. 63 at p. 69: 49 L. J. P. C. 9.
4. (1955) 2 S. C. 374: 1955 S. C. J. 515 : A. I. R. 1955 S. C. 604, followed in N. Baksi *v.* Accountant General, Bihar, A. I. R. 1957 Pat. 515 at p. 523 : 1957 B. L. J. R. 299 (2).
5. Alangaram Chetti *v.* Municipal Council, Pollachi, I. L. R. (1957) Mad. 1020 ; 70 M. L. W. 517: (1957) 2 M. L. J. 56: 1957 M. L. J. (Cr.) 324.
6. Balu Deochand Kulmi *v.* Fundibai Amichand Kulmi, A. I. R. 1972 M. P. 22 at p. 29.
7. Firm Ganga Ram Kishore Chand *v.* Firm Jai Ram Bhagat Ram, A. I. R. 1957 Punj. 293 at p. 296 : 59 Punj. L. R. 325.
8. Messrs. Co-operative Milk Societies Union Ltd. *v.* State of West Bengal, A. I. R. 1958 Cal. 373 at p. 377 : 62 C. W. N. 405.

be given a restrictive meaning if the statute requires it. By "context" is meant not only the textual context arising out of the other provisions of the statute, but also the factual context including the mischief to be remedied, and the circumstances under which the statute was passed. But a note of caution was sounded by Viscount Simonds by the observation that, "for such restriction, a compelling reason must be found". One such reason may be the repugnancy between the immediate enacting provisions and the other provisions of the Act.[1]

It is well settled that while construing a statute, Court should as far as possible interpret the several provisions of law in a harmonious way.[2]

When the Act defines a particular term, it is that definition which has to be taken for that term wherever it occurs in the Act and it would not be permissible to construe the said term in any other manner. Further, as far as possible the different provisions in the Act must be reconciled with each other and harmonious construction has to be put so as to bring out the intention of the Act without doing any violence to the language used. If the meaning of the words is clear, then the effect has to be given to those words and it would not be permissible to read something into it which is not there.[3]

To add words to the provisions of the statute is not the function of the interpretation but is the province of the Legislature.

The use of the words "may from time to time" which find place in Sec. 12 (1) of the Act would clearly show that the power is not limited to be exercised once but may be repeatedly exercised as the exigencies of the situation may require.

The phrase "time to time" fell for construction by their Lordships of the Privy Council in *William Lawrie* v. *George Lees*,[4] and while repelling such a construction observed in these words:

> "It seems to me that that would be a construction of a most inconvenient character. It is not one which I think your Lordships would lightly adopt, and I see no reason whatever for adopting it, because the words 'from time to time' are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore, not being able to act again in the same direction. The meaning of the words 'from time to time' is that after he has made one order he may make a fresh order to add something to it, or take something from it, or reverse it altogether; and as that meaning gives sufficient force to the words and explains the use of them here it seems to me that your Lordships ought not to go further and to narrow these words by any construction which would throw impediments in the way of carrying on the business, whereas the object of the Act was to facilitate it."[5]

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1. Sri Surendra Mohanty *v.* Sri Naba Krishna Choudhary, A. I. R. 1958 Orissa 168 at pp. 173, 174: I. L. R. (1958) Cut. 195; McLeod *v.* Attorney-General, 1891 A. C. 455; Butcher *v.* Poole Corporation, (1942) 2 All E. R. 572; Attorney-General *v.* Prince Ernest August of Hanover, 1957 A. C. 436.
2. Kamalamma *v.* Laxminarayana Rao, A. I. R. 1971 Mys. 211 at p. 212.
3. Bhaskar Narayan Hardikar *v.* S. G. Daithankar, A. I. R. 1971 Bom. 188 at p. 192.
4. (1881) 7 A.C. 19.
5. Gurdit Singh Aulakh *v.* State of Punjab, A. I. R. 1970 P. & H. 491 at p. 494.

The *ejusdem generis* rule is not a rule of law but is merely a rule of construction to aid the Courts to find out the true intention of the Legislature. If a given provision is plain and unambiguous and the legislative intent is clear, there is no occasion to call into aid that rule. *Ejusdem generis* rule is explained in Halsbury's *Laws of England*,[1] thus:

> "As a rule, where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, although this, as a rule of construction, must be applied with caution, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the *ejusdem* rule to apply, the specific words must constitute a category, class or genus; if they do constitute such a category, class or genus, then only things which belong to that category, class or genus fall within the general words...."

It is observed in Craies on *Statute Law*[2] that—

> "The *ejusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being what it is, a mere presumption, in the absence of other indications of the intention of the Legislature. The modern tendency of the law, it was said, is 'to attenuate the application of the rule of *ejusdem generis*'. To invoke the application of the *ejusdem generis* rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects."

According to Sutherland's *Statutory Construction*,[3] for the application of the doctrine of *ejusdem generis*, the following conditions must exist:

(*i*) the statute contains an enumeration by specific words;

(*ii*) the members of the enumeration constitute a class;

(*iii*) the class is not exhausted by the enumeration;

(*iv*) a general term follows the enumeration; and

(*v*) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

The scope of the *ejusdem generis* rule has been considered by this Court in several decisions. In *State of Bombay* v. *Ali Gulshan*,[4] it was observed—

> "Apart from the fact that the rule must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment, it is requisite that there must be a distinct genus, which must comprise more than one species, before the rule can be applied".

In *Lilavati Bai* v. *State of Bombay*,[5] it was observed—

> "The rule of *ejusdem generis* is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the Legislature presumed to use the general words in a restricted sense; that is

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1. 3rd Ed., Vol. 36, p. 397, para 599.
2. 6th Ed., p. 182.
3. 3rd Ed., Vol. II, p. 395.
4. (1955) 2 S. C. R. 867 : A. I. R. 1955 S. C. 310.
5. 1957 S. C. R. 721 : A. I. R. 1957 S. C. 521.

to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the Courts to give those words their plain and ordinary meaning."

The same view was reiterated by this Court in *K. K. Kochini* v. *States of Madras and Kerala.*[1]

Principle of *ejusdem generis.*

Ejusdem generis literally means of the same kind or nature. Where in a statute, etc. particular classes are specified by name followed by general words, the meaning of the general words is generally cut down by reference to the particular words, and the general words are taken to apply to those *ejusdem generis* with the particular classes.[2] The rule ought to be applied with great caution.[3] It has been expounded by the Supreme Court. The true scope of the rule is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow.[4] Apart from the fact that the rule must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment, it is requisite that there must be a distinct genus, which must comprise more than one species, before the rule can be applied.[5] But where the context and the object and the mischief of the enactment do not require a restricted meaning to be attached to words of general import, it becomes the duty of the Court to give these words their plain and ordinary meaning.[6] Decisions of the High Courts and leading English cases on the *ejusdem generis* rule are given in the footnote.[7]

If the Legislature uses an artificial expression or a term of art, then that expression or that term must be construed according to the language used by the Legislature.[8]

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1. A. I. R. 1960 S. C. 1050 ; Jage Ram *v.* State of Haryana, A. I. R. 1971 S. C. 1033 at pp. 1036, 1037.
2. Stephen's *Commentaries.*
3. Smelting Co. *v.* Inland Revenue, (1857) 1 Q. B. 175.
4. Thakur Amarsinghji *v.* State of Rajasthan, A.I.R. 1955 S.C. 504 at p. 523 : (1955) 2 S. C. R. 303: 1955 S. C. A. 766: 1955 S. C. J. 523.
5. State of Bombay *v.* Ali Gulshan, A.I.R. 1955 S. C. 810 at p. 812: (1955) S. C. J. 822.
6. Smt. Lilavati Bai *v.* State of Bombay, A.I.R. 1957 S. C. 521 at p. 529: 1957 S. C. A. 465: 1957 S. C. J. 557: 59 Bom. L. R. 934; Skinner & Co. *v.* Shew & Co., (1893) 1 Ch. 413: 62 L. J. Ch. 196.
7. Mantaravadi Bhavanarayana *v.* Merugu Venkatadu, (1953) 2 M. L. J. 748: 66 Mad. L. W. 1087: 1953 Mad. W. N. 884: A. I. R. 1954 Mad. 415 (F.B.); State *v.* Jamuna Bai Manji Keshanji, I. L. R. (1955) Bom. 514: 57 Bom. L. R. 278: 1955 Cr. L. J. 1052: A. I. R. 1955 Bom. 280 (D. B.); Atul Krishna Roy *v.* Ruakishore, I. L. R. (1956) Cut. 1: 22 Cut. L. T. 32: A. I. R. 1956 Orissa 77 ; Adimoola Chettiar, *In re*, 1957 Mad. L. J. (Cr.) 520 : (1957) 2 M. L. J. 358 ; Ittiavira Thomas *v.* St. Joseph Tile Works, Ltd., I. L. R. (1956) T. C. 1180 : A. I. R. 1957 T. C. 6 (D. B.) ; R. *v.* Edmundson, (1859) 28 L. J. M. C. 213 : 121 E. R. 30 ; Attorney-General *v.* Brown, (1920) 1 K. B. 773 ; R. *v.* Partugal, (1885) 16 Q. B. D. 87 : 50 J. P. 501 ; Rollason, *In re* (1887) 3 Ch. D. 495 : 56 L. J. Ch. 768; Jhanda Singh *v.* Chief Settlement Commissioner, Punjab, I. L. R. (1958) Punj. 1090 ; Bhunath Garai *v.* Divisional Forest Officer, 62 C. W. N. 610 ; Satrughna Sahu *v.* State of Orissa, I. L. R. (1958) Cut. 269 : A. I. R. 1958 Orissa 187 ; Sarat Chandra Ghatak *v.* Corporation of Calcutta, A. I. R. 1959 Cal. 36 ; Punjab State *v.* Mehr Chand, A.I.R. 1959 Punj. 222 : (1959) 61 P. L. R. 68.
8. K. N. Joglekar *v.* Barsi Light Railway Co., A. I. R. 1955 Bom. 294 at p. 297: 57 Bom. L. R. 148.

The word "any" must be given full effect. The interpretation invoking the doctrine of *ejusdem generis* cannot, therefore, be accepted.

In fact, to rewrite the section is not the function of the Court. There is no compulsion of logic and there is no necessity for adding any such words to effectuate the intention of the Legislature. It is, therefore, that "sum due" must be a sum which has been determined or adjudged to be due to the Panchayat.[1]

Use of word "shall" and "may" when mandatory or directory or *vice versa*.

The word "may" or "shall" is according to strict language directory or mandatory respectively. The use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or outcome of the proceeding would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid.[2] It is well established that an enactment in form mandatory might in substance be directory, and that the use of the word "shall" does not conclude the matter. The question was examined at length in *Julius* v. *Bishop of Oxford*,,[3] and various rules were laid down for determining when a statute might be construed as mandatory and when as directory. They are well known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the Legislature which is the determining factor, and that must ultimately depend on the context.[4] The word "may", though primarily permissive, has been, in certain circumstances treated as obligatory.[5] Where a statute directs the doing of a thing for the sake of justice or public good, "may" has the same force as "shall".[6] "May" in the English language sometimes means "must" and where indeed a compulsive meaning is rendered necessary, it has to be given to it.[7] One of the fundamental tests for determining whether a statute is directory or mandatory is to find out if the provisions affects the performance of a public duty or relates to a right, privilege or power; in the former case the enactment is generally directory and in the latter mandatory.[8]

It is indisputable that the word "shall" does not always conclusively convey an imperative mandate and similarly the word "may" is at times intended by the law-giver to mean "must". But to construe "shall" as "may" and "may" as "shall" there must be compelling reasons discernible from the context and the statutory aim, object and purpose. In the absence of such consideration, these words must be given their normal meanings in the English language.[9]

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1. Mistry Babulal Tulsidas *v.* Sayla Gram Panchayat, A. I. R. 1971 Guj. 96 at p. 100.
2. State of U. P. *v.* Manbodhanlal Srivastava, A. I. R. 1957 S C. 912 at pp. 917, 918: 1957 All. W. R. (H. C.) 710 : 1957 M. P. C. 744.
3. (1880) 5 A. C. 214.
4. Hari Vishnu Kamath *v.* Ahmad Ishaque, A. I. R. 1955 S. C. 233 at p. 245 : 1955 S. C. R. 1104.
5. Vetcha Sreeramamurthi *v.* Income-tax Officer, A. I. R. 1957 A.P. 114 at pp. 120: 121: (1956) 30 I. T. R. 252 : 1956 Andh. L. T. 256 : 1956 Andh. W. R. 752 (D. B.).
6. State *v.* Ramratan Bhudan, A. I. R. 1957 M. B. 7 at p. 8: 1956 M. B. L. J. 1314 : 1957 Cr. L. J. 64.
7. State *v.* Birda, A. I. R. 1957 Raj. 318 at p. 321 : 1957 Cr. L. J. 1184 : I. L. R. (1957) Raj. 71.
8. Ajit Kumar Sen *v.* State of West Bengal A. I. R. 1954 Cal. 49 at p. 55 : I. L. R. (1953) 2 Cal. 41; Chacko *v.* Chacko, A. I. R. 1959 Ker. 149 at p. 150: 1958 K. L. T. 930 : 1958 K. L. J. 1165.
9. Washdev Singh Biji *v.* Union of India, A. I. R. 1970 Delhi 85 at p. 88.

For the purpose, the distinction between the terms "mandatory" or "imperative" and "directory" or "permissive" which seem to have reference to the method by which the Legislature sets about attaining its object, must be borne in mind, when the statute requires that something shall be done, or done in a particular manner or form without expressly declaring what shall be the consequence of non-compliance, the question often arises: what intention is to be attributed by inference to the Legislature? The following passage in Maxwell in the *Interpretation of Statutes*, 11th Ed., at page 354, serves as a useful aid to ascertain the true intention of the Legislature:

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard or as imperative with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice and, when the result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded."

In this connexion, the general rule as laid down in *Woodward* v. *Sarsons*[1] is that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially, i.e. that the act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory permission. As observed by the Supreme Court in *Hari Vishnu Kamath* v. *Ahmad Ishaque*[2]:

> "The practical bearing of the distinction between a provision which is mandatory and one which is directory is that while the former must be strictly observed, in the case of the latter, it is sufficient that it is substantially complied with."

It was earlier observed in the same decision:

> "It is well established that an enactment in form mandatory might in substance be directory and that the use of the word 'shall' does not conclude the matter."

As observed therein, the rules of interpretation aforesaid are well known and are all of them only aids for ascertaining the true intention of the Legislature which is the determining factor and that must ultimately depend upon the context. A valuable guide in the matter even while construing a penal statute is to be found in *People* v. *De Renna*,[3] where the statute provided that a defendant, upon conviction by the jury to life imprisonment, "may be sentenced to life imprisonment" by the Court, the ordinary permissive word "may" was held to be mandatory. The relevant passage in the case which is set out in the *Construction of Statutes*, by Earl T. Crawford, 1940 Ed., at page 516, reads:

> "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the

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1. (1875) 10 C. P. 733 at p. 746.
2. A. I. R. 1955 S. C. 233 at p. 245.
3. 2 N. Y. S. (2) 694: 166 Misc. 582.

> language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other. This case is applicable to the case at Bar because it deals with the question of punishment."

In *Liverpool Borough Bank* v. *Turner*,[1] Lord Campbell has, with regard to enactments expressed in merely affirmative language, observed:

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

The passage appears at page 242 in Craies on *Statute Law*, 5th Ed. A useful aid to ascertain the true legislative intent is to be found in the following passage from Maxwell on the *Interpretation of Statutes*, 11th Ed., at page 369, which has been approvingly referred to and reaffirmed by the Supreme Court in the case of *State of Uttar Pradesh* v. *Babu Ram Upadhaya*,[2] which reads:

> "On the other hand, where the prescriptions of a statute relate to the performance of a public duty, and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, yet not promote the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them."

The passages aforesaid from Maxwell, Crawford and Craies were approvingly referred to by the Supreme Court in *State of Uttar Pradesh* v. *Babu Ram Upadhaya*,[3] which lays down the rules of interpretation of statutes and holds that para. 486 of the Police Regulations was mandatory in nature. In that case, by a majority judgment as per A. K. Sarkar, K. Subba Rao and J. R. Mudholkar, JJ., with P. B. Gajendragadkar and K. N. Wanchoo, JJ. dissenting, the Supreme Court laid down the rules of interpretation, following which it held that para. 486 was mandatory. In the language of the majority view:

> "The relevant rules of interpretation may be briefly stated thus: when a statute uses the word 'shall', *prima facie*, it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention, the Court may consider, *inter alia*, the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not

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1. (1860) 30 L. J. Ch. 379 at p. 380.
2. A. I. R. 1961 S. C. 751.
3. *Ibid.*

visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

In that case, the Supreme Court was concerned with an order of dismissal passed against a police officer under Sec. 7 of the Police Act which was challenged by the police officer in the High Court of Uttar Pradesh on the ground that the provisions of rule 1 of para. 486 of the Police Regulations which were mandatory were not observed and, therefore, the proceedings under Sec. 7 of the Police Act were invalid and illegal, a contention which was upheld by the High Court and the State had filed an appeal in the Supreme Court by special leave. Paragraph 486 of the Police Regulations provided that: "When the offence alleged against a police officer amounts to an offence only under Sec. 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made in accordance with the following rules: I. Every information received by the Police relating to the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XIV, Criminal Procedure Code, according to law, a case under the appropriate section being registered in the police station concerned." The Supreme Court considered the question as to whether rule I of para. 486 was directory having regard to the aforesaid rules of interpretation including the nature and the design of the statute and in the context of the provisions contained in paras. 487, 489 of the Police Regulations which made it abundantly clear that the Police investigation under the Criminal Procedure Code was a condition precedent for the departmental trial. The view expressed as per the majority judgment was that when a rule says that a departmental trial can be held only after a police investigation, it is not permissible to hold that it can be held without such investigation and that for all the reasons stated in the judgment, para. 486 was mandatory and as the investigation had not been held under Chapter XIV of the Criminal Procedure Code, the subsequent inquiry and the order of dismissal were illegal.

As observed in the earlier Supreme Court case, the use of the word "shall" does not conclude the matter nor does the use of the word "may". The overall considerations in such a case would be the real legislative intent and whether the object of the legislation will be defeated or furthered by interpreting the particular rule, or rules as mandatory or directory.

As observed by Mr. Justice J. M. Shelat (as he then was) speaking for the Division Bench of the Gujarat High Court in *Mohanlal Chhaganlal Mithawala* v. *Vipinchandra R. Gandhi*[1]:

"The object of the Act as seen from the title and the preamble is the prevention of adulteration of food. In other words, the object is to achieve purity of food and the maintenance of public health. The Legislature presumably intended, while enacting this statute, that those responsible for such adulteration are brought to book and the mischief of the evil perpetrated by them is prevented * * *."

It was further observed at p. 743 (of Guj. L. R.): (at p. 48 of A. I. R.) of the report:

"It is obvious from the Act that the objects that the Legislature had in mind were: to secure purity of food, to maintain public

1. (1961) 2 Guj. L. R. 735 at p. 741 : A. I. R. 1962 Guj. 44 at p. 47.

health, to eradicate the evil of adulteration of food and to prevent a vendor of such adulterated food from continuing to perpetrate the mischief sought to be done away with under this statute."[1]

The use of the word "may" and the words "for all or any" strongly suggest that the provision is merely directory and not mandatory. In suitable circumstances, the Court can regard a provision to be mandatory even though the framers of the enactment used the word "may".[2]

Interpretation of words "or" and "and".

The word "or" and the word "and" are often used interchangeably. Careless use of them by the Legislature may be corrected by the Court changing one to the other. But if the alteration operates to change the law or the statutory meaning is clear this cannot be done:[3]

Purport, meaing of.

The word "purport" has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable.[4] Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable. Section 8 (2-A) by giving a retrospective effect to Sec. 8 (2-A) of the Act makes the vesting as if it was vesting under Sec. 8 (2-A) of the Act and therefore the attack on the ground of invalidity cannot be sustained.[5]

Principle of harmonious construction.

The principle of harmonious construction of statutes requires that in construing the provisions of a statute Courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective; the Court should always make an attempt so to reconcile the relevant provisions as to advance the remedy intended by the statute. Where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction, so as to give meaning to all parts of the provision and to make the whole of it effective and operative.[6] No question of liberal or strict interpretation arises so long as the interpretation is natural and grammatical and warranted by the plain words of the statute. What is not permissible is to give a forced interpretation to the language of a statute, which it is not capable of bearing, in order to suit the exigencies of a certain case.[7]

In *Commissioner of Income-tax, Delhi* v. *S. Teja Singh*,[8] the Supreme Court observed : "A construction which leads to such a result must, if that is possible, be avoided, on the principle expressed in the

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1. Gela Hira Rabari *v.* S. V. Pandya, A. I. R. 1970 Guj. 235 at pp. 238, 239, 240.
2. City Board *v.* State Electricity Board, A. I. R. 1971 All. 219 at p. 221.
3. Sundara Ramaraju *v.* Ramachandraiah, 1955 Andh. W. R. 66 : A.I.R. 1955 Andh. 1416.
4. Dicker *v.* Angerstein, 3 Ch. D. 600 at p. 603.
5. Ahmedbhai Abdulkadar *v.* Custodian of Evacuee Property and Regional Settlement Commissioner, A. I. R. 1971 Guj. 181 at p. 186.
6. Siraj-ul-Haq Khan *v.* Sunni Central Board of Wakf, U. P., A. I. R. 1959 S. C. 198 at p. 204 : 1959 All. L. J. 83.
7. Khagendranath *v.* Umesh Chandra Nath, A. I. R. 1958 Assam 183 at p. 188.
8. A.I.R. 1959 S.C. 352 at p. 356: 1959 S. C. J. 425.

maxim, *at res magis valea quam pereat.*"[1] The principle enunciated by the Supreme Court was based on two English decisions. In *Curtis* v. *Storin*,[2] Fry, L. J., said: "The only alternative construction offered to us would lead to this result, that the plain intention of the Legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect." In *Whitney* v. *C. of I. R.*,[3] Lord Dunedin observed: "A statute is designed to be workable and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

31. Remedial and penal statutes.—*General features.*—Although it is customary to contrast remedial and penal provisions with one another, usually they are not sharply distinguishable and most statutes contain provisions of both kinds. Thus, even though a statute extends a benefit to one and imposes a burden on another the statute should be interpreted to protect the interest of each. That the one is described as penal and the statute is strictly construed and the other is described as remedial and the statute is liberally interpreted should not disguise the similar purpose of each rule.

Statute to be construed in the light of legislative intent.

The description of the statute as penal and its strict construction will neglect the interest of the person benefited. The description of the statute as remidial and its liberal interpretation may prejudice the person constrained. The statute should be interpreted in the light of the legislative intent to formulate a rule which will work fairly for both. To disregard the interest of one of the parties in determining the rules of construction to be applied to the statute is dangerous.

Remedial statutes.—Generally speaking, remedial statutes are those which afford a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries, and statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the State.

Liberal construction not to override other rules.

Remedial statutes are liberally construed to suppress the evil and advance the remedy,[4] but the rule of liberal construction will not override other rules where its application would defeat the intention of the Legislature. Thus, statutes in derogation of the common law, public grant statutes, and statutes taking private property for public use,[5] may under proper circumstances be given strict construction.

Penal statutes.—The term "penal" has been given wide and varying meaning. It may apply to "fines and imprisonments" only, it may include "penalties and forfeitures," and it may extend to certain "civil" recoveries.[6] The applicatian of the classification frequently depends on considerations

1. *See* also State *v.* Bhaishanker Uttamarai, I. L. R. (1956) Bom. 511: 58 Bom. L.R. 435: A. I. R. 1956 Bom. 660 (D. B.).
2. (1889) 22 Q. B. D. 518 at p. 519.
3. (1925) 10 Tax. Cas. 88 at p. 110.
4. Heydon's case, 3 Coke Rep. 76 Eng. Repr. 637 (1584).
5. *See* Banks *v.* Darden, (1855) 18 Ga. 318; Chicago & Alton R. Co. *v.* Smith, (1875) 78 Ill. 96; Best *v.* Gholson, (1878) 89 Ill. 465; Mathews *v.* Skinker, (1876) 62 Mo. 329; Morris Aqueduct *v.* Jones, (1873) 36 N. J. L. 206; People *v.* Board of Sup'rs Queens Co., 6 Hun. 304 (N. Y. 1875); Ryan *v.* State, (1869) 32 Tex. 280.
6. United States *v.* Constantine, 296 U. S. 287: 80 L. Ed. 233: (1935) 56 Sup. Ct. 223.

more esoteric than the form or the terms of the statute.[1] It is customary to say that if the statute is penal it will be strictly construed.[2]

Inference of legislative intent.

When the law imposes a punishment which acts upon the offender alone, and it is not a reparation to the party injured, and the punishment is entirely within the discretion of the law-giver, it will not be presumed that the Legislature intended the punishment to extend farther than it is expressly stated.[3]

Where statute is both "remedial" and "penal".—The general purpose or aim of a statute may be remedial, as where it provides punitive compensation to an injured party,[4] but the provisions that create the wrong, and those which define the punishment are penal in character and are strictly construed.[5] Thus, a statute may be remedial in one part and penal in another.[6] Likewise, a statute may be remedial for certain purposes and therefore liberally construed and at the same time operate with such harshness upon a class of offenders subject to it that they are entitled to invoke the rule of strict construction.[7]

Provisions of criminal statutes are not all construed strictly.

The provision of criminal statutes are not all construed strictly. They are construed strictly against the accused and favourably and equitably in his favour.[8]

Although these rules reflect the attempts of English Judges to relieve against the harshness of criminal punishments and to preserve flexibility in the administration of statutes of uncertain content and of even uncertain source, modern legislation with its greater exactness might well be interpreted according to the legislative intent independent of its penal or remedial characteristics. It can hardly be supposed that the determinations that the statute is penal or remedial, when it necessarily is both, will facilitate an accurate discovery of the legislative intent.

Interpretation.—The cases are legion which declare that penal statutes shall be strictly construed and that remedial statutes shall be liberally

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1. Cardozo, dissenting in United States *v.* Constantine, "The judgment of the Court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields." *see* Van Rennselaer *v.* Sheriff, 1 Cow. 443 (N. Y. 1823); Commissioner *v.* Martin, 17 Mass. 359 (1821); United States *v.* Wiltbergar, 5 Wheat. (18 U. S.) 76: 5 L. Ed. 37 (1820); Andrews *v.* United States, Fed. Cas. No. 381 (1824).
2. Prussian *v.* United States, 282 U. S. 675: 75 L. Ed. 610: 51 Sup. Ct 223 (1931); United States *v.* Scharton, 285 U. S. 518: 76 L. Ed. 917: 52 Sup. Ct. 416 (1932); Snyder *v.* State, 204 Ind. 666: 185 N. E. 507 (1933); State *v.* Campell, 92 A. L. R. 1176 (1934); People *v.* Shakum, 251 N. Y. 107: 167 N. E. 187: 64 A. L. R. 1066 (1929).
3. *See* State *v.* Stephenson, 2 Bailey (8 S. C.) 334 (1831).
4. Palmer *v.* York Bank, 18 Me. 166; 86 Am. Dec. 710 (1841); Froock *v.* Pattee, 38 Me. 103 (1854); Reed *v.* Northfield, 13 Pick. (30 Mass.) 94, 100 (1832); Bayard *v.* Smith, 17 Wend. (13 N. Y.) 88 (1837); Foote *v.* Vanzandt, 34 Miss. 40 (1857).
5. Smith *v.* Causey, 22 Ala. 568 (1853) Le. Forest *v.* Tolman, 117 Mass. 109 (1875); Bay City & E. S. R. Co. *v.* Austin, 21 Mich. 390 (1870); Swift *v.* Applebone, 23 Mich. 252 (1871); Cohn *v.* Neeves, 40 Wis. 393 (1876).
6. Smith *v.* Townsend, 148 U.S. 490: 37 L. Ed. 533: 16 Sup. Ct. 634 (1892); Raynard *v.* Chase, 1 Burr. 2, 6: 97 Eng. Rep. 155 (1756); Wynne *v.* Middleton, 1 K. B. 126: 95 Eng. Repr. 531 (1745).
7. Hathaway *v.* Johnson, 55 N. Y. 93 (1873).
8. United States *v.* New Bedford Bridge, Fed. Cas. No. 15, 867 (1847); Myers *v.* State, 1 Conn. 502 (1816); Warrington *v.* Furbor, 8 East 242: 103 Eng. Repr. 355 (1807).

construed to advance the remedy and suppress the mischief the statute was intended to correct. Unfortunately, the classification does not separate the two rules so that the Court is usually called upon to do the impossible apply both rules at once. Obviously, in this situation the results are inconsistent. Thus, in the case of criminal statutes the provisions are only strictly construed against the accused. They are liberally construed in his favour.[1] This is rather complicated way of saying the same thing that when the individual faces the State in litigation, the Courts will zealously protect the individual against the passions of the moment. They will make certain that a fair and conclusive case is made against the individual before the force of the State is applied to restrict his liberty. This desire to insure a fair and conclusive trial is basic to our entire legal system; it does not justify, however, a restrictive interpretation of the objectives of the Legislature. No presumption should apply in this case; the Court should determine what the legislative intent was and follow it. If no clear legislative intent can be determined ,then ,and only then should a restrictive interpretation be applied. But note that this procedure, though reaching the same result in many cases as the rule of penal and remedial construction is much more accurate. If the statute is first classified as penal and strictly construed from the start, the legislative intent may be wholly abrogated.[2]

Desire to insure fair and conclusive trial is basic to all legal system.

Restrictive interpretation when to be adopted.

32. Mandatory and directory statutes.—*General features.*—The important distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while the failure to comply with the requirements of the latter either invalidates purported transactions or subjects the non-complier to affirmative legal liabilities.

This distinction grows out of the fundamental difference in the intention of the Legislature in enacting the two statutes. Although directory provisions are not intended by the Legislature to be disregarded, yet the seriousness of non-compliance is not considered so great that liability automatically attaches for failure to comply. The question of compliance remains for judicial determination. If the Legislature considers the provisions suffi- ciently important that exact compliance is required then the provision is mandatory.[3]

Fundamental difference in these two types of statutes.

Distinction between mandatory and directory statutes.—There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. The intention of the Legislature

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1. United States *v.* New Bedford Bridge, Fed. Cas. No. 15, 867 (1847); Myers *v.* State, 1 Conn. 502 (1816).
2. Note that the modern tendency is to avoid strict construction, particularly, if the result would be inconsistent with the legislative intent. Donnelley *v.* United States, 276 U. S. 505: 72 L. Ed. 676: 48 Sup. Ct. 400 (1928); United States *v.* Kenig Coal Co., 270 U. S. 512: 70 L. Ed. 709; 46 Sup. Ct. 392: 77 (1926); Wilson *v.* United States, F. (2d) 236; *certiorari* denied 295 U. S. 759 L. Ed. 1701: 55 Sup. Ct. 926 (1935); Commonwealth *v.* Tsouprakakis, 267 Mass. 496: 166 N. E. 855 (1929); People *v.* Clark, 242 N. Y. 313. 151 N. E. 631 (1926); State *v.* Firemen's Ins. Co., 164 S. C. 313, 162 S. E. 334 (1932); *Statutes and Statutory Construction*, by J. G. Sutherland, 3rd Ed., Vol. 2, at pp. 234 to 238.
3. If the statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory only. French *v.* Edwards, 13 Wall. (80 U. S.) 506: 20 L. Ed. 702 (1871); John C. Winston Co. *v.* Baughan, 11 F. Supp. 954 (1935), aff'd. 83 F. (2d) 370 (1936).

however, should be controlling and no formalistic rule of grammar or word form should stand in the way of carrying out the legislative intent.[1]

No nice distinction between the two.

On occasion, some courts have said that language affirmative in form indicates that the statute is directory only, while negative language implies a mandatory provision.[2] In particular instances this may be true, but usually the draftsman is not concerned with nice deductions of this sort. The statute should be construed according to its subject-matter and the purpose for which it was enacted. Thus, Lord Campbell said, "It was the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."[3] And Lord Penzance said, "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provisions, and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or directory."[4]

Courts's duty to get at the real intention of the Legislatures.

General features.

And again in *Upshur* v. *Baltimore City*[5] the Maryland Court said: "The whole surroundings, the purpose of the enactment, the ends to be accomplished, the consequences that may result from one meaning rather than another, and the cardinal rule that seemingly incongruous provisions shall be made to harmonize rather than conflict, must all be considered in determining whether particular words shall have a mandatory or directory effect ascribed to them."

Generally those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute, are not commonly considered mandatory. Likewise, if the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardised.

Mandatory statutes.—Although in every case the legislative intent should control in determining whether a statute or some of its provisions are mandatory there are, nevertheless, certain forms and certain types of statutes which generally are considered mandatory. Unless the context otherwise indicates the use of the word "shall" (except in its future tense) indicates a mandatory intent. And even the word "may" is interpreted as mandatory when the duty is imposed upon a public official and his act is for the benefit of a

Use of the word "shall" and "may" —Inference from.

1. Morrison *v.* State *ex rel.* Indianappolis Free Kindargarten, 181 Ind. 544: 105 N. E. 113 (1914). *In re* Petition of Douglass, 58 Barb. 174 (N. Y. 1870); State *ex rel.* Meyers *v.* Board of Education, 94 Ohio St. 367; 116 N. E. 516 (1917); Bladen *v.* Philadelphia, 60 Pa. St. 464 (1869).
2. "It would not, perhaps, be easy to lay down any general rule as to which the provisions of a statute are merely directory and when mandatory or imperative. When words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be and often have been construed to be directory; but negative words which go to the power or jurisdiction have never, that I am aware of, been brought within the category"; Balden *v.* Philadelphia, 60 Pa. St. 464 at p. 466 (1869).
3. Liverpool Bank *v.* Turner, 30 L. J. Ch. 380: 70 Eng. Repr. 703 (1860).
4. Howard *v.* Bodington, L. R. 2 P. Div. 211 (1877).
5. 94 Md 743: 51 Atl. 953 (1902).

private individual.[1] Likewise, the legislative history of the Act, the effect of a contra construction, the character of the Act itself all influence the interpretation of the Act.

Directory statutes.—Again, although the legislative intent should be controlling. some guidance may be gained from the manner of expression and the purpose of the statute in determining its character. Thus, Justice Sharswood said : "Where words are affirmative, and relate to the manner in which the power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed as directory;...."[2] Likewise, where the time, or manner of performing the action directed by that statute is not essential to the purpose of the statute, provisions in regard to time or method are generally interpreted as directory only.[3]

Well-recognized general rule.

As has been recognized again and again by the Courts, no general rule can be laid down for deciding whether any particular provision in a statute is mandatory, meaning thereby that non-observance thereof involves the consequence of invalidity or only directory, i. e. a direction the non-observance of which does not entail the consequence of invalidity, whatever other consequences may occur. But in each case the Court has to decide the legislative intent. Did the Legislature intend in making the statutory provisions that non-observance of this would entail invalidity or did it not ? to decide this Courts have to consider not only the actual words used but the scheme of the statute, the intended benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same.[4]

Things required to be done in prescribed manner or form.

Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of the non-compliance, the question whether the provision was mandatory or directory had to be adjudged in the light of intention of the Legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity : if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed in Maxwell on *Interpretation of Statutes*[5]:

Maxwell's view.

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with

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1. People *ex rel.* Reynolds *v.* Common Council of City of Buffalo, 140 N. Y. 300: 35 N. E. 485 : 37 Am. St. Rep. 563 (1893); Pierson *v.* People *ex rel.* Walter, 204 Ill. 456: 68 N. E. 383 (1903).
2. Bladen *v.* Philadelphia, 60 Pa. St. 464 at p. 466 (1869).
3. A statute specifying a time within which a public officer is to perform an official act regarding the right and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered as limitation on the power of the officer; Jhon C. Winston Co. *v.* Vaughan, 11 F. Supp. 954 (1935), aff'd. 83 F. (2d) 370 (1936) : Limestone Co. *v.* Rather, 48 Ala. 433 (1872); People *v.* Allen, 6 Wend. 486 (N. Y. 1831); Durond *v.* Gage, 76 Mich, 624: 43 N.W. 583 (1889); State *v.* St. Paul. Trust Co., 76 Minn. 423: 79 N. W. 543 (1899); Spruill *v.* Davenport, 178 N. C. 364 : 100 S. E. 527 (1919); Allen *v.* Allen, 114 Wis. 615: 91 N. W. 218 (1902) ; *Statutes and Statutory Construction*, by J. G. Sutherland, 3rd Ed., Vol. 2, pp. 214 to 217.
4. Banwarilal Agarwalla *v.* State of Bihar, A. I. R. 1961 S. C. 849 at p. 851: (1962) 1 S. C. R. 33.
5. 10th Ed. p. 376.

an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded."

Lord Campbell in *Liverpool Borough Bank* v. *Turner*[1] observed:

Lord Campbell's view.

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."[2]

Use of word "shall" if always obligatory.

The word "shall" is ordinarily mandatory, but it is sometime not so interpreted if the context or the intention otherwise demands. In *In re Lord Thurlow; Ex parte Official Receiver*,[3] Lord Esher, M. R., observed at page 729 that "the word 'shall' is not always obligatory. It may be "directory," and Lopes, L. J., at page 731 added:

> "It is clear that the word 'shall' is not always used in a mandatory sense. There is abundance of authority to the contrary in cases where it has been held to be directory only."

It was thus that the word "shall" was held to be directory only, in that case, by Coutts-Trotter, C. J., in *Manikkam Pattar* v. *Manchappa Chettiar*,[4] by Russel, J., in *Rustom* v. *H. Kennedy*;[5] *Rustom Jamshed Irani, In re*,[6] by Venkatasubba Rao, J., in *Jethaji Peraji* v. *Krishnayya*[7] and by the Judicial Committee in *Burjore and Bhawani Pershad* v. *Mst. Bhagana*.[8]

Employment of the word "shall" is not conclusive.

It is needless to add that the employment of the auxiliary verb "shall" is inconclusive and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance, sets out the consequence of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof. It would, *inter alia*, depend on whether

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1. (1860) 30 L. J. Ch. 379.
2. *See* Bhikraj Jaipuria *v.* Union of India, A. I. R. 1962 S. C. 113 at p. 119: (1962) 2 S. C. R. 880 at pp. 893, 894.
3. (1895) 1 Q. B. 724.
4. 1928 M. W. N. 441.
5. I. L. R. 26 Bom. 396; on appeal 4 Bom. L. R. 1.
6. 3 Bom. L. R. 653.
7. A. I. R. 1930 Mad. 278 at p. 280: I. L. R. 52 Mad. 648 at p. 656.
8. 11 I. A. 7 (P. C.); *see* M. S. Sainik Motors, Jodhpur *v.* State of Rajasthan, A. I. R. 1961 S. C. 1480 at p. 1485: (1962) 1 S. C. R. 517 at pp. 527, 528.

the requirement is insisted on as a protection for the safeguarding of the right of liberty of person or of property which the action might involve.[1]

Use of the word "may" is not decisive.

Similarly, it cannot be disputed that the use of the expression "may" is not decisive. Having regard to the context, the expression "may" used in a statute has varying significance. In some contexts it is purely permissive, in others, it may confer a power and make it obligatory upon the person invested with the power to exercise it as laid down.[2]

33. Powers and duties—Their relationship.—Where powers and duties are inter-connected and it is not possible to separate one from the other in such wise that powers may be delegated while duties are retained and *vice versa*, the delegation of powers takes with it the duties. The proposition hardly needs authority ; but if one were necessary, reference may be made to *Mungoni* v. *Attorney-General of Northern Rhodesia*.[3]

When a power is delegated it is intended that he would perform all the conditions precedent to the exercise of the power.[4]

Delegation of ancillary or subsidiary powers only to subsidiary authority.

It is well established by the decisions of the Rajasthan High Court as well as of the Supreme Court that the power of delegation is a constituent element of the legislative power as a whole, and in modern times when the Legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegates of their choice for carrying out the policy laid down by their enactments. It is further well settled that though subsidiary legislative authority may thus be delegated, nay many a time it becomes inevitable to do so in modern legislative mechanism, the Legislature cannot delegate its essential legislative function in any case, and it must lay down the legislative policy and principle and must afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf.[5]

34. Implied powers.—The doctrine of law that an action of a statutory corporation may be *ultra vires* its powers without being illegal and also the principle that when a statute confers an express power, a power inconsistent with that expressly given cannot be implied. It would, therefore, be sufficient to notice the decision in *Wenlock* (*Baroness*) v. *River Dee Co.*,[6] in support of the proposition that when a corporation is authorized to do an act subject to certain conditions, it must be deemed to have been prohibited to do the said act except in acccordance with the provisions of that Act which confers the authority

English decisions.

1. Collector of Monghyr *v.* Keshav Prasad Goenka, A. I. R. 1962 S. C. 1694 at p. 1701; *see* also R. B. Sugar Co. Ltd.. Rampur *v.* Rampur Municipality, A. I. R. 1965 S. C. 895.
2. Societe De Taaction, et. D'Electricite Societe Anonyone Engineering Co. Ltd., A. I. R. 1964 S. C. 558 at p. 562.
3. (1960) A. C. 336 ; *see* Hazrat Syed Shah Mastershid Ali Al Quadari *v.* Commissioner of Wakfs, West Bengal, (1961) 3 S. C. R. 759 at p. 763.
4. Daluram Pannalal Modi *v.* Assistant Commissioner of Sales-tax, Indore, (1964) 2 S. C. R. 286 at p. 290.
5. See *In re* Art. 143, Constitution of India, and Delhi Laws Act (1912), etc., A. I. R. 1951 S. C. 332 ; Vasanlal Maganbhai *v.* State of Bombay, A. I. R. 1961 S. C. 4 ; Mohan Lal *v.* Mahboob, I.L.R. (1958) 8 Raj. 248 ; Virendra Kapur *v.* University of Jodhpur, A. I. R. 1964 Raj. 161 at p. 165 (F. B.) : 1964 Raj. L. W. 328 : I. L. R. (1964) 14 Raj. 463.
6. (1885) 10 A. C. 354.

on it. Where by Act 14 and 15 Vict. a company was empowered to borrow at interest for the purposes of the concerned Acts, subject to certain conditions, it was held that the company was prohibited by the said Act from borrowing except in accordance with the provisions of that Act. Strong reliance is placed on the decision in *Attorney-General* v. *Fulham Corporation*.[1] There, in exercise of the powers conferred under the Baths and Washhouses Acts, the Metropolitan Borough of Fulham propounded a scheme in substitution of an earlier one whereunder it installed a wash-house to which persons resorted for washing their clothes bringing their own wash materials and utilized the facilities offered by the municipality on payment of the prescribed charges, Sarjant, J., held that the object of the legislation was to provide for persons who became customers facilities for doing their own washing, but the scheme provided for washing by the municipality itself and that, therefore, it was *ultra vires* the statute.

In coming to that conclusion the learned Judge, after considering an earlier decision on the subject, applied the following principle to the facts of the case before him :

> "That recognizes that in every case it is for a corporation of this kind to show that it has affirmatively an authority to do particular acts ; but that in applying that principle the rule is not to be applied too narrowly, and the corporation is entitled to do not only that which is expressly authorized but that which is reasonably incidental to or consequential upon that which is in terms authorized."

The principle so stated is unobjectionable.[2]

35. Statutory exercise of power.—The contention before the Supreme Court in the *State of Uttar Pradesh* v. *Singhara Singh*[3] was that *Nazir Ahmed's* case[4] was distinguishable because all that the Judicial Committee decided in *Nazir Admed's* case[5] was that if a Presidency Magistrate, a Magistrate of the first class or a Magistrate of the second class specially empowered in that behalf records a statement or confession under Sec. 164, Cr. P. C., but the procedure laid down in it is not complied with, he cannot give oral evidence to prove the statement or confession. That it does not follow from that decision that Magistrate of a first class not mentioned in the section, for example, a Magistrate of the second class not specially empowered by the State Government cannot give oral evidence of a confession made to him which he had purported to record under Sec. 164 of the Code of Criminal Procedure.

Principles laid down in Privy Council's case held applicable.

Answering the above contention it was held by their Lordships of the Supreme Court that it is true that the Judicial Committee did not have to deal with a case like the one in question where a Magistrate of the second class not specially empowered had purported to record a confession under Sec. 164. The principle applied in that decision would, however, equally prevent such a Magistrate from giving oral evidence of the confession. When a statute confers a power on certain judicial officers,

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1. (1921) 1 Ch. D. 440.
2. M. Pentiah *v.* Muddala Veeramallappa, A. I. R. 1961 S. C. 1107 at pp. 1113 , 1114: (1961) 2 S. C. R. 295 : A. I. R. (1961) 2 S. C. A. 249.
3. A. I. R. 1964 S. C. 358 at p. 362 : 1963 A. L. J. 1093 : I. L. R. (1964) 1 All. 340.
4. 63 I. A. 372 : A. I. R. 1936 P. C. 252 (2).
5. *Ibid.*

that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him. Now the power has been conferred by Sec. 164 on certain Magistrates of higher classes. Obviously it was not intended to confer the power on Magistrates of lower classes. If, therefore, a proper construction of Sec. 164, Cr. P. C., is that a Magistrate of a higher class is prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by Sec. 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that these safeguards were not thought necessary and could be ignored, where the confession had been made to a Magistrate of a lower class and that such a Magistrate was, therefore, free to give oral evidence of the confession made to him. The Court cannot put an interpretation on Sec. 164, Cr. P. C., which produces the anomaly that while it is not possible for higher class Magistrates to practically abrogate the safeguards created in Sec. 164, Cr. P. C., for the benefit of an accused person, it is open to a lower class Magistrate to do so. The decision in *Nazir Ahmed's* case[1] also covers the case in question and that on the principle there applied, here too oral evidence given by *D* of the confession made to him must be held inadmissible.[2]

36. Statutory rules.—"Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation."[3] The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal. It follows that where the appropriate authority takes disciplinary action under the Police Act or the rules made thereunder, it must conform to the provisions of the statute or the rules which have conferred upon it the power to take the said action. Thus if there is any violation of the said provisions, subject to the question, whether the rules are directory or mandatory, the public servant would have a right to challenge the decision of that authority.[4]

Statutory rules if can be equated with administrative directions.

37. Intention of Legislature.—"Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in enactment to speculative opinion as to what the Legislature would have meant, although there has been omission to enact it. "In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."[5] When a question arises as to the interpretation to be put on an enactment,

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1. A. I. R. 1936 P. C. 253(2) : 63 I. A. 372.
2. State of Uttar Pradesh *v.* Singhara Singh, A. I. R. 1964 S. C. 358 at pp. 362, 363 : 1963 A. L. J. 1093 : I. L. R. (1964) 1 All. 340.
3. *See* Maxwell on *Interpretation of Statutes*, 10th Ed., pp. 50-51.
4. State of Uttar Pradesh *v.* Babu Ram Upadhya, A.I.R. 1961 S.C. 751 at pp. 761-62 : (1961) 2 S. C. R. 679.
5. *Per* Lord Waston in Solomon *v.* Solomon & Co., Ltd., (1897) A. C. 22 at p. 38 : 66 L. J. Ch. 35; Bank of England *v.* Vagliano Brothers, (1891) A. C. 107 ; Narendranath Sarkar *v.* Kamlabasini, I. L. R. 23 Cal. 563 (P. C.) : 23 I. A. 18 : 6 Sar. P. C. J. 667 : 6 M. L. J. 71.

Tests to ascertain intent of Legislature.

what the Court has to do is to ascertain "the intent of them that made it",[1] and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. "The literal construction then", says Maxwell on *Interpretation of Statutes*, 10th Ed., p. 19, "has, in general, but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act, to consider, according to Lord Coke : (1) What was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy." The reference here is to *Heydon's* case.[2] These are principles well settled, and were applied by the Supreme Court in *Bengal Immunity Co. Ltd.* v. *State of Bihar*.[3] To decide the true scope of an Act, therefore, the Court must have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the Legislature, such as the history of the legislation and the purposes thereof, the mischief which it is intended to suppress and other provisions of the statute.[4]

Interpretation to carry out object of the Legislature.

It is a recognized rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its powers invalid.[5] In an earlier case[6] it was said : "It is elementary that the primary duty of a court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention." The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts

Intent of Legislature to be gathered from the very words used by it.

to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction,[7] or when the language is not clear and unambiguous and

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1. *See* Jagga Rao *v.* Emperor, A. I. R. 1946 Pat. 136 : I. L. R. 24 Pat. 690 : 1946 P. W. N. 167 : 48 Cr. L. J. 116 : 228 I. C. 384.
2. (1584) 3 Co. Rep. 7a. : 77 E. R. 637.
3. A. I. R. 1955 S. C. 661 at pp. 674, 675 : (1955) 2 S. C. R. 603.
4. Chamarbaughwalla *v.* Union of India, A. I. R. 1957 S. C. 628 at p. 631: 1957 S. C. A. 912 : 1957 S. C. J. 593: (1957) Andh. W.R. 76 : 59 Bom. L. R. 973 : 1957 M. P. C. 630: (1957) 2 M. L. J. (S. C.) 76 : 1957 M. L. J. (Cr.) 547; *see* also S. C. Parashar *v.* Vasantsen Dwarkadas, A. I. R. 1963 S. C. 1356 at p. 1371: (1963) 1 S. C. J. 671 : (1963) 49 I.T.R. (S. C.), *per* Kapur, J.
5. Messrs. New India Sugar Mills Ltd. *v.* Commissioner of Sales-tax, Bihar, A. I. R. 1963 S. C. 1207 at p. 1213 : (1963) Supp. 2 S. C. R. 459.
6. New Piece Goods Bazaar Co. Ltd. *v.* Commissioner of Income-tax, Bombay, A.I.R. 1950 S.C. 165 at p. 168: 1950 S.C.R. 553.
7. Kanai Lal Sur *v.* Paramnidhi Sadhukhan, A. I. R. 1957 S. C. 907 at pp. 910-11: 1958 S. C. J. 99.

when more than one interpretation is possible, the interpretation that appears to be most in accord with reason, convenience and justice is to be preferred.

The courts have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.[1]

If the words in a statute leave no doubt as to their meaning and import, it is the obvious duty of the Court, to give effect to them. Where the language is plain and admits of one meaning only, it has to be given effect to, even if it leads to apparent hardship.[2]

Courts have to gather the meaning and intention of the statutory provisions firstly from the plain and unambiguous words used therein. It is needless for a court to scan the wisdom or the policy of the statute, where the meaning of the words used admits of no ambiguity.[3]

The Court must look at the language employed in a statute and give effect to it.[4]

It is elementary that the primary duty of a court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention.[5]

The well-known rule of interpretation of statute that it is elementary that the primary duty of a court is to give effect to the intention of the Legislature, as expressed in the words used by it and no outside consideration can be called in aid to find that intention.[6]

The language of Acts of Parliament and more especially of modern Acts must neither be extended beyond its natural and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case.[7] This is so because the Court is not concerned with legislative policy, its only function being to construe the statute that is placed before it and not to legislate.[8] The function of a court to interpret the language of a statute, and it is not its province to scan its wisdom or policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real meaning of the words.[9] But it has been said that

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1. *In re* Daily Zemindar, A. I. R. 1947 Lah. 340 at pp. 343, 349 (F. B.) : I. L. R. (1947) Lah. 795 : 49 P. L. R. 190 : 48 Cr. L. J. 915 ; *see* Parmanand *v.* Emperor, A. I. R. 1939. Lah. 81 (F.B.) : 41 P.L.R. 26: 40 Cr.L.J. 497.
2. Kapildeoram Baijnath Prosad *v.* J. K. Das, A. I. R. 1954 Assam 170 at p. 173 : I. L. R. (1954) 6 Assam 207; K. Munishwami Chetti *v.* State of Andhra Pradash, (1957) Andh. L. T. 120; Union of India *v.* Kanhayalal Shamlal, A. I. R. 1957 Punj. 117 (F.B.) : (1957) Punj. 255: 59 Punj. L. R. 150 ; Kewaldas *v.* Phusa, 1957 Raj. L. W. 330 : 1957 Cr. L. J. 682 ; Lala Ram Babu *v.* Lala Ramesh Chandra, 1957 A. L. J. 53 : 1957 A. W. R. (H. C.) 209; Madanlal Fakirchand Dudhediaya *v.* Changdeo Sugar Mills Ltd., Bombay, I. L. R. (1958) Bom. 250 : 60 Bom. L. R. 254 : (1958) 28 Com. Cas. 312.
3. Lahore Enamelling and Stamping Co. Ltd. *v.* A. K. Bhalla, A. I. R. 1958 Punj. 341 at p. 344 : (1958) 28 Com. Cas. 216.
4. Ram Krishan *v.* State of Delhi, A. I. R. 1956 S. C. 476 at p. 478 : 1956 S.C.J. 452.
5. Ishwari Prasad, Dr. *v.* Registrar, University of Allahabad, A. I. R. 1955 All. 131 at p. 137.
6. Ramchandra Singh *v.* B. Gopi Krishna Dass, A. I. R. 1957 Pat. 260 at p. 264.
7. Mohan Lal *v.* Grain Chamber Ltd., Muzaffarnagar, A. I. R. 1959 All. 276 at p. 287 ; *see* also Himat Singh Dhan Singh *v.* Sonee Devi Singh, 56 Bom. L. R. 69 (D. B.); Kewaldas *v.* Phusa, 1957 Raj. L. W. 330; Jaggamma *v.* Satyanarayanan Murthy, (1957) 2 Andh. W. R. 520; Jaibir Singh *v.* Mulkhan Singh, 1958 A. L. J. 256 : A. I. R. 1958 All. 364 : 1958 A. W. R. (H. C.) 291; Queen *v.* Bishop of London, (1889), 4 Q. B. D. 213 ; Bank of England *v.* Vagliano Brothers, 1891 A. C. 197.
8. Jaggamma *v.* Satyanarayana Murthi, (1957) 2 Andh. W. R. 520.
9. Harish Chandra *v.* R., A. I. R. 1949 All. 15 at p. 17: 1948 A. L. J. 502 : 50 Cr. L. J. 31.

the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.[1]

Where a case falls within the plain meaning of a provision of law, its application thereto cannot be denied on any *a priori* considerations as to the supposed intentions of the Legislature.[2]

The Privy Council discarded all argument from the presumed general intention of an Act as treacherous and inconclusive[3] but a court is not precluded from examining the provisions of an Act to ascertain its intention[4] and for this purpose all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act it self.[5] The Court cannot, while applying a particular statutory provision, stretch its meaning to embrace cases, which it was not intended to govern. It cannot ignore the obvious object and intention of the Legislature, apparent from the context, and so interpret and construe it as to enlarge the scope of its applicability by importing into it, meaning by implications which do not necessarily arise.[6] The meaning and intention of a statute should be collected from the plain and unambiguous expressions used therein rather than from any notions entertained by the Court as to what is just or expedient.[7] If the language of the Legislature interpreted according to the recognised canons of construction involves a result not contemplated by the Legislature while enacting a law, the Court must yield to the result even if it should be satisfied that it was not in the contemplation of the Legislature.[8] Maxwell in his *Interpretation of Statutes*, 10th Ed., p. 82, says that "it is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness." This dictum does not afford much assistance where the Legislature has expressed its intention "with irresistible clearness".[9]

In the face of the clear and unambiguous language of the law, a court cannot put its own gloss on it to squeeze out some meaning

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1. Govind Sripad Lakhande *v.* Shrinivas Krishna Hebbali, A. I. R. 1937 Bom. 275 : 39 Bom. L. R. 548; Dattatraya Sitaram Biniwale *v.* Emperor, A. I. R. 1948 Bom. 239 at p. 243: 50 Bom. L. R. 169 : 49 Cr. L. J. 341.
2. Jairamdas *v.* Regional Transport, A.I. R. 1957 Raj. 312 at p. 316 : 1957 Raj. L. W. 447 ; *see* also Mahalaxmi Mills Ltd. *v.* Jejeebhoy ; A. I. R. 1954 Bom. 247 : I. L. R. (1954) Bom. 559 : 56 Bom. L. R. 78; Mir Fateh Muhammad Mir Pir Baksh Khan *v.* Emperor, A. I. R. 1940 Sind 97 : I. L. R. (1940) Kar. 287 : 189 I. C. 586 : 41 Cr. L. J. 750; Central Bankers *v.* N. K. Murthy, A. I. R. 1954 Mad. 699 : I. L. R. (1954) Mad. 966: (1954) 1 M. L. J. 457 : 1954 M. W. N. 149 : 67 M. L. W. 415 : 1954 Andh. L. J. (W.) H. C. 20; Subba Raju *v.* State of Andhra Pradesh, 1956 Andh. L. T. 574 : 1956 Andh. W. R. 709 : (1956) 7 S. T. C. 479 ; Official Trustee of West Bengal *v.* Commissioner of Income-tax, West Bengal, I. L. R. (1955) 2 Cal. 193 ; Palanichami Chettiar *v.* Reliance Bank of India, Ltd., (1956) 2 M. L. J. 1 : 67 M. L.W. 440 ; Lala Ram Babu *v.* Lala Ramesh Chandra, 1957 A. L. J. 63 : 1957 A. W. R. (H. C.) 201.
3. Narayanaraju *v.* Suryanarayudu, 66 I.A. 278 : I. L R. (1940) Mad. 1 : 50 L. W. 349 : (1939) 2 M. L. J. 901 : 184 I. C. 1 : 70 C. L. J. 441.
4. M. Rangia Chetti *v.* Andhra State, (1955) 1 M. L. J. 516 : 1954 M, W. N. 612.
5. Brij Bhukan Kalwar *v.* S. D. O., Siwan, A. I. R. 1955 Pat. 1 at p. 21 (S. B.) : 38 Pat. 690 : 1954 B. L. J. R. 513.
6. Haji Mohammad Khaja *v.* Akbar Ali, A.I.R. 1955 Hyd. 150 at p. 152 : I.L.R. (1955) Hyd. 362(D. B.).
7. Govind Nair Neelakantan Nair *v.* Narayani Amma, A. I. R. 1955 T. C. 235 at p. 239 (F. B.) : I. L. R. (1935) T. C. 147: 1955 Ker. L. T. 309.
8. *Per* Lord Herschell in Cox *v.* Hakes, (1890) 15 A. C. 506 : 54 J. P. 820.
9. Adhar Chandra Mondal *v.* Bistu Pada Gure, A. I. R. 1956 Cal. 497 at p. 498 (D. B.) :60 C. W. N. 351.

Probable intention of Legislature not to prevail.

which is not borne out by the language of the law.[1] In construing a statute which gives the subject a valuable protection, the probable intention of the Legislature cannot prevail against the literal, grammatical meaning of the words of the section so as to whittle down the protection that is given by taking that meaning.[2]

Golden rule of interpretation.

The golden rule of interpretation is that the Court must first try to ascertain the intention of the Legislature by giving to the very words used by it their ordinary and grammatical meaning, adding nothing and omitting nothing: and to give effect to the intention thus ascertained, if the language is unambiguous and no absurdity results.

Every part of the statute to have effect.

In the interpretation of statutes the Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of rule-making authority also.[3] Where the language used by the Legislature is not free from ambiguity, the Court can take into consideration the background of the legislation and other relevant circumstances which may help the ascertainment of the intention. If, even though free from ambiguity, the ordinary meaning of the words used gives rise to an absurdity, the Court has to endeavour to avoid the absurdity, by adding, if possible, some words and omitting some words to ascertain the Legislature's intention.[4] If, of two interpretations, one appears to be more in accord with the intention of the Legislature, or if there are other circumstances to infer the intention of the Legislature, the interpretation which is consistent with such an intention should be put upon the words of the enactment.[5] It is the well-established rule of constructiion that if two alternative constructions of a statute are possible, that constructon must be adopted which would promote the object intended by the framers of the Act and the alternative construction must be rejected which would frustrate the object.[6]

If the language is either ambiguous or capable of more than one meaning the Courts must seek aid from the other provisions of the statute itself in order to arrive at the proper meaning of the word used in that statute and that that interpretation should be accepted which would result in the properly carrying out the intention of the Legislature in enacting that statute.[7]

Where the words of a statute are clear or unambiguous, they must be given the ordinary, natural and recognized meaning attributed to them, unless they have acquired a technical or special legal meaning, or it is necessary to obviate repugnancy or inconsistency, or it is necessary to give effect to the manifest intention of the Legislature. The statute must be taken as it stands without any judicial addition or subtraction, for the Court can neither enlarge, stretch or expand a statute under the guise of interpretation nor restrict, constrict or qualify its provisions.[8] The Legislature might have intended to do a certain thing, but if the words employed do not

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1. Rambul Singh *v.* Board of Revenue for Rajasthan, A. I. R. 1957 Raj. 19 at p. 21 (D. B.) : 1957 Raj. L. W. 129.
2. B. Bansi Ram Lal *v.* Emperor, A. I. R. 1944 Lah. 51 at p. 53 (F. B.) : 46 P. L. R. 130 : 45 Cr. L. J. 377.
3. J. K. Cotton Spinning and Weaving Mills Co. Ltd. *v.* State of U.P., A.I.R. 1961 S. C. 1170 at p. 1174 : (1961) 3 S. C. R. 185.
4. Promode Ranjan Sarkar *v.* R.N. Mullick, 63 C. W. N. 6.
5. Misri Lal *v.* Bhagwati Prasad, A. I. R. 1955 All. 573 at p. 577 (D. B.) : 1955 A. L. J. 741; Official Trustee *v.* Commissioner of Income-tax, West Bengal, I. L. R. (1955) 2 Cal. 193.
6. Gouri Kumari Devi *v.* Krishna Prasad, A. I. R. 1957 Pat. 575 at p. 583: 1957 B. L. J. R. 210 : 1957 Pat. L. R. 97.
7. Mohan Lal *v.* Grain Chamber Ltd., Muzaffarnagar, A. I. R. 1959 All. 276 at p. 287.
8. Union of India *v.* Kanhaya Lal Sham Lal, A. I. R. 1957 Punj. 117 at p. 120 (F.B.): I.L.R. (1957) Punj. 255: 59 Punj. L. R. 150.

express that intention, it is not for the Courts to assume the role of legislators and give effect to the unexpressed intention. No confusion must be made, as Lord Halsbury said, between what the draftsman might have intended to do and the effect of the language which in fact was employed. If the words, which are a medium of expressing intention, fall short of declaring the intention, it is for the Legislature to amend the language of the section.[1] In the interpretation of a statute what matters is not the popular sense of the words used but the intention of the Legislature.[2]

Intent of Legislature to be gathered from other sources.

In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears most in accord with convenience, reason, justice or legal principle, should, in all cases of doubtful significance, be presumed to be the true one.[3] It is an accepted proposition of law that no reason for the enactment of a law may be imputed to the Legislature which is not supported by the face of the law itself.[4] As Lord Atkinson pointed out in his speech in *Ormond Investment Co. Ltd.* v. *Bettsoy*[5] : "An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it". Legislation founded on an erroneous assumption has not the effect of making that the law which the Legislature had erroneously assumed to be so.[6] "We are not limited to the lifeless words of the statute and the formalistic canons of construction in our search of the intention of Congress (*Parliament in our case*) and in construing a statute we may with propriety recur to the history of the time when it was passed."[7] (Brackets and italics supplied.)

It is elementary to say that the intention of the Legislature must be gathered from the language of the Act itself. It is only when there is ambiguity and when an expression used by the Legislature is capable of more than one meaning, that it is permissible to the Court to look at the preamble, even to look at the title of the Act, in order to find out what was the object with which the Legislature put the legislation upon the Statute Book or what was the mischief which the Legislature was out to remedy.[8]

Interpretation to be based on commonsense, reason and justice.

It is true that a penal statute should be strictly construed, but it is none the less true that every statute, whether penal or not, should be construed in a manner consistent with commonsense, and that if the intention of the Legislature is not apparent from the words of the statute itself, it ought to be presumed to have been such as is consistent with reason and justice.[9] One has to take the language as one finds it in the statute, although, of course, one has to look at the Act as a whole and construe it so as to give effect to what appears from the

1. Madanlal Fakirchand Dudhediya *v.* Changdeo Sugar Mills Ltd., Bombay, I. L. R. (1958) Bom. 250 : 60 Bom. L.R. 254 : : (1958) 28 Com. Cas. 312 : A. I. R. 1958 Bom. 491 at p. 495.
2. Banwarilal Chowkhani *v.* A. M. Deshmukhya, Additional Deputy Commissioner, A.I.R. 1958 Assam 155 at p. 156 : I. L. R. (1958) 10 Assam 104.
3. Aidal Singh *v.* Karan Singh, A. I. R. 1957 All. 414 at p. 432 (F. B.) : 1957 A. L. J. 389 : 1957 A. W. R. (H. C.) 397; *see* also Jagendra Chandra Roy *v.* Superintendent of the Dum Dum Special Jail, A. I. R. 1933 Cal. 280 : I. L. R. 60 Cal. 742 : 37 C. W. N. 363 : 34 Cr. L. J. 291.
4. Firm L. Hazarimal Kuthiala *v.* Income-tax officer, Ambala Cantt., A.I.R. 1957 Punj. 5 at p. 9 (D. B.) : 58 Punj. L.R. 499 : (1950) 30 I. T. R. 500, citing Mackenzie *v.* Hare, (1915) 239 U. S. 299.
5. 1928 A. C. 143 at p. 164.
6. Hariprasad Shivshankar Shukla *v.* A.D. Divelkar, A. I. R. 1957 S. C. 121 at p. 131 : 1957 S. C. A. 57 : 59 Bom. L.R. 384.
7. G. N. Railway Co. *v.* United States of America, (1942) 316 U. S. 262.
8. Commissioner of Labour *v.* Associated Cement Companies Ltd., A. I. R. 1955 Bom. 363 at p. 365.
9. Jagendra Chandra Roy *v.* Superintendent of the Dum Dum Special Jail, A. I. R. 1933 Cal. 280 at p. 282 : I.L.R. 60 Cal. 742 : 34 Cr. L. J. 291 : 37 C. W. N. 363.

language of the whole Act to be the intention of the Legislature. The Judge should not make up his mind as to the object of the Legislature and then construe the Act so as to fit in with that object.[1] Modification of the language of a statute is permissible only under exceptional circumstances such as are mentioned in the following quotation: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpreting other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning."[2] Debates in the Legislative Council, Statements of Objects and Reasons or Reports of the Select Committees are no guide to the construction of a Code,[3] much less a Penal Code, the provisions of which must be plain and unambiguous so as to afford both a clear warning and a certain proof of guilt.[4] If these observations are true about penal statutes generally, they are particularly apposite to the Penal Code, which, for its minuteness and comprehensive rigour, is perfectly Draconian; indeed, so much so that there is scarcely any act or movement, which, if judged malignantly, may not be brought within its ambit. In its attempts to be exhaustive the Code has ceased to be exact. It strove to be scientific, but it has become illogical so that its interpreters have to exercise the greatest circumspection in construing it.

Modification of language of a statute when permissible.

There is a consensus of opinion that the terms of a statute have to be given their plain and grammatical meaning. It is only when the terms of the statute are ambiguous or vague that resort may be had to Statement of Objects and Reasons attached to the Bill as introduced in the Rajya Sabha or the circumstances under which a particular word came to be deleted from the provisions of the Bill, and the fact of such deletion when the Act came to be passed for the purpose of arriving at the true intention of the Legislature.[5] Though it is not legitimate to refer to the Statements of Objects and Reasons as an aid to the construction or for ascertaining the meaning of any particular word used in the Act or statute,[6] nevertheless the Supreme Court in *State of West Bengal* v. *Subodh Gopal Bose*,[7] referred to the same "for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the

Reference to the Statement of Objects and Reasons attached to the Bill.

1. Emperor *v.* Mahomed Kassam Panwalla, A. I. R. 1942 Bom. 39 at p. 41 : 43 Cr. L. J. 321 : 198 I. C. 226: 32 Bom. L. R. 952 : I. L. R. (1942) Bom. 107.
2. Maxwell on *Interpretation of Statutes*, 9th Ed., p. 236.
3. Walji *v.* Jagannath, I. L. R. 2 Bom. 84; Gopal *v.* Sakoji, I. L. R. 18 Bom. 133; Surat Sundari *v.* Uma Prosad, I.L.R. 31 Cal. 628 at p. 640; Sri Churn, I.L.R. 20 Cal. 1017 (F.B.); Administrator-General *v.* Premlal, I. L. R. 22 Cal. 788 (P. C.); Gopal *v.* Parsotam, I.L.R. 5 All. 121 at p. 135 (F. B.); Kadir Baksh *v.* Bhawani, I. L. R. 14 All. 145.
4. *Cf.* Secretary of State *v.* Balwant, I.L.R. 28 Bom. 105; Rash Behari *v.* Bhugwan, I. L. R. 17 Cal. 209.
5. Express Newspapers (Private) Ltd. *v.* Union of India, A. I. R. 1958 S. C. 578 at p. 622 : 1958 S. C. A. 952 : 1958 S. C. R. 12.
6. *See* Aswini Kumar Ghose *v.* Arabinda Bose, A. I. R. 1952 S. C. 369 : 1953 S. C. R. 1.
7. A. I. R. 1954 S. C. 92 at pp. 104-5: 1954 S. C. R. 587.

same and the extent and urgency of evil which he sought to remedy."[1] Where construing the clear terms of urgency of evil, the Court is not required to ascertain the object of the enactment.[2]

38. Mens rea.—The law on the subject is fairly well settled. It has come under judicial scrutiny of Courts on many occasions. It is enough to restate the principles. *Mens rea* is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute, would otherwise be defeated. The nature of the *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions there of, see *Srinivas Mall* v. *King-Emperor*,[3] *Hariprasada Rao* v. *State*,[4] and *Sarjoo Prasad* v. *State of Uttar Pradesh*.[5] Most of the relevant English decisions on the subject were referred to in the judgment of the Supreme Court in *State of Maharashtra* v. *Mayor Hans George*.[6] How to disprove *mens rea* has been succinctly stated in Halsbury's *Laws of England*,[7] thus:

Mens rea as an essential ingredient of a criminal offence.

> "When the existence of particular intent or state of mind is necessary ingredient of the offence, and *prima facie* proof of the existence of the intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind, for example, by showing that he was justified in doing the act with which he is charged, or that he did it accidentally or in ignorance, or that he had an honest belief in the existence of facts which, if they had really existed, would have made the act an innocent one. The existence of reasonable grounds for a belief is evidence of the honesty of that belief."[8]

Halsbury's statement of law.

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1. Commissioner of Income-tax, Madhya Pradesh and Bhopal *v.* Smt. Sodra Devi, A.I.R. 1957 S.C. 832 at p. 839: (1957) 32 I.T.R. 615: 1958 S.C.J. 1 ; *see* also A. Thangal Kunju *v.* M. Venkatachalam Patti, A. I. R. 1956 S. C. 246: (1955) 2 S.C.R. 1196:1956 S.C.J. 323: 1956 S. C. A. 259; Rajavaja Varman *v.* K. K. Krishnan Nair, 69 M. L. W. 401 : (1956) 2 M. L. J. 46: A. I. R. 1958 Mad. 117; Radhey Sham Dani *v.* Chief Commissioner, State of Ajmer, A. I. R. 1956 Ajmer 25 (particularly when the words of the statute are quite clear and unambiguous); Brigade Commander, Meerut *v.* Ganga Prasad, A. I. R. 1956 All. 507 (D. B.) : 1956 A. L. J. 251: 1956 A. W. R. (H. C.) 253 ; Passarilal Mannoolal *v.* Mst. Chhutanbi, A. I. R. 1958 M. P. 417; 1957 M. P. L. J. 769; M. P. Mineral Industries Association, Nagpur *v.* Regional Provident Fund Commissioner, Bombay, A. I. R. 1959 Bom. 60: 1958 Nag. L. J. 490 : 60 Bom. L. R. 1420; Satrughan Sahu *v.* State of Orissa, A. I. R. 1958 Orissa 187 : I. L. R. (1958) Cut. 269 : 24 Cut. L. T. 191.
2. Sitaramamma *v.* State of Madras, I. L.R. (1957) A. P. 154.
3. A.I.R. 1947 P.C. 135: I.L.R. 26 Pat. 460.
4. A. I. R. 1951 S. C. 204 : 1951 S. C. R. 322.
5. A. I. R. 1961 S. C. 631 : (1963) 3 S. C. R. 324.
6. Criminal Appeal No. 218 of 1963 , dated 24th July, 1964: A. I. R. 1965 S. C. 722.
7. 3rd Ed., col. 10, p. 283.
8. Nathu Lal *v.* State M. P., A. I. R. 1966 S. C. 43 at pp. 44-45 : 1965 M. P. L. J. 832 : (1965) 2 Andh. L. T. 206.

Unless the statute creates an offence independently of dishonest intention, there can possibly be no conviction unless the guilty mind is proved.[1] But the criminal quality of an act cannot be discerned by intention nor can it be discovered by reference to any standard but one : Is the act in question prohibited with penal consequences ? Morality and criminality are far from co-extensive or is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by State and that those who commit them are punished.[2]

39. Mens rea in statutory offences.—A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases, the Courts have concluded that despite the absence of express language the intention of the Legislature was that *mens rea* was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of *mens rea*. Instances of this strict liability have arisen on the legislation concerning food and drugs, liquor licensing, and many other matters.[3]

40. Principles of natural justice.—In *Hari Khemu Gawali* v. *Deputy Commissioner of Police*,[4] the provisions of Sec. 57 of the Bombay Police Act, 1951, were challenged before their Lordships of the Supreme Court on various grounds *inter alia* that the provisions regarding hearing by police authorities and appeal to the Government were illusory. The police was both the prosecutor and the Judge and the remedy provided by the Act is a mere eye-wash. That the proceedings are initiated by the police and it is the police which is the Judge in the case and that therefore the provisions of the Act militate against one of the accepted principles of natural justice that the prosecutor should not also be the Judge.

Their Lordships considered the principles of natural justice and thus observed :

> "In order to appreciate this argument reference has to be made to the provisions of Sec. 59 of the Act. It provides that before action is taken under Secs. 55, 56 or 57 of the Act, the authority entrusted with the duty of passing orders under any one of those sections or any officer above the rank of an Inspector authorised by that officer or authority shall inform the person proceeded against in writing 'of the general nature of the material allegations against him' in order to give him a reasonable opportunity of explaining his conduct.

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1. Emperor *v.* Chaturbhuj Narain Chaudhary, A. I. R. 1936 Pat. 350 at p. 352: I. L. R. 15 Pat. 108 : 37 Cr. L. J. 877 : 164 I. C. 74 : 17 P. L. T. 302.
2. Proprietary Articles Trade Association *v.* Attorney-General of Canada, A. I. R. 1931 P. C. 94 at p. 99 : 32 Cr. L. J. 899 : 132 I. C. 593.
3. Halsbury's *Laws of England* (3rd Ed.), Vol. 10, pp. 273-74.
4. A. I. R. 1956 S. C. 559 at pp. 566-67: (1956) 58 B.L.R. 995: 1956 S.C.R. 505.

"If that person wishes to examine any witnesses, he has to be given an opportunity of adducing evidence. That person has the right to file a written statement and to appear in the proceeding by an advocate or attorney for the purpose of tendering his explanation and adducing evidence. If the person fails to appear or to adduce evidence, the authority or officer has the right to proceed with the enquiry and to pass such order as may appear fit and proper. It is thus clear that the criticism against the procedure laid down in Sec. 59 is not entirely correct.

Criticism against procedure not correct.

"The evidence or material on the basis of which a person may be proceeded against under any one of the Sec. 55, 56 or 57 may have been collected by police officers of the rank of an Inspector of Police or of lower rank. The proceedings may be initiated by a police officer above the rank of Inspector who has to inform the person proceeded against of the general nature of the material allegations against him. But the order of externment can be passed only by a Commissioner of Police or a District Magistrate or a Sub-Divisional Magistrate specially empowered by the State Government in that behalf.

"Hence the satisfaction is not that of the person prosecuting, if that word can at all be used in the context of those sections. The person proceeded against is not prosecuted but is put out of the harm's way. The Legislature has advisedly entrusted officers of comparatively higher rank in the police or in the magistracy with the responsible duty of examining the material and of being satisfied that such person is likely again to engage himself in the commission of an offence similar to that for which he had previously been convicted.

When proceedings do not amount to prosecutions for offences.

"The proceedings contemplated by the impugned Sec. 75, or for the matter of that, the other two Sec. 55 or 56 are not prosecutions for offences for judicial proceedings, though the officer or authority charged with the duty aforesaid has to examine the information laid before him by the police. The police force is charged with the duty not only of detection of offences and of bringing offenders to justice, but also of preventing the commission of offences by persons with previous records of conviction or with criminal propensities.

"As observed by Patanjali Sastri, C. J., in the case of *State of Madras* v. *V.G. Rao*,[1] 'externment of individuals, like preventive detention, is largely precautionary and based on suspicion'. To these observations may be added the following words in the judgment of Patanjali Sastri, C. J.,[2] with reference to the observations of Lord Finlay in *Rex.* v. *Halliday*[3] : 'The Court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based.'

When Court not an appropriate tribunal for investigation of suspicion.

"It is thus clear that in order to take preventive action under Sec. 57 of the Act the Legislature has entrusted police officers or Magistrates of the higher ranks to examine the facts and circumstances of each case brought before them by the Criminal Investigation Department. But

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1. A. I. R. 1952 S. C. 196 at p. 200.
2. *Ibid.*
3. 1917 A. C. 260 at p. 269.

the Legislature has provided certain safeguards against tyrannical or wholly unfounded order being passed by the ranks of the police or the Magistracy."

41. Special Acts, offences under.—It is a cardinal rule of interpretation that statutes, which trench upon the liberty of the subject, must be construed strictly and nothing should be deemed to fall within the terms of any statute unless the words used are wide enough to cover it.[1] Special Acts affecting the liberty of a subject have to be strictly interpreted and enforced and action under them should be taken in full conformity with the letter and the object of the Acts.[2] If there are two interpretations, the one more favourable to the liberties of the subject should be accepted and that the statute restricting the liberties of the subjects should be construed strictly. But even if the language used is ambiguous and does lend itself to two possible constructions. Even then according to the recognised canons of interpretation the Court should adopt the one which will be consistent with the smooth working of the system which the statute purports to regulate.[3] A penal enactment in a Special Act, e.g. in Sec. 236 of the Companies Act, is no bar to a prosecution under the Penal Code.[4]

42. Law of Sedition, and Press Act.—The Law of Sedition and the provisions of the Press Emergency Powers Act are in their nature penal and they must therefore be construed liberally and must not be allowed to trespass on the liberty of the individual. Every man has a right to criticise those in authority and the right of free speech is a right which must be zealously defended by the law Courts. The extent to which the Government can be criticised will depend on a number of circumstances. During a period of emergency such as war, irresponsible utterances may create far more mischief than during peace-time when greater latitude must be allowed to the subject in such matters. Also notions of liberty and the conception of what sedition is, have been changing from time to time. The modern world attaches far more importance to the right of free speech than was available to the subject a few decades ago. Consistently with this right the law must be administered as it exists. A court of law will not refuse to administer certain law even if it appears to be harsh and unjust.[5]

43. Limitations.—It is a general rule of interpretation of statutes, though subject to some qualifications, that a statute creating an offence and imposing a penalty for it should be so construed as to apply only to those persons who by virtue of residence or, in some cases, citizenship or nationality are regarded as subject to the jurisdiction of the State which has enacted the statute.[6]

44. Ignorance of law.—If a penal statute or order is required to be promulgated in a particular manner and this is not done, a charge for non-observance thereof is fully met if it is pleaded that the accused had no knowledge of the order and the plea is accepted.[7]

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1. Rehmat Aslam *v.* Crown, A. I. R. 1950 Lah. 232 at p. 234.
2. Inder Prakash *v.* Emperor, A. I. R. 1949 All. 37 at p. 42 : 1948 A. L. J. 385.
3. Tarun Sen Deka *v.* State, A. I. R. 1949 Assam 50 at p. 54 : 53 C. W. N. 422.
4. Emperor *v.* Bishan Sahai Vidyarthi, A. I. R. 1937 All. 714 at p. 716 : I. L. R. (1937) All. 799 : 1937 A. L. J. 1072 : 1937 A. W. R. 748 : 39 Cr. L. J. 38.
5. Kidar Nath *v.* Crown, A. I. R. 1949 E. P. 289 at p. 292 : 51 P. L. R. 82 (F. B.).
6. Naim Molvan *v.* Attorney-General of Palestine, A. I. R. 1948 P. C. 186 at p. 190 : 49 Cr. L. J. 671 (P. C.).
7. State *v.* Gendalal, A. I. R. 1950 M. B. 89 at p 100.

45. Ultra vires.—In determining the question of a statute being *ultra vires* it will be a wise course for the Court to decide each case which arises as best it can, without entering more largely upon the interpretation of the statute than is necessary for the particular question in hand. It is not the function of any Court to veto or directly annul a law made by non-sovereign law-making body. Upon any particular case coming before it, the defence of which depends upon the validity of a law made by such a body, the function of the Court simply is to decide for the purpose of that particular case whether the law is or is not within the powers conferred on that body and to give judgment in the case according to the Court's view of the validity of the law.[1] Whenever the powers of a Legislature, whether Central or Provincial are brought into question the correct method of approach is to look to the Constitution Act and to find out what it provides and what it prohibits. It is then necessary to examine the pith and substance of the impugned legislation critically to find out whether all that it provides falls within the powers granted by the Constitution Act and then to find out whether it transgresses any prohibition contained therein.[2] The Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, Courts cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the Instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interpretation, except so far as the express words or written Constitution give that authority: It is also stated, if the words be positive and without ambiguity, there is no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and in indefinite either for its own security or the protection of private rights.[3] Where the question that falls for decision is whether certain rules purporting to be made under the rule-making power conferred by a statute are *intra vires*, the tests to be applied are : (1) whether the rules are reasonable and convenient for carrying the Act into full effect; (2) whether the rules relate to matters arising under the provisions of the Act; (3) whether they relate to matters not in the Act otherwise provided for; and (4) whether they are consistent with the provisions of the Act. The validity of a rule is to be determined not so much by ascertaining whether it contains rights or merely regulates procedure, but by determining whether the rule is in conformity with the powers conferred under the

Correct method of approach is to look to the Constitution Act what it provides and what it prohibits.

Tests.

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1. *Per* Munir, J., in Harkrishnadas *v.* Emperor, A.I.R. 1944 Lah. 33 at p. 46 : 212 I.C. 321 : 45 Cr. L.J. 580 : 1944 F.L.J. 72 (F.B.); *see* also Emperor *v.* L. Munna Lal, A. I. R. 1942 All. 156 : I. L. R. (1942) All. 302: 43 Cr. L. J. 674 (2): 1942 A.L.J.112.
2. Om Prakash Mehra *v.* Emperor, A. I. R. 1948 Nag 199 at p. 201: 1947 N.L.J. 326 : I. L. R. (1946) Nag. 579 : 49 Cr. L. J. 230.
3. A. K. Gopalan *v.* State of Madras, A. I. R. 1950 S. C. 27 p. 42 : (1950) 2 M L. J. 42 : 1950 S. C. R. 88 : 1950. M. W. N. 495.

statute and whether it is consistent with the statute, reasonable and contrary to general principles.[1]

Use of speeches by members of Constituent Assembly.

The use made by the Court of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes.[2] The reason behind the rule was explained by the Supreme Court in *Gopalan* v. *State of Madras*[3] thus :

> "A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the Bill . Nor is it reasonable to assume that the minds of all those legislators were in accord,".

Or, as it is more tersely put in an Amercian casetn[4].

> "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other":

This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its meaning. It would seem that the rule is adopted in Canada and Australia.[5]

Construction if to confine within limits of controversy.

It is hardly necessary to emphasise that in dealing with constitutional questions Courts should be slow to embark upon an unnecessarily wide or general inquiry and should confine their decision as far as may be reasonably practicable within the narrow limits of the controversy arising between the parties in the particular case.[6]

However, in interpreting the provisions of the Constitution the Court must always bear in mind that the relevant provision "has to be read not in *vacuo* but as occurring in a single complex instrument in which one part may throw light on another."[7]

Court not to be concerned with motives of Parliament.

It may be remarked that the Court in construing and interpreting the Constitution or provisions of an enactment has to ascertain the meaning and intention of Parliament from the language used in the statute itself and it is not concerned with the motives of Parliament. To use the language of Gwyer,

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1. Perumalla Venkayya *v.* Batchu Pullayya, A. I. R. 1942 Mad. 466 at pp. 467, 468 : I. L. R. (1942) Mad. 654 : (1942) 1 M. L. J. 390 : 55 L. W. 186 : 1942 M. W. N. 230 : 206 I. C. 568.
2. *See* Administrator-General of Bengal *v.* Premlal Mallick, 22 I. A. 107 at p. 118 (P. C.).
3. 1950 S. C. R. 88.
4. United States *v.* Trans-Missouri Freight Association, (1897) 169 U.S. 290 at p. 318 (sic).
5. *See* Craies on *Statute Law*, 5th Ed., p. 122; State of Travancore-Cochin *v.* Bombay Company Ltd., Alleppey, A.I.R. 1952 S.C. 366 at pp. 368, 369; Aswini Kumarghose *v.* Arabinda Bose, A. I. R 1952 S. C. 369 at pp. 368, 369 : 1953. S. C.R. 1 : 1952 S. C. A. 683.
6. Atiabari Tea Co. Ltd. *v.* State of Assam, A. I. R. 1961 S. C. 232 at p. 251 : (1961) 1 S. C. R. 809 at p. 853.
7. *Vide* James *v.* Commonwealth of Australia (1936) A. C. 578 at p. 613 ; *see* also Atiabari Tea Co. Ltd *v.* State of Assam, A.I.R. 1961 S.C. 232 at p. 253 : (1961) 1 S. C. R. 809 at pp. 859, 860.

C. J., in *In the matter of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*, 1938[1]:

> "It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it, nor will it allow itself to be influenced by any considerations of policy, for these lie wholly outside its sphere."

Federal Court's view.

Similar observations in regard to the doctrine of colourable legislation were made by Mukherjea ,J., (as he then was) in *K. C. Gajapati Narayan Deo* v. *State of Orissa*,[2] where it was observed :

Supreme Court's observations.

> "It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the Legislature. The whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the Legislature lacks competency, the question of motives does not arise at all. Whether a statute is constitutional or not is thus always a question of power."[3]

Competency of Legislature to enact law.

46. Severability, doctrine of.—Where a statute is partly valid and partly invalid, then, provided the invalid portion can be severed from the rest, it must be upheld to the extent that it is good.[4] It is not at all correct to say that if a statute is challenged or impugned, it must necessarily be held to be *ultra vires* with regard to the whole of the statute. The Legislature may exercise its powers within its competence to the extent of a part of a statute and it may overstep those powers with regard to the rest of it. If the two parts are severable then the Court would hold that only a part of the legislation is *ultra vires* and not the whole.[5] The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires*.[6] When the valid part of a law is so clearly dependent and so inseparably connected with the invalid part that they cannot be separated without defeating the object of the statute, that part must also fail with the part which is invalid.[7]

It is however worthy of note that in *Davis* v. *Wallace*,[8] as well as *Lemke* v. *Farmers Grain Co.*,[9] the point for decision was as to what the effect was of

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1. 1939 F. C. R. 18 : A. I. R. 1939 F. C. 1.
2. A. I. R. 1953 S. C. 375 at p. 379: 1954 S.C.R. 1.
3. R. M. D. C. (Mysore) Private, Ltd. *v.* State of Mysore, A. I. R. 1962 S. C. 594 at pp. 599, 600 : (1962) 3 S. C. R. 230.
4. Kunwar Lal Singh Indraraj Singh *v.* Provincial Govt., C. P. and Berar, A. I. R. 1944 Nag. 201 at p. 219 : I. L. R. (1944) Nag. 180.
5. Kishori Shetty *v.* Emperor, A. I. R. 1950 Bom. 221 at p. 224 : 5 D. L. R. (Bom.) 39 : 52 Bom. L. R. 29 : I. L. R. (1950) Bom. 290 : 51 Cr. L. J. 1207.
6. Kishori Shetty *v.* Emperor, A. I. R. 1950 Bom. 221 at p. 224 : A. G. of Alberta *v.* A. G. of Canada, A. I. R. 1948 P. C. 194 at p. 199 : 52 C. W. N. 236
7. Ghanairam Pachhuram *v.* State, A. I. R. 1954 Nag. 265 at p. 266 (D.B.): I.L.R. (1954) Nag. 661 :1954 Nag. L. J. 534 : 1954 A. W. R. (Supp.) 80.
8. (1921) 257 U. S. 478 : 66 Law Ed. 325.
9. (1921) 258 U. S. 50 : 66 Law Ed. 458.

holding that a substantive provision in a law was unconstitutional, on another substantive law in the same statute.

Distinction in the matter of severability between criminal and civil laws.

It has sometimes been stated that a distinction should be made in the matter of severability between Criminal and Civil Laws, and that a penal statute must be construed strictly against the the State. But there are numerous decisions in which the same rules of construction have been applied in deciding a question of severability of a criminal statute as in the case of a civil law, and on principle it is difficult to see any good for the distinction. "Perhaps the most that can be said", says Sutherland, "for the distinction between criminal and civil statutes is that the penal nature of a statute may be a makeweight on the side of inseparability."[1]

English cases.—Speaking of the material drawn for the groundwork of the Code, the framers referred to the English system as "artificial", "complicated", "framed without slightest reference to India", and very "defective", and they therefore, declined to make it more than any local system, the groundwork of the Code. "Cases decided in England must, therefore, be received in India with a careful allowance for the great difference of the law in the two countries".[2] As Storey remarks: "The common law has been expounded to meet the exigencies of the times as they have arisen"[3] and has so far as traditional impediments allowed, improved the defence of society, as the weapons of its enemies have been improved, and so West, J., remarked: "The anomalies of the English law arising from its peculiar history have no place here. It is, no doubt, an *exemplum victus imitable*, but we should look rather to its general and regular development than to the abnormal growths which here and there disfigure its venerable form, and which, perhaps, most strike the eye of a careless observer. The comprehensive views of Macaulay and his colleagues are manifested in their report presenting the Penal Code: and they ought, I think, to be seconded by a corresponding method of interpretation."[4]

47. General—Vicarious liability.—The question whether the master can be held vacariously responsible for the acts of his servant should primarily be considered in the light of these statutes. No doubt, the principle of *mens rea* is accepted by criminal courts, but it is within the power of the Legislature to make a certain illegal act or omission penal and fix an absolute liability upon any person if a breach of a certain enactment is made. Those on whom the duty is cast to interpret the statutes cannot ignore the purpose and object of an enactment. If the Legislature expressly or in any implied manner has placed this vicarious responsibility on the master, the Court of law cannot question the discretion of Legislature by relying upon certain well-recognised principles.

Such general principles apply to all offences but it is within the power of the Legislature to enact that an accused may be convicted without making a probe into his mind and without finding out whether he had knowledge of the crime that was committed or an intention of committing that crime. No doubt, these principles can be given up only where the language of the statute either

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1. Vide *Statutory Construction*, Vol. 2, p. 197, para. 2418; Jia Lal *v.* The Delhi Administration, (1963) 2 S. C. R. 864 at p. 880.
2. *Per* West, J., in Moorga, I.LR. 5 Bom. 338 at pp. 362 and 363 (F. B.); Hoondraj Mithomal, 84 I. C. (S.) 58; Potaraju, I. L. R. 36 Mad. 216; Kari Singh, I. L. R. 40 Cal. 433 at p. 438; Satish Chandra *v.* Ramdayal, I. L. R. 48 Cal. 388 (S. B.); *cf.* Bejoy Singh *v.* Commissioner of Income-tax, 60 I. C. 1029 at p. 1034 (P. C.).
3. *Conflict of Laws*, Sec. 24.
4. *Per* West, J., dissentient in Moorgaa, I. L. R. 5 Bom. 338 (F. B.).

clearly expresses the fastening of the vicarious responsibility or it can safely be taken as implied. The question whether the statute has by necessary implication made the master liable depends upon several considerations.[1]

1. This Act may be called the Indian Penal Code, and shall extend to the whole of India except the State of Jammu and Kashmir.

Title and extent of operation of the Code.

SYNOPSIS

1. Analogous law.
2. Amendments.
3. Commencement of Code.
4. Offences committed before the commencement of the Code.
5. Territorial extent.
6. Territorial waters.
7. Ships.
8. Air.
9. Aircraft.
10. Ex-territorial extension.
11. Code of Criminal Procedure.
12. Principle.
13. Meaning of words.

1. Analogous law.—The Indian Penal Code was the outcome of the scheme of codification of Indian laws undertaken on behalf of the Government. Prior to this Act, the criminal law in force in the three Presidency towns of British India, namely, Bombay, Calcutta and Madras, was the English Criminal Law, the Mofussil being subject to the Anglo-Indian Regulation made by the three Legislative Councils, supplemented by other laws introduced by the Muhammedan rulers. In short, the law in force before the passing of this Act was neither uniform nor universal. It presented a strange mosaic of English, Mussalman and local laws, the first of which was, and even to this day is, wrapped in glorious uncertainties, the second of which was obviously unsuited to a civilised country and the third, the Regulations, fashioned on the local Legislatures, contained widely different provisions, many of which were in the words of the authors of the Anglo-Indian Codes, "amazingly unwise.".

2. Amendments.—Section 1 as originally enacted stood as follows :

> "This Act shall be called the Indian Penal Code and shall take effect on and from the first day of May, 1861, throughout the whole of the territories which are or may become vested in Her Majesty by the Statutes 21 and 22 Victoria, Chapter 106, entitled 'An Act for the better government of India', except the Settlement of Prince of Wales' Island, Singapore and Malacca."

Since the date of its passing, Sec. 1 underwent several amendments by Act VI of 1861, and the Repealing and Amending Act XII of 1891 and A. O. 1937, and the section has later been amended by A. O. 1948 and A. O. 1950, and Act III of 1951 as shown below, successively so as to read as above in its present form.

After the attainment of independence by India in 1947 the words "British India" were replaced by the words "the Provinces of India" by the Adaptation of Laws Order, 1948. The same Order had the effect of replacing the words "take effect throughout British India" in Sec. 1 by the words "extend to all the Provinces of India". In 1950 the Adaptation of Laws Order, 1950, came into being which replaced the words "the Provinces of India" by the words "the whole of India except Part B States". Similarly, this Order substituted the words "the whole of India except Part B States" for the words "all the Provinces of India" in Sec. 1 of the Act. Finally, by virtue of the Part B States (Laws) Act, III of 1951, in the Preamble the word "India" was substituted for the words "the whole of

1. Tharoo Lal *v.* State, (1962) 1 Cr. L.J. 126 at p. 128

India except Part B States". The same Act also substituted in Sec. 1 the words "except the State of Jammu and Kashmir" for the words "except Part B States."

3. Commencement of the Code.—Under Sec.1 as originally enacted, the Code was to take effect "on and from the 1st day of May, 1861". This date was, however, changed to the "first day of January, 1862" by Act VI of 1861, and it was on this latter date that the Code came into effect. The date was subsequently omitted by the Repealing and Amending Act XII of 1891, as no longer necessary.

The Code was however applied in the Punjab[1] and Ajmer-Merwar[2] to offences committed before that date, but apart from such extension it is not applicable to offences committed before its enactment.[3]

4. Offences committed before the commencement of the Code.—Offences committed before the 1st of January, 1862, when the Code commenced, were still punishable under the old Regulations.[4] These were many and widely divergent.[5] Such offences could be enquired into and tried by any criminal Court in India in accordance with its own procedure,[6] except in the case of persons who were entitled to be tried by the Supreme Courts of the three Presidencies (e.g. European British subjects committing grave offences) when the Supreme Court could certify the case to the Governor of the Presidency concerned who could order the trial of the person concerned by the High Court.[7]

5. Territorial extent.—Before the Indian Independence Act came into force on the 15th of August, 1947, India was divided into (1) British India, consisting of nine Governor's Provinces and five Chief Commissioner's Provinces, and (2) Native States, numbering about 651. These Native States were ruled by Sovereign Princes who were directly under the paramountcy of His Majesty, the King of England. The Central Legislature of British India had no legislative power in respect of these Native States and the British Indian Laws had no direct application to them. The Indian Independence Act ushered into existence two separate Dominions : (1) Pakistan, comprising the former British India Provinces of Sind, Baluchistan, West Punjab, the North-West Frontier Province and East Bengal, and (2) India, comprising the rest of British India. On the passing of that Act, the paramountcy of the British King over the Indian States terminated, but their relationship with the Central Authority of India was left undermined. But, due to the statesmanship of the late Sardar Vallabh Bhai Patel, the then Home Minister, by a rapid process of accession and merger the Indian States lying in the Dominion of India became integrated with the Indian Union.

Before the Constitution (Seventh Amendment) Act, 1956, India, that is, Bharat, was Union of States and the territory of India comprised (*a*) the territories of the States specified in Parts A, B and C of the First Schedule, (*b*) the territories specified in Part D of the First Schedule, and (*c*) such other territories as may be acquired.

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1. Act IV of 1872, Sec. 39.
2. Regulation III of 1877, Sec. 29.
3. 1 W. R. Cr. letters 325.
4. Mulana, I. L. R. 1 All. 599 at p. 600; *contra* in Diljour, I. L. R. 2 Cal. 225 (F. B.).
5. Bengal Reg. XVII of 1817, Reg. XII of 1818, Reg. XIV of 1827, XVIII of 1827, XXII of 1927; Mad. Reg. VI of 1811, Reg. XIII of 1916, Reg. XIV of 1832.
6. Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict, c. 96, Sec. 1, extended to India by the Admiralty Jurisdiction (India) Act, 1860, 23 & 24 Vict., c. 88, Sec. 1; Kastya, 8 B. H. C. R. Cr. 36.
7. Admiralty Jurisdiction (India) Act, Sec. 2.

The reorganisation of the States of India was effected mainly by the States Reorganisation Act, 1956 (37 of 1956) and by other Acts like the Andhra State Act, 1953, Chandernagore (Merger) Act, 1954 and the Bihar and West Bengal (Transfer of Territories) Act, 1956. The Constitution (Seventh Amendment) Act, 1956, amended the Constitution to make the territorial divisions of India harmonize with the reorganisation. After this amendment, India, that is, Bharat is a Union of States the territories of which comprise (*a*) the territories of all the States; (*b*) the Union territories specified in the First Schedule; and (*c*) such other territories as may be acquired.[1]

Under Art. 1 (3) of the Constitution of India, the territory of India shall comprise—

(*a*) the territories of the State;

(*b*) the Union territories specified in the First Schedule, and

(*c*) such other territories as may be acquired.

The territories of the States and the Union are specified in First Schedule to the Constitution which is reproduced below :

FIRST SCHEDULE OF THE CONSTITUTION

Name	Territories
1. *Andhra Pradesh* ..	The territories specified in sub-section (1) of Sec. 3 of the Andhra State Act, 1953, sub-section (1) of Sec. 3 of the States Reorganisation Act, 1956, the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, and the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1998, but excluding the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.
2. *Assam* ..	The territories which immediately bofore the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951, and the territories referred to in Part I of the First Schedule to the Constitution (Ninth Amendment) Act, 1960 and territories specified in sub-section (1) of Sec. 3 of the State of Nagaland Act, 1962. and the territories specified in Secs, 5, 6 and 7 of the North-Eastern Areas (Reorganisation) Act, 1971.
3. *Bihar* ..	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province and the territories specified in Cl. (*a*) of sub-section (1) of Sec. 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in sub-section (1) of Sec. 3

1. Article 1 of the Constitution as amended by the Constitution (Seventh Amendment) Act, 1956.

Name	Territories
	of the Bihar and West Bengal (Transfer of Territories) Act, 1956, and the territories specified in Cl. (*b*) of sub-section (1) of Sec. 3 of the first mentioned Act.
4. *Gujarat* ..	The territories referred to in sub-section (1) of Sec. 3 of the Bombay Reorganisation Act, 1960.
5. *Kerala* ..	The territories specified in sub-section (1) of Sec. 5 of the States Reorganisation Act, 1956.
6. *Madhya Pradesh* ..	The territories specified in sub-section (1) of Sec. 9 of the States Reorganisation Act, 1956.
7. *Tamil Nadu* ..	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in Sec. 4 of the States Reorganisation Act, 1956, and the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, but excluding the territories specified in sub-section (1) of Sec. 3 and sub-section (1) of Sec. 4 of the Andhra State Act, 1953, and the territories specified in Cl. (*b*) of sub-section (1) of Sec. 5, Sec. 6 and Cl. (*d*) of sub-section (1) of Sec. 7 of the States Reorganisation Act, 1956, and the territories specified iu the First Schedulc to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.
8. *Maharashtra* ..	The territories specified in sub-section (1) of Sec. 3 of the States Reorganisation Act, but excluding the territories referred to in sub-section (1) of Sec. 3 of the Bombay Reorganisation Act, 1960.
9. *Mysore* ..	The territories specified in sub-section (1) of Sec. 7 of the States Reorganisation Act, 1956 but excluding the territory specified in the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.
10. *Orissa* ..	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that province.
11. *Punjab* ..	The territories specified in Sec. 11 of the States Reorganisation Act, 1956 but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960.
12. *Rajasthan* ..	The territories specified in Sec. 10 of the States Reorganisation Act, 1956 but excluding the territories specified in the First Schedule of the Rajasthan and Madhya Pradesh (Transfer of Territories Act, 1959.

Name	Territories
13. *Uttar Pradesh* ..	The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of the Province and the territories specified in Cl. (*b*) of sub-section (1) of Sec. 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in Cl. (*a*) of sub-section (1) of Sec. 5 of that Act.
14. *West Bengal* ..	The territories which immediately before the commencement of the Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in Cl. (*c*) of Sec. 2 of the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of Sec. 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956, but excluding the territories referred to in Part III of the First Schedule to the Constitution (Ninth Amendment) Act, 1960.
15. *Jammu and Kashmir*	The territories which immediately before the commencement of the Constitution were comprised in the Indian State of Jammu and Kashmir.
16. *Nagaland* ..	The territories specified in sub-section (1) of Sec. 4 of the State of Nagaland Act, 1962.
17. *Haryana* ..	The territories specified in sub-section (1) of Sec. 3 of the Punjab Reorganisation Act, 1966.
18. Himachal Pradesh	The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioners' Provinces under the names of Himachal Pradesh and Bilaspur and the territories specified in sub-section (1) of Sec. 5 of the Punjab Reorganisation Act, 1966.
19. Manipur ..	The territory which immediately before the commencement of the Constitution was being administered as if it were a Chief Commissioner's Province under the name af Manipur.
20. Tripura ..	The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.
21. Meghalaya ..	The territories specified in Sec. 5 of the North-Eastern Areas (Reorganisation) Act, 1971.

6. Territorial waters.—In Oppenheim's *International Law*, it is said : "The territory of a State consists in the first place of the land within its boundaries. To this must be added, in the case of a State with a sea coast, certain waters which are within or adjacent to its land boundaries, and these waters are of two kinds—national and territorial :

(*i*) *National waters.*—These consist of the waters in its lakes, in its canals, in its rivers together with their mouths, in its ports and harbours, and in some of its gulfs and bays.

(*ii*) *Territorial waters.*—These consist of waters contained in a certain zone or belt, called the maritime or marginal belt, which surround a State, and that includes a part of the waters in some of its bays, gulfs, and straits.

"The territorial waters are as much inseparable appurtenances of the land as are the territorial sub-soil and atmosphere."

Messrs. Higgins and Columbus in their *International Law of the Sea* observe :

"Notwithstanding the principle of the freedom of the sea, there are certain portions of the sea along a State's coasts which are universally considered as a prolongation of its territory and over which its jurisdiction is recognised."

As to the limits of the territorial waters there has been some divergence of juristic opinion. Various tests have, from time to time, been propounded for defining them, such as the range of cannon-shot, the limit of visual horizon and so forth. This was one of the three subjects discussed in the Hague Codification Conference, 1930, which ended without any agreement being reached.

Hyde in his *International Law*[1] remarks :

"There has long been a disposition on the part of some publicists of distinction to advocate an extension of three marine miles as the limit of territorial waters."

Oppenheim in his *International Law*, after stating that the three-mile limit has the support of a large number of States observes :

"Although the three-mile limit of territorial waters must still be regarded as the rule of International Law on the subject, it is a rule which is in need of modification in relation to the various interests involved."

In the Territorial Waters Jurisdiction Act, 1878, and in subsequent legislation, Great Britain has adopted the rule that the marginal belt extended only to three miles, and that the words "territorial waters" both in the Government of India Act and in the Constitution should be construed in accordance with the views held by the British Government. It cannot, therefore, be said that the law on the subject is finally settled.[2]

How the existence of *islands* might affect the limits of territorial waters is thus stated by Higgins and Columbus :

"Where an island is therefore situate within the three-mile limit, the belt of waters round it will constitute territorial waters. This belt will be three miles wide and will be measured from low-watermark, following the sinuosities of the island. If the island is more than three, but not more than six miles from the coast, then the whole extent of waters would be territorial since it would be inadvisable to allow any small strip of high seas between the coast and the island. Where the island is more than six miles from the shore, but only slightly so, then it would appear reasonable to permit a State to claim a small extension or its marginal belt in order to establish a uniform regime of its territorial waters."

As regards *bays*, "considerations based on historical and prescriptive grounds come into play when the territorial extent of bays and gulfs are

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1. Volume I, pp. 464 and 465.
2. *See* A. M. S. S. V. M. & Co. Ramanathapuram *v.* State of Madras, A. I. R. 1954 Mad. 291 at p. 299 I. L. R. (1953) Mad. 1175 : (1963) 2 M. L. J. 587 ; *see* also Secretary of State *v.* Chelikan Rama Rao, 43 I. A. 392: I. L. R. 39 Mad. 617 (P. C.).
3. Higgins and Columbus on *International Law of the Sea*, p. 11.

examined".[3] The learned authors then state that when bays are bounded by the territory of the same State on both sides, the six-miles rule might be adopted but that—

> "this rule is subject to the exemption that on historical or prescriptive grounds, or for reasons based on the special characteristics of a bay, the territorial State is entitled to claim a wider belt of marginal waters, provided that it can show affirmatively that such a claim has been accepted expressly or tacitly by the great majority of other nations."

The rule that effective occupation of a bay by one State and acquiescence in it by the other States furnishes a ground of title was adopted by the Privy Council in *Direct United Cable Co.* v. *Anglo-American Telegraph Co.*[1]

7. Ships.—The "territory" of a State also includes its ships, whether armed or unarmed, and the private ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships while within its ports.[2] As regards public vessels, the rule is : "A public ship of war belonging to a State with which amicable relations exist is exempt from the jurisdiction of the State in whose waters she may happen to be."[3]

8. Air.—On the principle *cujus est solum, ejus est usque ad collum et ad infero* (whoever is the owner of the soil, it is his even to the firmament, and to the centre of the earth), the column of air resting on the territory of the State should be included in the territory.

9. Aircraft.—Like ships, aircraft registered in India are included in the territory of India.[4]

10. Ex-territorial extension.—The Code and its auxiliary the Criminal Procedure Code[5] had also been extended to the British Protectorates on the East Coast of Africa,[6] Zanzibar,[6] Somaliland,[7] and on the Persian Coast and adjacent island, the Settlement of Prince of Wales' Island, Singapore, Malacca, and the Nicobar Island.[9] The Penal Code further extended to the Island of Perim[10] and the Laccadive Islands,[11] and it had been adopted (with or without modifications) by the Straits Settlements and Ceylon.

11. Code of Criminal Procedure.—It is provided by the Code of Criminal Procedure that all offences under this Code shall be investigated, enquired into, tried and otherwise dealt with according to its provisions.[12] The Penal Code is thus the substantive law, of which the Procedure Code furnishes the adjective law to put in force its provisions.

12. Principle.—This Code was the outcome of the genius of Lord Macaulay, whose defence of a systematized Code has already been noticed in the Introduction.[13] The great advantage of a Code like the present is its simplicity, uniformity and certainty; its drawbacks are its rigorous inelasticity and inadptability to individual circumstances.

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1. (1877) 2 A.C. 394; *see* also Annakumaru Pillai *v.* Muthupayal, I. L. R. 27 Mad. 551.
2. R. *v.* Lewis, 7 Cox C. C. 277 : (1857) 26 L. J. M. C. 104.
3. Pitt Cobbet, Vol. 1, p. 282.
4. *See* Sec. 4 (2) *infra*.
5. Mulu, I. L. R. 1 All. 599 at p. 600 ; *contra* in Diljour, I. L. R. 2 Cal. 225 (F. B.) offences committed before enactment of the Penal Code only triable in accordance with the procedure laid down in the Code of Criminal Procedure (*see* Sec. 5, Act V of 1898).
6. Order, 1897.
7. *Ibid.*
8. Order, 1889.
9. *Ibid.*
10. Mangal, I. L. R. 10 Bom. 258.
11. Cheria, I. L. R. 13 Mad. 353.
12. Section 5, Cr. P. C. (Act V of 1898).
13. See *Penal Law* (4th Ed.), (Sec. 35).

13. Meaning of words.—"*Shall be called the Indian Penal Code*" : The word "shall" has the force of "may" a word now used to similar places in the Indian Acts.[1]

2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within [2][India.]

Punishment of offences committed within India.

SYNOPSIS

1. Amendments.
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6. "Every person."
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15. Indian princes.
16. Public servants,
17. Juridical persons.
18. "And not otherwise."
19. "Within India."
20. Men-of-war.
21. Master's liability for acts of his servants:
    (*i*) Liability under a statute.
    (*ii*) Licensee's responsibility.
    (*iii*) Absolute prohibition.
    (*iv*) Neglect in the performance of duty.
    (*v*) Public nuisance.
    (*vi*) Commission of offence under orders of superiors.

1. Amendments.—This section as originally enacted in 1860 stood as follows :

> "Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, which he shall be guilty within the said territories on or after the 1st day of May, 1861."

By Act VI of 1861, the words "on or after the 1st day of May, 1861" were altered to "the 1st day of January, 1862". Subsequently the words "the 1st day of January, 1862" were altogether deleted by Act XII of 1891, Sch. I. Later on, the words "said territories" were replaced by the words "British India" by the Government of India (Adaptation of Indian Laws) Order, 1937. In 1948, the words "the Provinces" were substituted for the words "British India" by the Adaptation of Laws Order, 1948. Again the words "the Provinces" were replaced by the words "the States" by the Adaptation of Laws Order, 1950. Finally, the words "the States" were altered to the word "India" by the Part B States (Laws) Act, III of 1951, both in the margin and in the body of the section.

2. Analogous law.—The legislative powers of the Supreme Government, at the time of the passing of this Code, were defined in 3 and 4 Will. IV, c. 85, which empowered the Governor General-in-Council "to make laws, and regulations for repealing, amending or altering any laws or regulations whatever now in force, or hereafter to be in force, in the territories of India, or any part thereof, and to make laws and regulations for all persons whether British or native, foreign or otherwise, and for all Courts of Justice whether established by Her Majesty, Charters, or otherwise, and the jurisdictions thereof, and

1. E. g Sec. 1, Code of Criminal Procedure (Act V of 1898).
2. The original words "the said territories" have successively been amended by the A. O. 1937, the A. O. 1948, the A. O. 1950 and Act 3 of 1951, Sec. 3 and Sch. to read as above.

for all places and things whatsoever, within and throughout the whole and every part of the said territories and for all servants of the said Company within the dominions of the Princes and States in alliance with the said Company, except that he shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend or affect any of the provisions of the Acts, or any provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of Her Majesty or the said Company, or any provision or Act hereafter to be passed in any wise affecting the said Company or the said territories or the inhabitants thereof; or any laws which shall in any way affect any prerogative of the Crown or the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories."

"And not otherwise." These words are thus justified by the Law Commissioner in the second report :

"And not otherwise" explained by Law Commissioner's Report.

"536. We do not advise the general repeal of the penal laws now existing in the territories for which we have recommended the enactment of the Code.

"537. We think, it will be more expedient to provide only that no man shall be tried or punished (except by a Court-Martial) for any acts which constitute any offence defined in the Code, otherwise than according to its provisions."[1]

3. Scope of section.—Sections 3 and 4 deal with offences committed beyond the territorial limits of India and Sec. 2 obviously and by contrast refers to offences committed within India. It appears clear that it is Sec. 2 that is to be looked into for determining the liability and punishment of persons who have committed offences within India. The section asserts categorically that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within India.

This recognizes the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them, being within India.[2]

In this connexion the Supreme Court made the following observations in the above case :

Exercise of criminal jurisdiction if depends on the locality of the offence and not on nationality of alleged offenders.

"No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle emerging therefrom is clear that once it is *treated* as committed within the State the fact that he is a foreigner corporally present outside at the time such commission is no objection to the exercise of municipal jurisdiction

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1. Commissioner's 2nd Report, Secs. 536-38 and (1866) 3 in H C App. XI.
2. Mobarik Ali Ahmad v. State of Bombay, A. I. R. 1957 S C. 857 at pp 869 71 : 1958 S. C. J. 111 : 1957 M. L. J (Cr.) 42 : 1957 Cr. L. J, 1346.

under the municipal law. This emphasises the principle that exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, princes, etc.).

"Learned counsel for the appellant has relied on various passages in the judgment of Cockburn, C. J., in the well-known case, *The Queen* v. *Keyn* (*Franconia's* case),[1] fourteen learned Judges participated in that case and the case appears to have been argued twice. Eight of them including Cockburn, C. J., formed the majority. Undoubtedly there are various passages in the judgment of Cockburn, C. J., which *prima facie* seem capable of being urged in favour of the appellant's contention. In particular the following passage at page 235 may be noticed :

> 'The question is not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction.'

"The learned Chief Justice, however, recognized at page 237 that there were certain American decisions to the contrary. Now the main debate in that case was whether the sea up to three-mile limit from the shore is part of British territory or whether in respect of such three-mile limit only limited and defined extra-territorial British jurisdiction extended which did not include the particular criminal jurisdiction under consideration.

Territorial Waters Jurisdiction Act, 1878.

"In respect of this question, as a result of the judgment, the Parliament had to enact the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict., c. 73) which in substance over-rule the view of the majority and of the learned Chief Justice on this point. The main principle of criminal jurisdiction, however relevant for our purpose, was enunciated in the minority judgment of Amphlett, J. A., at page 118, that 'it is the locality of the offence that determines the jurisdiction' implying by contrast that it is not the nationality of the offender.

Applicability of Indian Penal Code to foreigners.

"The question, however, that still remains for consideration is whether there is anything in the language of the sections of the Indian Penal Code relating to the general scheme of the Code which compels the construction that the various sections of the Penal Code are not intended to apply to a foreigner who has committed an offence in India while not being corporeally present therein at the time.

Sections 2 to 4 only indicate its scheme.

"For this purpose we are not concerned with such of the sections of the Penal Code, if any, which indicate the actual presence of the culprit as a necessary ingredient of the offence. Of course, for such offence a foreigner *ex hypothesi* not present at the time in India cannot be guilty. The only general sections

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1. (1876) 2 Ex. D. 63

of the Indian Penal Code which indicate its scheme in this behalf are Secs. 2, 3 and 4 and as they stand at present, they are as follows :

'2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

'3. Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any Act committed beyond India in the same manner as if such act had been committed within India.

'4. The provisions of this Code apply also to any offence committed by—

(1) any citizen of India in any place without and beyond India ;

(2) any person on any ship or aircraft registered in India wherever it may be.

'*Explanation.*—In this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code.'

General scope of Secs. 3 and 4.

"Sections 3 and 4 deal with offences committed beyond the territorial limits of India and Sec. 2 obviously and by contrast refers to offences committed within India. It appears clear that it is Sec. 2 that has to be looked to to determine the liability and punishment of persons who have committed offences within India. The section asserts categorically that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within India.

Every person—Interpretation of.

"This recognizes the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them being within India. The use of the phrase 'every person' in Sec. 2 as contrasted with the use of the phrase 'any person' in Sec. 3 as well as in Sec. 4 (2) of the Code is indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exoeption is liable for punishment under the Code.

' Learned counsel for the appellant suggests that the phrase 'within India' towards the end of Sec. 2 must be read with the phrase 'every person' at the comencement thereof. But this is far-fetched and untenable. The plain meaning of the phrase 'every person' is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed.

"This section must be understood as comprehending every person without exception barring such as may be specially exempt from criminal proceedings or punishment thereunder

by virtue of the Constitution[1] or any statutory provisions or some well-recognized principle of International Law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

"Learned counsel drew our attention to a number of sections in the Penal Code, viz. Secs. 108-A, 177, 203, 212, 216, 216-A and 236. The argument based on reference to these sections is that wherever the Legislature in framing the Penal Code wanted to legislate about anything that has reference to something done outside India it has specifically said so and that therefore it may be expected that if it was intended that the Penal Code would refer to a person actually present outside India at the time of the commission of the offence, it would have specifically said so. We are unable to accept this argument.

Criminal liability for related offence committed in India.

"These sections have reference to particular difficulties which arose with reference to what may be called, a related offence being committed in India in the context of the principal offence itself having been committed outside India—that is for instance, abetment, giving false information and harbouring within India in respect of offences outside India. Questions arose in such cases as to whether any criminal liability would arise with reference to the related offence, the principal offence itself not being punishable in India and these sections were intended to rectify the lacunae.

Applicability of the Code to a foreigner committing offence in India.

"On the other hand, a reference to Sec. 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so the legal fiction implicit in the phrase 'as if such act had been committed within India' in Sec. 3 would not have been limited to the supposition that such act had been committed within India, but would have extended also to fiction as to his physical presence at the time in India.

"In the argument before us, there has been some debate as to what exactly is the implication of the clause 'of which he shall be guilty within India' in Sec. 2 of the Code. It is unnecessary to come to any definite conclusion in respect thereto. But it is clear that it does not support the contention of the appellant's counsel. We have, therefore, no doubt that on a plain reading of Sec. 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside.

"It has next been urged before us that the exercise of jurisdiction over foreigner by municipal courts depends on the theory of temporary allegiance to the State by reason of his entry into the State, which carries with it the protection of its laws and therefore his submission thereto. Dicta from some of the decided

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1. *See* Art. 361 (2) of the Constitution

cases have been cited before us. It is unnecessary to deal with any of those cases.

"On an examination of those cases it will be found that allegiance, temporary or otherwise, has not been laid down anywhere as a limiting principle in respect of criminal jurisdiction, which is primarily concerned with questions of security of the State and of the citizens of the State.

Old law.

"A number of early cases of the High Courts in India have been brought to our notice as bearing on the question now under consideration.[1] As against them may be noticed the case in *Emperor* v. *Chhotalal Babar*.[2]

"It is unnecessary to consider them at any length. Undoubtedly some of them seem to support the view pressed before us on behalf of the appellant that criminal jurisdiction cannot extend to foreigners outside the State. These, however, are decisions rendered at a time when the competence of the Indian Legislature was considered somewhat limited, under the influence of the decisions like those in *Macleod's* case,[3] in spite of the decision in *Queen* v. *Burah*.[4]

Position of law after Indian Independence.

"However that may be, these concepts are no longer tenable after India became a Dominion by the Indian Independence Act of 1947 and after it became an independent free sovereign republic under the present Constitution. It is enough to refer to the case of *Croft* v. *Dunphy*,[5] and to the decision of Spens, C. J., in *Governor-General* v. *Raleigh Investment Co.*[6]

"In the latter case Spens, C. J., indicates that there has been considerable change in the concept of the doctrine of extra-territorial legislation, subsequent to *Macleod's* case[7] and the criticism of *Macleod's* case[8] in certain Canadian decisions and of the Privy Council itself has been adverted to.

Notions of criminal jurisprudence prevailing at the time of enactment of the Code.

"Learned counsel invited our attention to a passage from the report of the Indian Law Commissioners quoted at page 274 of Ratanlal's *Law of Crimes* (Eighteenth Edition). It is enough to say that though this quotation may be valuable as a matter of history, it cannot be a legitimate guide for the construction of the section. That construction must be based on the meaning of the words used, to be gathered according to the ordinary rules of interpretation and in consonance with the generally accepted principles of exercise of criminal jurisdiction.

"It is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the

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1. *See* Reg. *v.* Elmstone, Whitwell, 7 Bom. H.C R. (Cr.) 89 (F. B.); Reg. *v.* Pirtai, 10 Bom. H. C. R. 356; Mst. Kishen Kour *v.* The Crown. (1878) 13 Punj. Re (Cr.), p. 49 and Gokaldas Amarsee *v.* Emperor, A. I. R. 1933 Sind 333 : 35 Cr. L. J. 585.
2. I L. R. 36 Bom. 524.
3. (1891) A. C. 455.
4. (1878) 3 A. C. 889.
5. A. I. R. 1933 P. C. 16 : (1933) A. C. 156.
6. A. I. R. 1944 F C. 51 at pp. 60, 61.
7. (1891) A C. 455
8. *Ibid*.

notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between them and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.

"After giving our careful consideration to the questions raised before us, we are clearly of the opinion that even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time."

4. Principle.—The object of this section is to declare the liability of every person, irrespective of rank, nationality, caste or creed, to be punished under its provisions.[1] In this respect it makes no distinction between an Indian citizen and a foreigner, who enters India and thus by accepting the protection of Indian laws, virtually gives an assurance of his fidelity and obedience to them and submits himself to their operation. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act being no offence in his own country.[2] But, though by virtue of this section, every person, be he even King, is liable to punishment under this Code, it does not necessarily imply a power in the criminal Courts to punish all persons irrespective of rank, status, race and nationality. For, as the power of the Courts is regulated by the Code of Criminal Procedure, it follows that though a person may have committed an offence within the meaning of this Code, still it does not necessarily follow that there is a tribunal competent in this country to punish him. Thus, it had been held that there was no Court competent in this country to hear, try or determine any indictment or information against the Governor General and members of his Executive Council,[3] the Governors of Bombay and Madras and members of their Executive Councils,[4] and the Chief Justices and Judges of the Indian High Courts,[5] for any act done in their public capacity. But the offences committed by them could be enquired into, heard, tried and determined in the Court of King's Bench in London,[6] in accordance with the procedure defined in the English Statute.[7] Foreign sovereigns and ambassadors, their families, secretaries, messengers and servant fall into the same category.[8]

Power of Criminal Courts if extends to punishing all persons irrespective of rank, status, etc.

1. Mahabir Singh, I. L. R. 25 All. 31.
2. Esop, (1836) 7 C. & P. 456 ; though this is no defence, yet it is a matter to be considered in mitigation of punishment.
3. 13 Geo. III, c. 63, Secs. 15, 16; 21 Geo. III, c. 70, Sec 1 ; 37 Geo. III, c. 142, Sec. 11 ; 9 & 10 Geo. III. c. 97, Sec. 3 ; 4 Geo. IV, c. 30, Sec. 87 ; *see* Government of India Act, 1915, Sec. 110 : 5 & 6 Geo. V, c. 61 ; now *ib.* 1935 (25 & 26 Geo. V, c. 42), Sec. 306.
4. 37 Geo. III, c. 142, Sec. 11 ; 39 & 40 Geo. III, c. 39, Sec 3 ; now *see* Government of India Act, 1935, Sec. 306.
5. 13 Geo. III, c 63 Secs. 17, 39 ; 37 Geo. III, c. 142, Sec 11; now *see* Government of India Act, 1935 (25 & 26 Geo. V, c. 42), Sec. 306.
6. 11 Will. IV, c 12 ; 18 Geo. III, c. 63, Sec. 39 ; 21 Geo. III, c. 70, Secs. 4. 5.
7. 24 Geo. III, c. 25 Secs. 645—8 ; 26 Geo. III, c. 57, Secs. 1—28.
8. 7 Anne, c. 12, 35, Secs. 3, 4, 6.

It will be observed that the Code enacts that, in future, all offenders shall be punished only under the Code and not otherwise, which implies that the Code being exhaustive, all infractions of law, as laid down in this Code, shall only be punished in the manner therein laid down.[1] As Innes, J., remarked in a case : "It must be borne in mind that, up to the date of the enactment of Act XVII of 1864, the Legislature took no steps towards expressly repealing the old criminal law. Possibly, it may have been thought hazardous to repeal it wholesale and without such a careful scrutiny as would ensure the rescission of such parts alone of the old law as the Penal Code rendered superfluous : whatever may have been the reason the old law was left in the Statute Book, and, but for the provision of Sec. 2, the great body of acts and omissions punishable under the Penal Code might have been still prosecuted under the old law."[2]

5. **Meaning of the words.**—*"Every person"* clearly comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed: *"Shall be liable to punishment"* means that they run the risk of being punished, and not that they shall be punished which depends upon the powers of the Court constituted to try offenders. The "persons" here spoken of is a *natural* as distinguished from a *judicial* person, such as a corporation. *"And not otherwise"* means that no person can be punished for any act which amounts to an offence under the Code otherwise than according to the provisions thereof, except when the same act is made punishable by some local or special law.[3] Of course, the clause could not mean that if a given set of facts constitute an offence both under the Code as well as some local or special law, the offender can only be punished under the Code and not under any other law. The clause is rather intended to direct attention to the forms of punishments prescribed in the Code, which have superseded other forms which were in vague prior to its enactment. *"Act or omission"*: A mere act or omission, however immoral, is not punishable, unless it is contrary to the provisions of the Code.[4]

6. **"Every person."**—The use of the phrase "every person" in Sec. 2 as contrasted with the use of the phrase "any person" in Sec. 3 as well as Sec. 4 (2) of the Code is indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code.

The phrase "every person" is not qualified by the phrase "within India" which occurs towards the end of the section.

Whatever may be the implication of the clause "of which he shall be guilty within India" there is no doubt that on a plain reading of Sec. 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside.

This section must be understood as comprehending every person without exception barring such as may be specially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution

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1. Gokul Mandar *v.* Padmanund Singh. I. L. R. 29 Cal. 707 at p. 715 (P. C.); Kali Singh, I. L. R 40 Cal 433.
2. 3 M. H. C. (App.) XI at p. 21.
3. Commrs. 2nd Rep., Secs. 537 and 538; Kali Singh, I. L. R. 40 Cal. 433 at p. 439.
4. *See* Sec 33, I. P. C.

[*See* Art. 361 (2) of the Constitution] or any statutory provisions or some well-recognized principle of International Law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.[1]

7. Persons subject to the Code—Foreigners.—It has been already remarked in para. No. 3 above that all persons citizens of India and foreigners are equally subject to the Code. The old concept that the exercise of jurisdiction over a foreigner by municipal courts depends on the theory of temporary allegiance to the State by reason of his entry into the State, which carries with it the protection of its laws and therefore his submission thereto, is no longer tenable.

Position before and after Indian Independence.

There are a number of early cases of the High Court in India[2] which support the view that criminal jurisdiction cannot extend to foreigners outside India. These, however, are decisions rendered at a time when the competence of the Indian Legislature was considered somewhat limited under the influence of the decisions like those in *Macleod's* case[3] in spite of decision in *Queen* v. *Burah*.[4]

However that may be, these concepts are no longer tenable after India became a Dominion by the Indian Independence Act of 1947 and after it became an independent free sovereign republic under the present Constitution. It is enough to refer to the case of *Croft Dunphy*[5] and to the decision of Spens, C. J., in *Governor-General* v. *Raleigh Investment Co.*[6]

A reference to Sec. 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase "as if such act had been committed within India" in Sec. 3 would not have been limited to the supposition that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India.[7] But while it is so it must be remembered that the authority of the Code may not reach all persons.

8. Exemption—The King.—During the British rule the Code could not touch the King. As the Code was an Act of the Governor-General-in-Council its authority was necessarily limited by his legislative authority. And as the Governor-General could not legislate so as to "affect the prerogative of the Crown or the authority of the Parliament or any part of the unwritten law or Constitution of the United Kingdom" it followed that the Act did not and could not affect the established prerogative of the Crown or the common law of England. Since according to the common law the King could do no wrong and

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1. Mobarik Ali Ahmed *v.* State of Bombay, A. I. R. 1957 S. C. 857 at pp. 869 70 : 1958 S. C. J. 111 : 1957 M. L. J. (Cr.) 42 : 1957 Cr. L. J. 1346.
2. *See* Reg. *v.* Elmstone, Whitwell, 7 Bom. H. C. R (Cr.) 89 (F. B.) ; Reg. *v.* Pirtia, 10 Bom. H. C. R. 356 : Mst. Kishen Kour *v.* The Crown, (1878) 13 Punj. Re. (Cr.), p. 49 ; Gokuldas Amarsee *v.* Emperor, A. I. R. 1933 Sind 333 : 35 Cr. L. J. 585.
3. (1891) A. C. 455
4. (1878) 3 A. C. 889.
5. (1933) A. C. 156 : A. I. R. 1933 P. C. 16.
6. A. I. R. 1944 F. C. 51 at pp. 60-61.
7. Mobarik Ali Ahmed *v.* State of Bombay, A. I. R. 1957 S. C. 857 at p. 870 : 1958 S. C. J. 111 : 1957 M. L. J. (Cr.) 42 : 1957 Cr. L. J. 1346.

by the Constitution of England his authority was paramount, it followed that he could not be proceeded against under the Code both because it did not apply to him as also because there was no Court competent to try him. As Blackstone says : "No suit or action can be brought against the sovereign even in civil matters because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power ; authority to try would be vain and idle without any authority to redress; and that sentence of a court would be contemptible unless the Court had power to command the execution of it ; but who, says Finch, shall command the King ? Hence it is likewise that, by the law the person of the Sovereign is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary, for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn him to punishment. If any foreign jurisdiction has this power, as was formerely claimed by the Pope, the independence of the kingdom would be no more ; and if such power were vested in any domestic tribunal, there would soon be an end of the Constitution by destroying the free agency of one of the constituent parts of the legislative power."[1]

Blackstone's view.

9. President and Governors.—*Article* 361 *of the Indian Constitution.* —The Constitution of India exempts certain high dignitaries of the Republic from the jurisdiction of the Criminal Courts. Clauses (1), (2) and (3) of Art. 361 of the Constitution which bear on the point run as follows :

Protection of President and Governors.—(1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties :

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House or Parliament for the investigation of a charge under Art. 61 :

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor [2][* * *] of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor [2][* * *] of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President or the Governor [2][* * *] of a State shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor [2][* * *] of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor [2][* * *] as the case may

1. 1 Black., p. 242, followed *per* Brett, L. J., in The Parlement Belge, (1880) L. R. 5 P. D. 197 at p. 198 : 28 W. R. 642.

2. The words "Rajpramukh" omitted by the Constitution (Seventh Amendment) Act, 1956.

be, or left at his office stating the nature of the proceedings, the cause of action thereof, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

10. Ambassadors.—Besides the dignitaries mentioned in Art. 361 of the Indian Constitution, foreign ambassadors, their families, secretaries, messengers, and servants are not subject to any municipal law. As Blackstone observes: "The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nations, and not by any municipal constitutions. For, as they present the persons of their respective masters who are not subject to any laws but those of their own country, their actions are not subject to the control of the private law of that State wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made, but an ambassador ought to be independent of every power except that by which he is sent, and in consequence, ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends or makes an illuse of his character, he may be sent home and accused before his master, who is bound either to do justice upon him or avow himself the accomplice of his crimes."[1] Of course, in order to be exempt, an ambassador must have been sent by a foreign Government. If he is not, the mere fact that he was recognized by the Government is sufficient to clothe him with immunity.[2] It is also said that the immunity of ambassadors extends only to such crimes as a *mala prohibita*, and not to those that are *mala in se*, as murder.[3] For a direct attempt against the life of the Sovereign an ambassador or one of his suite would be directly punishable by the State.[4]

Immunity to ambassadors and his functions, etc. for certain crime.

11 Diplomatic Agent.—The immunities of ambassadors are enjoyed by all diplomatic agents of which the following classes were adopted by the Regulations passed at the Congress of Vienna :

(1) Ambassadors.

(2) Legates (who are Papal ambassadors extraordinary charged with special missions, primarily representing the Pope as head of the Church, always cardinals, and sent only to States acknowledging the spiritual supremacy of the Pope).

(3) Nuncios (who are ordinary ambassadors and residents, and are never cardinals).

(4) Envoys and Ministers Plenipotentiary.

(5) Ministers accredited to the Sovereign.

(6) *Charge d'affaires*, accredited to the Minister of Foreign Affairs.

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1. Black., pp. 253-54. The Diplomatic Privilege Act, 1708 (7 Anne, c. 21). As to when he may be attested, *see* Hall's *International Law*, pp. 168-69 (3rd Ed.); Magdalena Steam Navigation Co. *v.* Martin, (1859) 2 E. & E. 94; Musurus Bey *v.* Gadban, (1894) 2 Q. B. 352.
2. *Per* Bett, L. J., in The Parlement Belge, L. R. 5 P. D. 197 at p. 206.
3. Kerr on Blackstone, Vol. I, p. 224 (4th Ed.) *See* also Phillmore's *International Law*, Vol. II. p. 202 (3rd Ed.).
4. 2 Black., p. 254; 1 Hale P. C., Secs. 96, 99; 2 Phil. *International Law*, p. 292 (3rd Ed).

"The immunities of the diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and *attaches*, whether civil or military, forming part of the mission, but not personally accredited because of their necessity to him in his official relations and perhaps also to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. These classes of persons have thus no independent immunity. . . . It is no doubt generally held that they cannot be arrested on a criminal charge and that a civil suit cannot be brought against them without the leave of their master, and that it rests in his discretion whether he will allow them to be dealt with by the local authorities or whether he will reserve the case of action for trial in his own country."[1] That as an ambassador's house is the reputed part of his sovereign's realm, it follows that his children partake of the nationality of their father wherever they may be born.[2]

Immunities of diplomatic agents.

12. Foreign Sovereigns.—As foreign ambassadors are exempt from the Code, so are also foreign sovereigns, and for the same reason. As Marshall, C. J., observed: "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates, and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. One sovereign being in no respect amenable to another and being bound by the obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated are reserved by implication, and will be extended to him."[3] It has, therefore, been held to be in accordance with the laws of nations that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Court there.[4] Indeed, the exercise of such jurisdiction would be incompatible with the regal dignity, that is to say, with his absolute independence of every superior authority.[5]

Exemption of Foreign Sovereigns from jurisdiction of Courts.

13. Aliens.—Aliens are not privilged against the criminal law of a country. All aliens, whether friendly or hostile, may be proceeded against for any crime committed by them. But in respect of acts of war, alien enemies cannot, it would appear, be tried by Criminal Courts, though they may be dealt with by martial law.[6] Troops of a foreign sovereign nation are also said to be *de jure gentium* exempt from

1. Hall's *International Law* (3rd Ed.), pp. 174-75.
2. De Ger. *v.* Stone, (1883) 22 Ch. D. 253 at p. 254.
3. The Exchange *v.* M'Faddon, 7 Cranch 116 at p. 136; The Parlement Belge, L.R. 5 P. D. 197 at p. 205; Mighell *v.* The Sultan of Johore, (1894) 1 Q. B. 149.
4. *Per* Lord Langdale in Duke of Brunswick *v.* King of Hanover, (1844) 6 Beav. 1 at p. 50.
5. The Parlement Belge, *supra*; Secretary of State *v.* Moment, 17 C. W. N. 169.
6. Hawk., P. C. C. 17, Sec. 6. Also *see* Russel on *Crime*, 11th Ed., pp. 132, 133 and Halsbury, 3rd Ed., Vol 10, p. 293.

the municipal laws of the State through which they are accorded a passage.[1]

14. Ignorance of law by a foreigner.—Ignorance of law by a foreigner may be no legal defence but it is a matter to be taken into consideration in the matter of mitigation of punishment.[2]

15. Indian Princes.—During the British rule it had been held by their Lordships of the Privy Council that the Indian feudatory princes and princesses in political alliance with a Government were not British subjects, nor were their territories British territory.[3] They were, therefore, exempt from the operation of the Penal Code (Sec. 1). And as, being heads of their own State, they could not be tried by the tribunals of their creation, it followed, therefore, that in their case there was no judicial trial at all. Offences committed by them did not, however, as a rule, go unpunished, though the procedure adopted for their trial was not that provided by the Code of Criminal Procedure (Act V of 1898) nor was the evidence adduced sifted in the light of the Indian Evidence Act (I of 1872). The action of the Government in bringing them to justice was an act of State,[4] against which there was no appeal to judicial tribunals.[5] The usal practice adopted by Government in cases of alleged crime was to appoint a commission of enquiry which took such evidence as was forthcoming, drew up its report and submitted it to Government for "the information of its mind".[6] The Government then passed a final order, and in doing so, it was not necessary to adopt the recommendation or findings of the report. If the person affected by the order was aggrieved, his only remedy was by a memorial to the higher political authority, before whom he was entitled to no audience by counsel. He had no remedy in the Civil Court against his conviction, if unjust; for, this being an Act of State the Municipal Courts had no jurisdiction to enquire into or judge of its propriety or correctness. With the liquidation of princely order the above statement of law does not hold good. Now Sec. 197-A of the Code of Criminal Procedure provides for the prosecution of the members of the old princely order.

Indian Princes brought to justice under special procedure.

16. Public servants.—Besides this some statutes confer on public servants, immunity from prosecution for acts done by them in their official capacity.[7]

17. Juridical persons.—The "person" here spoken of, of course, means and includes a natural person, though the definition of this word as given in Sec. 11 "includes any company or association or body of persons whether incorporated or not". But inasmuch as *mens rea* is the true test of criminal responsibility, it is apprehended that there can

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1. Nazar Mohammad *v.* State, A.I.R. 1953 Punj. 227, following Esop's case, 7 Car. & P. 456 : 173 E. R. 203.
2. Nazar Mohammad *v.* State, A.I.R. 1953 Punj. 227 at p. 231.
3. Mohhmmad Yusufuddin *v.* Queen-Empress, I. L. R. 25 Cal. 20 (P. C).
4. *In re* Maharaja Madhava Singh, 6 Bom. L. R. 763 (P. C.) : I. L. R. 32 Cal. 1 : 81 I.A. 239.
5. *Per* Lord Davey, in *ib.*, p. 763.
6. *Per* Lord Davey in *In re* Maharaja Madhava Singh, 6 Bom L.R. 763 (P.C.).
7. *See* Sec. 132 of the Code of Criminal Procedure, 1898; Sec. 11 of Defence of India (Criminal Law Amendment) Act, 1915; Sec. 2 of the Indemnity Act, 1919; Sec. 28 of the Cantonment Act, 1910; Sec. 14 of the Indian Airships Act, 1911; Sec. 67 of the Income-tax Act, 1922; Sec. 97 of the Lunacy Act, 1912; Sec. 87 of the Mines Act, 1952; Sec. 117 of the Factories Act, 1948; Sec. 56 of the Electricity Act, 1910.

be no crime, unless there is the presence of criminal intention. The person here spoken of is, therefore, used in a narrower sense than in Sec. 11 where the term is defined.

But there may be cases in which necessary knowledge or intention of the servants or agents of a corporate body may be imputed to the latter.[1] Thus, where an officer of a company had made a false return under the Motor Fuel Rationing Order, 1941 (English), it was held that the knowledge and intention of the officer could be imputed to the company.[2] Similarly, it has been held that a corporation may be prosecuted and convicted under Sec. 6 of the Indian Merchandise Marks Act as it can, through its agents entertain an intention to apply a false trade description to goods.[3]

18. "And not otherwise."—The object of this clause has already been explained before in paras. 2 and 3 of this section. The Code being an exhaustive enactment of pains and penalties, all transgressions of its provisions shall only be punishable in conformity with its rules.[4] No person can claim that he shall be judged according to the English law and not by the Penal Code.[5] For example, the English Common Law doctrine of absolute privilege does not obtain in the mufassil in India.[6] The use of the words "and not otherwise" is a sufficient basis for holding that the rules of English Common Law or the legal maxims embodying certain judicial principles, even though they be very wholesome, cannot be engrafted on the Penal Code.[7] As observed by their Lordships of the Privy Council, the Criminal Law of India is prescribed by, and so far as it goes, is contained in, this Code, and the Criminal Law of India and that of England differ in sundry respects. The Code, therefore, has got to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before.[8] But in construing a codifying statute like the Indian Penal Code reference to earlier case-law on the subjects covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute is permissible where they are, or are contended to be, capable of rival constructions, though matters outside the statute cannot be looked into for the purpose of adding something to it which is admittedly not to be found within it.[9] A person who utters a libel cannot have his tongue pulled out by its root, and while "a tooth for a tooth, and an eye for an eye" may be the dictate of a religious code, it finds no place in the Code.

Indian Penal Code is an exhaustive enactment.

Non-compliance with certain social rituals or non-compliance with the rules of the so-called code of honour was in certain cases regarded as not only an offence against the society but also against the State,

Indian Penal Code is penal and moral Code.

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1. Director of Public Prosecutions *v.* Kent Sussex Contractors Ltd., (1944) 1 All E. R. 119 ; *see* Emperor *v.* Dhanraj Mills Ltd., A. I. R. 1943 Bom. 182 : 45 Bom. L. R. 300 : 44 Cr. L. J. 574.
2. Director of Public Prosecutions *v.* Kent Sussex Contractors Ltd., *supra*.
3. Emperor *v.* Dhanraj Mills Ltd., A. I. R. 1943 Bom. 182 at p. 183.
4. *Per* Lord Davey in Gokul Mandar *v.* Pudmanund Singh, I. L. R. (1902) 29 Cal. 707 at p. 715 (P. C.).
5. Kastya Ram, (1871) 8 B. H. C. R (Cr.) 63 ; Gopal Naidu, I. L. R. 46 Mad. 605 (F. B.).
6. Kari Singh, *In re*, I. L. R. 40 Cal. 433.
7. Emperor *v.* Joti Prasad Gupta, A. I. R. 1932 All. 18 at p. 22; I.L.R. 53 All. 642; Kari Singh, *In re*, I.L R. 40 Cal. 433.
8. Barendra Kumar Ghose *v.* King-Emperor, I. L. R. 52 Cal. 197 (P. C.),
9. Tiruvengada Moundali *v.* Tripurasundari, I. L. R. 49 Mad. 728 at p. 235 (F.B.): A. I. R. 1926 Mad. 906 (F. B.).

and was accordingly visited by condign punishment. All breaches of social etiquette, caste or custom are now no longer penal and they are, therefore, no longer punishable merely because they were punishable before. The Penal Code is now, therefore, not only the penal but also a moral Code, and by defining transgressions, it necessarily declares what it does not regard as culpable.

Penal Code and Special Acts.

The question has sometimes arisen whether an offender should be tried under the Penal Code or under a Special Act which also penalises the Act of the offender. Section 26 of the General Clauses Act, X of 1897, provides that "where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either, or any one of those enactments, but shall not be liable to be punished twice for the same offence". The simple rule of interpretation in such cases is that the Indian Penal Code will apply wherever its application is not expressly, or by necessary implication, excluded, and where the requirements prescribed under the Code for the offence charged are satisfied. The usual rule of law is that where there is a specific punishment provided in a Special Act it takes precedence of the general punishment under the Penal Code, and that where there is no specific punishment provided, the general law of the land, under the Penal Code, comes into operation if the requirements under any section thereof are satisfied.[1] It has been held by the Allahabad High Court that a penal enactment in a Special Act (e g. Sec. 236 of the Indian Companies Act, 1913), is no bar to a prosecution under the Penal Code.[2]

19. "Within India".—These words must be read with the words immediately preceding them, namely, "of which he shall be guilty" and not with the words "every person" which occur at the beginning of the section. Hence a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time.[3] It is to be observed that the Code only provides for the punishment of offences committed within the whole of India except the State of Jammu and Kashmir.[4] If, therefore, a person commits an offence under the Code but beyond the limits of India, he cannot be proceeded against under the Code, except so far as is otherwise provided by Secs. 3, 4 and 108-A.

Territorial water jurisdiction.

The International Law assigns to a State territorial jurisdiction in respect of acts done within a marine league or three geographical miles from the low-water mark of the shore.[5] In other words, the *territories*, strictly speaking, of a State include not only the compass of land in the

1. *In re* Mrs. B. Gervase, A. I. R. 1950 Mad. 599 at p. 600 : (1950) 1 M. L. J. 201 : 1950 M. W. N. 142.
2. Emperor *v.* Bishen Sahi Vidyarthi, A. I. R. 1937 All. 714 at p. 716: I. L. R. (1937) All. 799 : 171 I. C. 994 : 39 Cr. L. J. 38 : 1937 A. W. R. 748 : 1937 A. L. J. 1073 ; *see* also Jogi Prasad Gupta, A. I. R. 1932 All. 18 : I. L R. 53 All. 642 : 1931 A. L J. 986 : 52 Cr. L. J. 236 (case under the Salt Act).
3. Mobarik Ali Ahmed *v.* State of Bombay, A. I. R. 1957 S. C. 857 at p. 870 : 1958 S. C. J. 111 : 1957 M. L. J. (Cr.) 42 ; 1957 Cr. L. J 1346.
4. Section 1, para. No. 2, *ante*.
5. Rolet *v* R., (1866) L. R. 1 P.C. R. 198 : 16 E. R. 232 (P C) ; Q. *v.* Anderson, (1868) L.R. 1 Cr Ca. 161; Q. *v.* Musson, (1858) 8 E. & B. 900; Embleton *v.* Brown. 30 L.J.M.C. 1: 121 E R. 429 ; Kastya Ram, (1871) 8 B. H. C. R. (Cr) 63 ; *Potestaem torrock finirt ubi finitor armorum vis* [*De Dominio Maris*, Chap. II; R. *v.* Elmstone, (1870) 7 B.H.C.R. (Cr.) 89].

ordinary acceptation of the term belonging to such State, but also that portion of the sea lying along and washing its coast which is commonly called its maritime territory.[1] Over all this territory the ordinary Courts of the country are empowered to exercise jurisdiction in England with the consent of a Secretary of State, and in a colony with the consent of a Governor.[2] This jurisdiction is conferred on the State for its defence and security,[3] to prevent smuggling and poaching on its shore fisheries, and to protect its coastline. And the Courts are empowered to try offences committed within that area as it leads to the effectual trial of offenders on an near shore.[4]

Jurisdiction over person and jurisdiction over territory—Distinction.

The jurisdiction of a State over the persons within its territory may be distinguished from the jurisdiction of the State over the territory itself. As a practical matter the two forms of State authority by which the State gives effect to its right of independence, are on many points legally indistinguishable. Both the citizen body and the territorial domain of the State are essential elements of its corporate character. The membership of the former is, in general, determined by the fixed boundaries of the latter. The exercise of effective control over individual citizens is dependent upon their presence upon the territory of the State. Aliens who owe no formal allegiance to the State come under the authority of its laws by entering within its physical limit. Jurisdiction over persons, therefore, necessarily raises the collateral questions of jurisdiction over territory, whether connection between the two be close or remote. Nevertheless it is a convenient and not wholly arbitrary rule of international jurisprudence to regard the territory of the Sta.e, as something distinct from the State itself, and to treat it as if it were national property possessed by the State in much the same way that property in land is held by individual citizens within the State.[5]

Jurisdiction in land territory and over sea.

Besides the land territories of a State, it has jurisdiction over the sea within the marine league of three miles and this is so by the assent of nations.[6] In the much discussed case of *Queeu* v. *Keyn*,[7] the Captain of a German steamer the "*Franconia*" was convicted by a lower British Court of manslaughter for the death of a passenger caused by a collision that took place within three miles of the British Coast. The higher Court dismissed the case on the ground that although the exercise by the State of jurisdiction over the marine league was evidence by the practice of nations and by the statements of writers of authority, yet Parliament had not yet actually extended the criminal jurisdiction of the Courts over the territorial waters in question. It should be observed, however, that the case did not raise the question as to the

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1. *Per* Kemball, J., in Kastya Ram, 8 B.H.C R. (Cr) 63.
2. Trrritorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., c. 73), Preamble.
3. *Ibid.*
4. Admiralty Offences Act (12 & 13 Vict., c. 96), extended to India by the Admiralty Jurisdiction Act (23 & 24 Vict., c. 88).
5. *International Law* by Charles C. Fenwick, 3rd. Ed., p. 342.
6. Kastya Ram, 8 B H. C. R. (Cr.) 63.
7. L R. (1876) 2 Ex. D. 63 ; 46 L.J.M.C. 17 ; Fenwick cases, 485 ; *see* also Attorney General for British Columbia *v.* Att. Gen. for Canada, (1914) A. C. 513 ; Secretary of State for India *v.* Chelikani Rama Rao, I. L. R. 39 Mad. 617 at p. 626 (P. C.) : 18 Bom. L. R. 1007 : 43 I. A. 192.

sovereign right of Great Britain to exercise jurisdiction through its own appropriate agencies. This decision led to the enactment of the Territorial Waters Jurisdiction Act[1] in 1878. The application of this Act was subsequently extended to India. In consequence of the extension of the jurisdiction over the marginal sea, no other State may commit acts within that area which are regarded as a violation of the territorial sovereignty of the State. In the case of the *"Itala"*[2] a transport that was being used in the service of Chilean insurgents was, on the ground of alleged violation of the neutrality laws of the United States, pursued by an American cruiser into the harbour of Iquique Chile, and there captured without resistance. Chile protested the violation of its sovereignty and demanded redress. The case was referred to arbitration and an award was rendered holding the United States liable for damages. The case of a French ship *"Lotus"* may also be noticed in this connection. His ship collided on the high seas with a Turkish ship and as a result of this collision some Turkish lives were lost. The French Navigating Officer concerned was subsequently found in Turkish territory. He was arrested, tried for manslaughter and was convicted by a Turkish Court. It was held by the majority of Judges of the Permanent Court of International Justice that the Turkish Court had jurisdiction in the matter.

It is well established that the Courts of a State have jurisdiction over its ports, harbours, the mouths of its rivers and its land-locked bays.[3] The right of innocent passage granted to foreign States and the privileges granted to public ships in port and in part to private ships, are concessions which leave the general principle of sovereignty intact.[4] A foreigner who commits an act which is an offence under the Indian law in any of such places as stated above is amenable to the jurisdiction of Indian Courts and it is immaterial that the act in question did not constitute an offence in the country to which the foreigner belonged.[5]

20. Men-of-war.—As regards a ship of war on the high seas, all nations have agreed to certain limitations of their absolute territorial jurisdiction. "She constitutes a part of the military force of her nation, acts under the immediate and direct command of her sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and dignity. The implied licence under which such a vessel enters a friendly port may reasonably be construed, and, it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territories she claims the rights of hospitality."[6]

Two theories for exemption of men-of war.

In justification of the exemption of men-of-war from the jurisdiction of a foreign State in whose territorial jurisdiction they are, two theories have been propounded : One is that a public ship of a nation, for all purposes either is, or is to be treated by other nations as part of the

1. 41 & 42 Vict. c. 73.
2. South American Steamship Co. *v.* United States, Moore Arbitrations, 3067.
3. Issub Ibrahim, (1945) Pary's Oriental cases, 579.
4. *International Law* by Charles C. Fenwick, 3rd Ed., p. 376.
5. Esop. (1836) 7 C. & P. 456.
6. *Per* Marshall, C. J., in The Exchange, 7 Cranch 116, cited with approval *per* Brett, L. J., in The Parlement Belge, L. R. 5 P. D 197 at p 209; The Prince Fredrick, 2 Dod. 451 at p. 466 ; De Haber *v.* The Queen of Portugal, 17 Q. B. 171.

territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. Therefore there will be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question being done or the party to the proceedings being found a resident, in the local territory. The other theory is that a public ship in foreign waters, is not, and is not treated as territory of her own nation. The domestic Courts in accordance with the principles of International Law will accord to the ship and its crew and its contents certain immunities, some of which are well-settled, though others are in dispute. In this view, the immunities do not depend upon an objective ex-territoriality but on an implication of the demestic law. They are conditional and can in any sense be waived by the nation to which the public ship belongs.[1] Their Lordships of the Privy Council in the above-cited case have preferred the second theory. "The true view is", they proceed to observe, "that in accordance with the conventions of International Law, the territorial sovereign grants to foreign sovereign and their envoys and the public ship and the naval forces carried by such ship certain immunities. Some are well-settled ; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well-settled."

Immunity by international comity to men-of-war.

The immunity which is undoubtedly enjoyed by men-of-war has been by international comity, extended to troopships,[2] and indeed, to all ships of the State. "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty."[3] And it is on this ground that the exemption of war-ships has been justified : "The exemption of a public ship of war of a foreign Government from the jurisdiction of our Courts depends rather upon its public than upon its military character."[4] But since the immunity rests upon its public character, it cannot be claimed if it is used for trading purposes. And if it is substantially used for this purpose,[5] she cannot claim immunity ; but then, on the other hand, if she is declared by a sovereign authority by the usual means to be a ship of war or a ship of the State, the Court cannot inquire by contentious testimony whether that declaration is or is not correct. A ship may, for example, be used for carrying the mails, which is a national purpose. If, therefore, she also carries passengers and freight, she does on that account forfeit her general immunity.

As, however, the question of jurisdiction depends upon the place of commission of the offence, it may be sometimes necessary to inquire into that question, and the Courts are so far able to make an inquiry, for otherwise the Court is not in a position to say whether it has or has not jurisdiction.[6]

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1. Chung Chi Chaung *v.* Rex, 1939 A. C. 160 (P. C).
2. The Athol, (1842) 1 Wm. Rob. 374.
3. Briggs *v* The Lightships, 11 Allen 157.
4. The Thomas A. Scott 10 L T. 726 ; The Parlement Belge, L. R. 5 P. D 197 at p. 213.
5. The Parlement Belge, *supra*
6. *Ibid.* ; Motee Chand *v.* Mobendranath, 9 W. R. (Cr.) 29.

21. Master's liability for acts of his servants.—The maxim of *qui facit per alium facit per se* or the law of agency is not a doctrine of criminal law, but of civil law. The principal can be made responsible for, and found guilty of the acts of his agents, under the Criminal Code, only where it is proved that he has instigated or otherwise abetted the acts of the person who actually committed the crime.[1] Thus in cases of cattle trespassing in Government forests it has been repeatedly held that the master cannot be criminally liable for the acts of his grazier in taking his cattle into such forests, unless he permits the cattle so to graze by some overt act or by some negligent omission, as for instance entrusting large number of cattle in the vicinity of a closed forest to a youth and two children.[2] The reason for this rule is that it is a general principle of criminal law that there must be some blameworthy condition of mind or *mens rea*—there may be negligence, malice, guilty knowledge or the like. The other well-known principle is that there is no vicarious liability in criminal law; the condition of mind of the servant is not to be imputed to the master. These general principles apply to all offences though it is in the power of the Legislature, if it so pleases, to enact that a man may be convicted and punished, although there was no blameworthy condition of mind. But this exception would have to be made out convincingly from the language of the statute. The question whether the statute has by necessary implication made the master liable depends upon various considerations. Primarily it depends upon the language of the statute, the words used, then its scope, its objects, the nature of the duty laid down and whether it intends to impose a public duty binding on the master apart from any question of knowledge or a frame of his mind.[3] The condition of mind of a servant of agent is not imputed to the master or principal so as to make him criminally liable. A master is not criminally liable merely because his servant or agent commits a negligence or malicious or fraudulent act. But in cases where a particular intent or state of mind is not of the essence of the offence, of the acts or defaults of a servant or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders;[4] and a master can be criminally liable for his sevant's act if an act is expressly prohibited but not otherwise and that he cannot be so made liable if the Act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge an assent express or implied.[5] In the last cited case it was held that the petitioner was not in the motor lorry at the time of the alleged offence and had cautioned the driver not to exceed the regulation speed and to drive with due care and caution, *held*, he was not

General principles of criminal law.

Master when criminally liable for acts for his servant.

Master when criminally not liable for acts of his servant.

1. Muang Nwe *v.* Maung Po Hla, A. I. R. 1937 Rang. 117 at pp. 117-18: 38 Cr.L.J. 764.
2. Emperor *v.* Mohammad Khan, A. I. R. 1938 Nag. 365 at p. 366 : 39 Cr. L. J. 700 ; Saiyyad Rahim *v.* Emperor. A I.R. 1915 Nag 2 : 11 N. L. R. 76 : 16 Cr. L. J. 485 : 29 I. C. 325.
3. Harish Chandra Bagla *v.* Emperor A. I. R. 1945 All. 90 at p. 92 : I. L R. (1945) All 540 : 299 I. C. 87 : 46 Cr.L.J. 472 : 1945 A. L. J 151 ; *see* also Varaj Lall *v* Emperor, 51 Cal. 948 : A I R. 1924Cal 985 : 82 I. C. 137.
4. Halsbury's *Laws of England*, Vol. IX, p. 235 ; Varaj Lall *v.* Emperor, A I. R. 1924 Cal. 985 at pp. 985-86 : I. L. R. 51 Cal. 948: 25 Cr. L. J. 1209: 82 I. C. 137.
5. Varaj Lall *v.* Emperor, A.I.R. 1924 Cal. 985 at p. 986.

criminally liable for fast driving. *Varaj Lal's* case has been followed by the Bombay High Court in *Shantaram Rama Wadkar* v. *Emperor*[1] wherein it was held that where the accused is the owner of a motor car and his driver has a licence to drive within the Savantwadi State, the driver drove the car beyond the limits of that State in India and he was charged therefore under Sec. 6, Motor Vehicles Act, with driving the car beyond the limits of the licence. The word "allow" ordinarily involves permission, express or implied, and that it is used in that sense in Sec. 6 of this Act. It was held the conviction must be set aside.[2] A master cannot be held liable criminally for the act of his servant where the latter has acted for his personal benefit,[3] or beyond the scope of his employment.[4]

Exceptions to the general rule.

The following are the exceptions to the general rule that a master is not criminally liable for the acts of his servant :

(i) *Liability under a statute.*—A master would be criminally liable for the Acts of his servants where such liability is imposed by the terms of a statute. The question that invariably falls for dicision in such cases is whether upon the correct interpretation of the provisions of the statute it was the intention of the Legislature to fix criminal liability on the master for the acts of his servants done by them in contravention of the statute but within the scope of their employment.[5] In *Emperor* v. *Harjivan Valji*[6] the accused was held guilty for the act of the driver of a hired lorry who avoided the payment of octroi duty leviable under the Bombay District Municipal Act, 1901. In *Emperor* v. *Zawar Husain*,[7] the accused was a prominent member of his family, which lives either in, or around, the house raided and he is the owner, either in whole, or in part, of the house, which he had let on an agreement in writing to his brother-in-law, and the accused reserved to himself a locked apartment containing some of his goods, it was held that the inference from all these circumstances is irresistible that the box was being kept for the accused in the house of his brother-in law, in whose actual physical possession it was and he was held to be guilty. *Chundi Churn's* case[8] is an authority for the proposition that under Sec. 22 of the Indian Ports Act, 1876, it was not intended by the Legislature to make a master liable for the acts or omission of his servants without proof of connivance. But as held in *Jeevanji's* case[9] under Sec. 111 (1) of the Indian Emigration Act, 1883, the Legislature has made a master liable criminally for the acts of his servant.

Examples.

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1. A. I. R. 1932 Bom. 474 at pp. 474-75 : 33 Cr. L. J. 746 : 34 Bom. L. R. 897.
2. Halsbury's *Laws of England*, Vol. IX, p. 235 ; Varaj Lall *v.* Emperor. A. I. R. 1924 Cal. 985 : 25 C. L. J. 1209 : 82 I. C. 137 : I. L. R 51 Cal. 949.
3. Anglo-American Oil Co., Ltd. *v.* Manning, (1908) 1 K. B. 536 : 24 T.L.R 215.
4. Boyle *v.* Smith, (1906) 1 K. B. 432 : 22 T. L. R. 200 ; *see* also Uttam Chand, I. L. R. 39 Cal. 344 ; Behari Lal, I.L.R. 34 All. 146.
5. Coppen *v.* Moore (No. 2). (1898) 3 Q. B. 306 : 46 W. R. 620 ; Maung. Ba-Cho *v.* Emperor, : A. I R. 1934 Rang. 245 at p. 249: I.L.R. 12 Rang. 300 ; Emperor *v.* S. Mangal Chand, A. I. R. 1934 Rang. 182 ; *see* also A. M. Jivanji, I.L.R. 31 Bom. 611 ; Haji Sbaik, I. L. R. 32 Bom. 10
6. A. I. R. 1926 Bom. 231 at p. 236 : I.L.R. 50 Bom. 174 : 28 Bom. L. R. 115 : 27 Cr. L. J. 1335.
7. A. I. R. 1923 All. 592 at pp. 593-94 : 24 Cr. L. J. 705 : 21 A. L. J 481 : I. L. R. 45 All. 541.
8. I. L. R. 9 Cal. 849.
9. I. L. R. 31 Bom. 611.

(ii) *Licensee's responsibility*.—It is well settled in England as well as in India that a licensee is responsible for the acts of his employee done within the scope of his authority although contrary to the instructions of the licensee.[1] It is noteworthy that to fix a licensee with the liability for the acts of his servant personal knowledge on his part of such acts is not always necessary, otherwise the very object of the enactments granting licences to persons of good character would stand defeated.[2] Thus, where the manager of a licensed vendor of prohibited articles sells such articles without previously ascertaining that the buyer is legally authorized to buy such articles, the licence-holders will be held criminally liable even though the articles were not sold with his knowledge and consent.[3] The accused held a license under the Indian Explosives Act, 1884, to manufacture gunpowder. The fourth condition of that licence contains the following words :

Examples.

> "The explosive shall be manufactured in a tent or in lightly constructed building exclusively appropriated for the purpose and separated from any dwelling-house, highway, street, public thoroughfare or public place by the distance in the case of gunpowder of one hundred yards."

The effect of this positive injunction no doubt is to forbid the manufacture of gunpowder otherwise than in accordance with this condition.

The accused lived in the village and he constructed a building outside the village, which complied with this condition, and employed a woman to manufacture gunpowder there. The servant engaged another servant to assist her. On one day, the servant went to this building with her assistant and took some sulphur, some saltpetre, and some charcoal, the three ingredients necessary for the manufacture of gunpowder. She and her assistant, for reasons which are not clearly established, went with these ingredients to the house of the accused in the village, and performed part of the process of manufacture there and there was an explosion. On these facts the accused was charged with committing a breach of the condition of his licence.

If then the servant was acting within the general scope of her employment the accused is liable to be punished for her act.

It was held that what the servant did was in furtherance of her master's business, and not in pursuance of any purpose of her own. She was employed to manufacture gunpowder for her master. That was the general scope of her employment, and the breach of the condition of the licence was committed while she was so engaged.[4] In offences under the Forest Law the particular intent or state of mind of the servant is not of the essence of the offence and if the offence is found to be committed by the servant in the course of his employment for his

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1. Allen *v.* Whitehead, (1930) 1 K. B. 211 ; Massey *v.* Morris, (1894) 2 Q. B. 412 ; Mullins *v.* Collins, (1874), L. R. 9 Q. B. 292 ; Emary *v.* Nolloth, (1903) 2 K. B. 264 ; Commissioners of Police *v.* Cartmen, (1896) 1 Q. B 655 ; *see* Emperor *v.* Zawar Hussain, A. I. R. 1923 All. 592 : 24 Cr. L J. 705 : 21 A. L. J. 481 ; Maung Ba Cho. *v.* Emperor, A. I. R. 1934 Rang. 245 : I. L. R. 12 Rang. 300 ; Emperor *v.* S. Mangal Chand, A. I. R. 1934 Rang 182.
2. Massey *v.* Morris, *supra* ; Mullins *v.* Collinss *supra* ; Allen *v.* Whitehead, *supra*.
3. Tyabali *v.* Emperor, I. L. R. 24 Bom. 423 ; also Babu Lal I. L. R. 34 All. 319.
4. Emperor *v.* Mahadevappa Hanmantappa, A. I. R. 1927 Bom 209 at pp. 215, 216, 217 : 29 Bom. L. R. 135

master's benefit even without the master's knowledge or consent, the master is criminally liable.[1]

(*iii*) *Absolute prohibition.*—It should be remembered that Acts dealing with Government revenue,[2] and those relating to public heath and sanitation,[3] have to be construed in the same manner as the Licensing Acts with the result that under them a master is criminally liable for the acts of his servant or agent even though the master had no knowledge of them. But it is not in every case of absolute prohibition that no question of *mens rea* arises. It is only a limited and exceptional class of offences which can be held to be committed without a guilty mind. The Court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind.[4] In *Isak Soloman's* case it was held that there were no words in the Essential Supplies Act introducing the principle of vicarious liability, nor had the Legislature by necessary implication introduced that principle, and hence the supply of petrol to a bogus customer, without coupons as required by law, and at rates higher than the controlled rates, by the servant of an owner and licensee of a petrol pump could not render the latter liable to punishment in the absence of *mens rea*. Similarly, it was held by their Lordships of the Privy Council in *Sriniwas Mall's* case cited above that there were no grounds for saying that offences against the Defence of India Rules are within the limited and exceptional class of offences which could be held to be committed without a guilty mind ; offences within that class were usually of a comparatively minor character and it would be a surprising result of this delegated legislation, if a person who was morally innocent of blame could be held vicariouly liable for a servant's crime and so punishable with imprisionment.

Examples.

(*iv*) *Neglect in the performance of duty.*—Where a person who is under a duty to perform an act which is likely to cause dangerous results, does not perform it himself but entrusts it to some unskilful hands as a result of which there is loss of life of some injury is caused, he may be criminally liable.[5] But as pointed out in *Srish Chandra Sircar's* case,[6] if such duty is entrusted to skilful hands, the entruster cannot be held liable in the absence of express malice. In *Low's* case an engineer was in charge of a steam-engine which had been employed to draw up miners from a coal-pit. He left the engine in the charge of an ignorant boy who told the engineer that he was unable to manage it. In the absence of the engineer a man was drawn up who was killed for want of skill in the boy. It was held that the engineer was guilty of culpable homicide.

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1. Emperor *v.* S. Mangal Chand, A. I. R. 1934 Rang. 182 at p. 184 ; *see* also Maung. Ba Cho *v.* Emperor, A. I. R. 1934 Rang. 245 : I. L. R. 12 Rang. 300.
2. Attorney General *v.* Siddon, (1830) Cr. & J 220.
3. Brown *v.* Foot, 66 L. T. 649 ; Hannaford *v.* May, (1935) 2 K B. 385 ; Sew Karan *v.* Corporation of Calcutta, I. L. R. 39 Cal. 682.
4. Isak Soloman *v.* Emperor, A. I. R. 1948 Bom. 364 at p. 366 : 49 Cr. L. J. 551 : 50 Bom L. R 190: 2 D. L. R. 577 ; Srinivas Mall *v* Emperor, A. I. R. 1947 P. C. 135 : 49 Bom. L. R. 688 : (1947) 2 M. L. J. 528 : 1947 M. W. N. 589 : 1947 A. L. J. 497 : 60 L. W. 634 : 51 C.W.N. 900 (P C).
5. Lowe, *In re*, (1850) 3 C. & K. 123 : 4 Cox. C. C. 449.
6. A. I. R. 1919 All. 385 at p. 386 : 20 Cr. L. J. 299 : 17 A. L. J. 343.

(v) *Public Nuisance.*—*See* Sec. 273, I. P. C., and also Sec. 2, para. No 21 under the heading "Master's Liability for acts of Servants".

(vi) *Commission of offence under orders of superiors.*—It is one of the fundamental principles of law that a man is answerable for his acts. He cannot plead the unlawful order of his official superior in defence.[1]

Punishment of offences committed beyond but which by law may be tried within India.

3. Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

SYNOPSIS

1. Amendment.
2. Analogous law.
3. Historical retrospect.
4. Principle.
5. Meaning of words.
6. Legislative powers of Indian Government and extra-territorial operation of Indian laws.
7. Extra-territorial operation.
8. Foreigner committed offence in India but not corporeally present in India, if can be punished.
9. Presumption against extra-territorial operation.

1. Amendment.—Previously the section stood as follows:

"Any person liable, by law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act has been committed within the said territories."

Punishment of offences committed beyond but which by law may be tried within the territories.

The words "Indian law" were substituted for the words "law passed by the Governor-General of India in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937. The words "the limits of the said territories" occurring after the words "offences committed beyond" were omitted and were replaced by the words "British India" by Order of 1937 mentioned above. Similarly, by the same Order the words "the said territories" after the words "act committed beyond" were substituted by the words "British India". Again by the Adaptation of Laws Order, 1948, the words "British India" were replaced by the words "the Provinces". The Adaptation of Laws Order, 1950, changed the words "the Provinces" into the words "the States" both in the margin and the body of the section. Finally, the words "the States" were replaced by "India" both in the margin and body of the section by Act III of 1951.

2. Analogous law.—"Any Indian law" referred to in the section would now be Sec. 188 of the Code of Criminal Procedure (Act V of 1898). Now, as the definition of offence in the Code of Criminal Procedure is "any act or omission made punishable by any law for the time being in force," including "any act in respect of which a complaint may be made under Sec. 20 of the Cattle Trespass Act, 1871 (Act

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1. Haji Mahmood Khan Doulat Khan *v.* Emperor, A.I R. 1942 Sind 106 at p. 109: I. L. R. (1942) Kar. 94 : 43 Cr L. J. 888 : 202 I. C. 681.

I of 1871)," it follows that an Indian citizen may be prosecuted in India for anything done in foreign lands, if it is an offence under any Indian enactment though it may be an act of virtue in the place of commission. The clause as to sanction is his only safeguard, but it is a safeguard against which he has evidently no appeal. If, for instance, an Indian citizen vindicates himself by fighting a duel in France, his conduct would be gentlemanly in the place of his exile, but it will be a crime in India, for which the tribunals of his country may hang him. So again, if an Indian citizen commits adultery in England, he commits no crime, for adultery is no crime there, but he may be prosecuted for his act in India, because adultery is a crime in this country.

3. Historical retrospect.—The course of legislation on the subject is well worth recapitulation here. Leaving alone, for the present the English statute on the subject, the first Act dealing with offences committed beyond British India was the Offenders in Foreign States Act, 1849[1] (Act I of 1849) which purported to consolidate and supersede the several Regulations,[2] which more or less, provided for the punishment of offences committed beyond British India. This Act made "all subjects of the British Government, and also all persons in the civil or military service of the said Government, while actually in such service, and for six months afterwards, and also all persons who shall have dwelt for six months within the British territories under the Government of the East India Company" amenable to Indian law for all offences committed by them within the territorty of any foreign Prince or State (Sec. 2, Act I of 1849). Section 1 of this Act which had repealed all the previous Regulations on the subject was itself, however, repealed by the Repealing Act of 1870 (Act XIV of 1870). Two years later the Foreign Jurisdiction and Extradition Act (Act XI of 1872), was passed which again made provision for the punishment of offences committed beyond the territorial jurisdiction of the Government. But the Preamble to the Act referred only to the "Native State", in which term, however, such a place as Cyprus was held to be included.[3] This Act was superseded by a similar Act passed in 1879 (Act XXI of 1879), in which Chapter III (Secs. 9 and 10) dealt with the apprehension and trial of such offenders. These two Acts made all "British subjects" equally liable to prosecution for offences committed by them beyond British India. In 1882, the Code of Criminal Procedure (Act X of 1882), was passed and the two sections in the Foreign Jurisdiction Act dealing with foreign offences were transposed to this Code, where they became its Secs. 188 and 189, and the corresponding chapter in the former Act was by the same piece of legislation repealed. These provisions of the Code have been reproduced in the Consolidating Act of 1898 (Act V of 1898), and in consonance with the alteration thus effected the Foreign Jurisdiction and Extradition Act of 1879 was rechristened the Extradition Act, and it was again revised and re-enacted in 1903 (Act XI of 1903).[4]

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1. Section 4 (1), Cl. (O).
2. Regulation V of 1809; Reg. VIII of 1813; Reg. I of 1822, Sec. 1; Reg. IX of 1882; Reg. VI I of 1829 of the Bengal Code; Reg. II of 1829; Reg. XII of 1832 of the Madras Code; Reg. II of 1827, Sec. 4 of the Bombay Code.
3. Gurmukh Singn, I. L. R. 2 All. 218 (F. B.).
4. *See* the changes since brought about by Repealing Act of 1914 and the Amending Act of 1930.

So far, then, as regards Indian enactments, the only provisions now in force is that embodied in the Code of Criminal Procedure, and it is Sec. 188, which is produced below :

Present position of Indian enactments.

"*Section* 181.—When an offence is committed by—

(*a*) any citizen of India in any place without or beyond India; or (*b*) any person on any ship or aircraft registered in India, wherever it may be ;

Liability for offences committed out of India.

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found :

Provided that notwithstanding anything in one of the preceding sections of this chapter no charge as to any such offence shall be inquired into in India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in India ; and where there is no Political Agent, the sanction of the State Government shall be required :

Political Agent to certify fitness of inquiry into charge.

Provided also that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such persons for the same offence if such offence has been committed in India shall be a bar to further proceedings against him under the Indian Extradition Act, 1903, in respect of the same offence in any territory beyond the limits of India."

4. **Principle.**—This section merely provides for the uniformity of trial of offenders committed by an Indian citizen beyond the limits of India, for which he is liable to be tried in India, in accordance with any Indian law. The section does not authorize such a trial, nor does it specify the offences that are so triable. It merely enacts that, if a person is to be tried for such offences at all, it shall be under the Code. The question whether it is within the competency of a State to punish offenders for offences not committed within its territorial jurisdiction is one upon which there is some difference of opinion. On the one hand, it is asserted that since, subject to treaty or express compact, the judicial power of every State is co-extensive with its legislative power,[1] no State can punish acts committed beyond its territorial jurisdiction. So Wheaton says : "By the common law of England which has been adopted in this respect by the United States, criminal offences are considered as altogether local, and are justificable only by the Courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence

Difference of opinion.

1. Wheaton's *International Law*, Secs. 111, 113 ; Hardcastle on *Statute Law* (2nd Ed.), Chap. VII, *per* Russel, C. J., in R. *v.* Jameson, (1896) 2 K. B. 425 at p. 430; 12 T.L.R. 551. In 1839 the question was referred to eminent jurists by the Government of India, and they recorded it as their opinion that the Legislative Council of India had power to legislate for offences committed on the high seas, but later on a difference view was given by the Law Advisers of the Crown., *See* Forsyth's *Cases and Opinions*, pp. 17, 32 : Ilbert's *Government of India*, pp. 442 and 443.

of Great Britain and the United States, and even in these two countries, it has been frequently disregarded by the positive legislation of each in the enactment of statutes, under which offences committed by a subject or citizen within the territorial limit of a foreign State, have been made punishable in the Courts of that country to which the person owes allegiance, and whose law he is bound to obey. There is some contrariety in the opinions of different public jurists on the question; but the preponderance of their authority is greatly in favour of the jurisdiction of the Court of the offender's country."[1]

5. Meaning of words.—"*By any law*", that is, any other law, such law have been set out before. *See* para. No. 2 above. The words "*For any act*" would include also illegal omissions.[2]

6. Legislative powers of Indian Government and extra-territorial operation of Indian laws.—At the time of the enactment of the Code, the Indian Legislature possessed the powers conferred on it by the Government of India Act, 1833,[3] which empowered it to make laws for all territories of the East India Company "and for all places and things whatsoever within and throughout the whole and every part of the said territories, and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company".[4] The question whether this section enabled the Indian Legislature to legislate for the trial and punishment of offences committed beyond its territories was referred by it to four eminent English jurists, who recorded their opinion in the affirmative,[5] but they refrained from mentioning from what particular words in the section that power was deducible. It was not long before the Law Advisers of the Crown recorded the contrary opinion.[6]

Position of law prior to Indian Independence.

Now, the fetter imposed upon the Federal Legislature by Sec. 99 (2) of the Government of India Act, 1935, has been removed by Sec. 6 (1) of the Indian Independence Act, 1947, and under Art. 245 (2) of the Constitution of India, "no law made by Parliament shall be deemed to be invalid on the ground that would have extra-territorial operation". This clause of the Constitution may be taken to confer unlimited extra-territorial jurisdiction upon the Union Parliament. Entry No. 57 of List I of the Seventh Schedule to the Constitution expressly empowers the Union Parliament to legislate with respect to fishing and fisheries "beyond territorial waters".

Position under the Constitution of India.

The rulers of the Native States had, prior to 1947, the authority to pass extra-territorial laws relating to offences committed by their own subjects and vesting in their own courts the power to try them, except where the contrary is made out by evidence in the case of any individual State. (So far at least as Rewa State is concerned, the contrary has not been proved.) That power has not in any way been curtailed either by the Integration Covenant or

Position of law in the Native Indian States before 1947.

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1. Wheaton's *International Law*, Secs. 113, *et. seq.*
2. *See* Sec. 32, I. P. C.
3. 3 & 4 Will. IV, c. 85.
4. *Ibid.*, Sec. 43.
5. *See* opinion cited *in extenso* in Ilbert's *Government of India*, Chap. VII, pp. 442 and 443.
6. Forsyth's *Cases and Opinions on Constitutional Law*, pp. 17, 32.

by the Instrument of Accession. Therefore, Secs. 3 and 4, I. P. C., and Sec. 188, Cr. P. C., at least in so far as it affected the subjects and Courts of the State, were entirely within the legislative competence of the States concerned for all purposes of adaptation and amendments, and having been so adapted, they are validly in force at least in Vindhya Pradesh.[1]

7. Extra-territorial operation.—The enforcement of a law is by its nature territorial, for no State allows other States, as a general rule, to exercise powers of Government within it.[2] But the operation of a law may sometimes extend to persons, things and acts outside its territory. Extra-territorial operation means "the effect to be given in the Courts and within the territory of the enacting States as against person without that State or in respect to property situate or transactions happening abroad."[3]

Position under International Law.

It may be that under International Law a State is not competent to enact a law having extra-territorial operation, but the Municipal courts of the State which passed the law must give effect to the law, regardless of any law of the comity of nations.[4] Again, a Legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account and the courts of its country must enforce the law with the machinery available to them.[5]

Section 188, Cr. P. C., creates no offence; coupling with Secs. 186, 187 and 189, Cr. P. C., it prescribes a procedure by which is conferred an extra-territorial jurisdiction as respects offences committed (*i*) by citizens of India in any place without and beyond India, or (*ii*) by any person on any ship or aircraft registered in India, wherever it may be i a "floating" India, so to say, in any part of the globe. It is only a corollary to Sec. 4 of the Penal Code which provides for extension of the Code to extra-territorial offences. Again, whereas Sec. 4 of the Penal Code confines itself to any offences committed (1) by any citizen of India in any place without and beyond India and (2) by any person on any ship or aircraft registered in India wherever it may be, its procedural counterpart (Sec. 188) speaking the same language, as it must, there is another section of Penal Code, Sec. 3, which also provides for the extra-territorial operation of Code to any person liable by Indian law, to be tried for an offence committed beyond India, in the same manner as if it had been committed within India. In spite of such extra-territorial operation the warrant issued by a Magistrate will not have an extra-territorial effect. It will run inside of India, and not beyond. And then for offences committed beyond India, if the offender is found in India as Secs. 186 and 188 of the Criminal Procedure Code contemplate, either arrest and try him here (an extra-territorial operation) or extradite him into the country where it is said, he has committed the offence.[6]

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1. Rao Shiv Bahadur Singh *v.* State of V. P., A. I. R. 1953 S. C. 394 at p. 403
2. Salmond's *Jurisprudence*, 1948 Ed., p. 75.
3. Clement's *Canadian Constitution*, p. 61.
4. Jefferys *v.* Boosey, (1854) 4 H. L. Cas. 815 at p. 939 : 24 L. J. Ex. 81.
5. British Columbia Electric Railway Co. Ltd. *v.* King, A. I. R. 1946 P. C. 180 at p. 185.
6. Jugal Kishore More *v.* Chief Presidency Magistrate, Calcutta A. I. R. 1968 Cal. 220 at p. 227.

8. Foreigner committed offence in India but not corporeally present in India, if can be punished.—A reference to Sec. 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase "if such act had been committed within India" in Sec. 3 would not have been limited to the supposition that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India.[1]

9. Presumption against extra-territorial operation.—Primarily the legislation of each State is presumed to be territorial, according to the comity of nations. Hence, in the absence of an intention clearly expressed or to be inferred from its language or from the object, subject-matter, or history of the enactment, the general presumption is that the Legislature does not design its statutes to operate beyond the territorial limits of the State.[2] This presumption against extra-territorial operation has its most rigid application as regards criminal or penal laws. Acts committed by foreigner outside the territory of the enacting State are not taken to be covered by a criminal or penal law unless such construction is irresistible. One exception to this rule is *piracy jure gentium*.[3]

4. The provisions of this Code apply also to any offences committed by— Extension of Code to extra-territorial offence.

(1) any citizen of India in any place without and beyond India,

(2) any person on any ship or aircraft registered in India wherever it may be.

Explanation.—In this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code.

Illustration

A, who is a citizen of India commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.

SYNOPSIS

1. Amendment.
2. Analogous law.
3. Indian citizen-
4. Offences committed without and beyond India :
   —Extradition.
5. Subsequent acquisition of Indian domicile by accused committing offence in foreign territory, trial in India, validity of.
6. Form of Charge.
7. High seas.
8. Admiralty jurisdiction.
9. Jurisdiction of Indian High Courts.
10. Mofussil Courts.
11. Airships and aeroplanes.

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1. Mobarik Ali Ahmed *v.* State of Bombay, A. I. R. 1957 S. C. 857 at p. 870 : (1958) S. C J. 111 : (1958) M. L. J. (Cr.) 42 : 1957 Cr. L. J. 1346.
2. Maxwell, 9th Ed., p. 149 ; Jefferys *v.* Boosey, (1854) 4 H. L. 815 at p. 955, *per* Lord Cranworth.
3. R. *v.* Jameson, (1896) 2 Q. B. 245; Cooke *v.* Vogeler Co., (1901) A. C. 102 ; R. *v.* Walkem, (1908) 14 B. C. R. 1.

1. Amendment.—This section previously ran as under :

"4. The provisions of this Code apply also to any offence committed by—

Extention of Code to extra-territorial offences.

(1) any Native Indian subject of Her Majesty in any place without and beyond British India ;

(2) any other British subject, within the territories of any Native Prince or Chief in India ;

(3) any servant of the Queen whether a British subject or not within the territories of any Native Prince or Chief in India."

Explanation.—In this section the word "offence" includes every act committed outside India, which, if committed in India, would be punishable under this Code.

Illustrations

(*a*) *A*, a coolie, who is a Native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.

(*b*) *B*, a European British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.

(*c*) *C*, a foreigner who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found.

(*d*) *D*, a British subject living in Indore, instigates *E* to commit a murder in Bombay, *D* is guilty of abetting murder.

As would appear from the persual of the original section it had four clauses. By the Adaptation of Laws Order, 1950, Cls. (1) and (2) of the old section were replaced by the new clauses which now stand in the section and Cl. (3) was deleted. The old section had four illustrations. Illustrations (*b*), (*c*) and (*d*) were deleted and in Illustration (*a*) the words "is a coolie who is a Native Indian subject" were replaced by the words "who is a British subject of Indian domicile" by the Adaptation of Laws Order, 1948. Subsequently the Adaptation Laws Order, 1950, altered the words "a British subject of Indian domicile" into "a citizen of India".

2. Analogous law.—This section was substituted by the Amending Act, 1898,[1] but in view of the last section and similar provisions of Sec. 188 of the Criminal Procedure Code, it appears to be redundant.

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1. The original Sec. 4 was repealed by Sec. 2 of the Indian Penal Code Amendment Act, 1898 (IV of 1898), and the section printed in the text substituted for it. For Statement of Objects and Reasons of the Bill which became Act IV of 1898, and for Report of Select Committee, see *Gazette of India*, 1897, Pt. V, p. 183 ; *ibid.*, Pt. V, p. 13.

The combined effect of these sections is to attract the application of the Penal Code in the following cases :

General scope of the section.

(1) If an offence is committed by an Indian citizen in India.

(2) If an offence is committed by a citizen of India in any place without and beyond India.

(3) If an offence is committed beyond India it may be tried in accordance with this Code as if such offence has been committed in India. But the person to be thus tried for an act must be liable by any Indian law.[1] These words apparently restrict the operation to cases specified in the Extradition Act XI of 1903, and Secs. 186 and 188 of the Code of Criminal Procedure.

(4) Where an offence is committed by any person on any ship or aircraft registered in India, wherever it may be.

(5) If an offence is committed (*a*) by a foreigner in India, or (*b*) by a foreigner in a foreign territory but he continues the criminal act in India.

Where an offence is committed wholly by a foreigner in foreign territory he cannot on the principles of International Law be tried in India. It is an accepted doctrine that the law of the country where the crime is committed governs the nature of the offence and the Courts of that country alone have jurisdiction to try the offender.[2]

3. Indian citizen.—So far as an Indian citizen is concerned he should be deemed to have committed an offence in India, even if he has committed the offence outside the limits of Indian territory and even if the act complained of does not constitute an offence under the law prevailing in the place in which the offence was committed. Although it is true that Goa, Daman and Diu came to be merged in the Indian Union with effect from 20th December, 1961 and although from that date, they became Union territories, still an offender could not be tried in Daman territory by Daman Courts for an offence committed by him in 1953, when the offender was an Indian citizen and the offence falls within the purview of Secs. 3 and 4, I. P. C. It is the date of the offence, which would be determinative of the issue and on the date of the offence, the matter was governed by the provisions of Secs. 3 and 4, I. P. C. and Sec. 188, Cr. P. C. That position would continue unchanged till the extension of the provisions of the Indian Penal Code and the Code of Crimnal Procedure to Goa, Daman and Diu territories.[3]

4. Offences committed without and beyond India.—Where an offence is committed without and beyond India and the offender is in India, either of two courses may be adopted. He may either be surrendered to be tried in the country in which the offence has been committed, that is, he may be extradited, or he may be tried in the exercise of extra-territorial jurisdiction.

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1. Essub Ibrahim, (1845) Perry's Oriental Cases, 577 ; De Sylva, (1909) 11 Bom. L. R. 221 ; I. L. R 33 Bom. 380.
2. Anandgir, 7 S. L. R. 128 : 24 I. C. 599 ; Kishan Kuer, 20 P. R. 1878 (Cr.); Roda, 30 P. R. 1889 (Cr.) ; Baladeva, I. L. R. 28 All. 372 ; Gokaldas Amarsee *v.* Emperor, A. I. R. 1933 Sind 333 at p. 335 : Nawabji, 37 P. R. 1881 (Cr.) ; Pirtal, 10 B. H. C R. 356 ; Storey's *Conflict of Laws Act*, 23.
3. Pheroze Jehangir Dastoor *v.* State, A I.R. 1964 Bom. 264 at. 266 : 66 Bom. L. R. 225 : 1964 M. L. J. 339.

Extradition.—The jurisdiction of a State over all persons within its territorial boundaries and its rights in consequence to punish them for violation of its law is frequently defeated for the time being by the escape of an offender into the jurisdiction of a neighbouring State So strictly is the independence and severeignty of States interpreted that not even the repression of the most outrageous crimes will warrant the exercise by one State of the slightest act of jurisdictional authority within the territory of another State. In the famous Nasik Conspiracy case,[1] Savarkar accused, while being brought from London to Bombay in a British vessel escaped from the vessel while she was in the port of Marseilles ; but he was caught and returned to the vessel with the unauthorized assistance of the local police. He was then brought to Bombay and committed for trial by a special Magistrate of Nasik. The French Government demanded that the prisoner should be returned to France and a formal demand made for extradition. The British Government declined to surrender the prisoner. Upon reference of the dispute to the Permanent Court of Arbitration, it was decided that while there were irregularities in the recapture of the prisoner at Marseilles there was no rule of International Law imposing an obligation to return him.[2] Under these circumstances a mutual interest in the maintenance of law and order and the administration of justice has led nations to co-operate with one another by surrendering fugitive criminals to the State in which the crime was committed. This surrender, in compliance with a formal demand and in accordance with the conditions attached to the general obligation assumed in the treaty agreement, is known as extradition.[3] The procedure for securing the surrender of a fugitive offender from India depends upon where the offence was committed. If the offence was committed in a foreign State, the procedure laid down in Sec. 3 of the Indian Extradition Act has to be followed. In such a case if the Indian Government thinks fit and the offence committed is not of a political character the fugitive offender may be surrendered on a requisition being made. In order that an offence may be of a political character it is necessary that there must be more than one party in the State and each party must be seeking to impose government of its own choice on the other or others. If an offence is committed in persuit of this object, then it is of a political character but not otherwise.[4] If an offence was committed in a part of the British Commonwealth then the question of surrender of the fugitive offender would be governed by the Fugitive Offenders Act, 1881.[5]

Exercise of jurisdictional authority within the territory of another State.

Applicability of Indian Extradition Act and Fugitive Offenders Act.

Courts in India possess extra-territorial jurisdiction to try offences committed on land, on high seas and in the air and these powers have been conferred by Secs. 3 and 4 of this Code and by Sec. 188 of the Code of Criminal Procedure. Section 188 has been set out in full in the notes under Sec. 3.

Extra-territorial jurisdiction of Indian Courts.

Where dacoity was committed in a former Native State but the stolen property was found in British territory, the conviction for dacoity

1. Vinayak Damodar Savarkar. I L. R. 35 Bom. 225 : 13 Bom L. R. 296.
2. Hague Court Reports, p. 275 ; Fenwick case, 384 ; Hudson case, 969.
3. *International Law* by Charles G. Fenwick 3rd Ed., p. 330.
4. Mounier, (1894) 2 Q. B. 415, *per* Cave, J.
5. 44 & 45 Viet., c. 69.

could not be sustained and was altered to one for receiving stolen property.[1] This Bombay decision was followed by the Calcutta High Court and a Nepalese subject who stole cattle and brought them into British territory was convicted of dishonestly retaining the stolen property though he could not be convicted of theft.[2] The view of the law in the last two cases cited was dissented from in a Full Bench decision of the Bombay High Court on the ground that an offence such as receiving and retaining stolen property which is in its very nature accessory to the principal act, should be conformed to those acts which are made criminal by the Code itself.[3] The language of Sec. 4, I. P. C., and Sec. 188, Cr. P. C., plainly means that if at the time of the commission of the offence, the person committing it is a citizen of India, then even if the offence is committed outside India he is subject to the jurisdiction of the courts in India. The rule enunicated in the sections is based on the principle that *qua* citizens the jurisdiction of courts is not lost by reason of the venue of the offence. If, however, at the time of the commission of the offence the accused person is not a citizen of India, then the provisions of these sections have no application whatsoever.[4] There are, however, certain offences, such as murder, piracy, or promotion of revolt which the laws of all nations regard as far too heinous to escape punishment in the country where they are committed. If the law were otherwise it might imperil the peace of States, but the comity of nations draws a line between a direct excitement of revolt and an agitation for political reform, though it may result in a revolt.

5. Subsequent acquisition of Indian domicile by accused committing offence in foreign territory, trial in India, validity of. —The language of Sec. 4 of the Penal Code and Sec. 188 of the Code of Criminal Procedure, 1888 (V of 1888) plainly means that if at the time of the commission of the offence, the person committing it is a citizen of India, then even if the offence is committed outside India, he is subject to the jurisdiction of the Courts in India. The rule enunciated in the section is based on the principle that *qua* citizens the jurisdiction of the Courts is not lost by reason of the venue of the offence. If, however, at the time of commission of the offence the accused is not a citizen of India, then the provisions of these sections have no application whatsoever.

Principle of the section.

A foreigner was not liable to be dealt with in British India for an offence committed and completed outside British India under the provisions of the sections as they stood before the adaptations made in them after the partition of India. Illustration to Sec. 4, I. P. C., delimits the scope of the section. It indicates the extent and the ambit of this section.

Illustration if delimits the scope of the section.

In the Illustration, if *A* was not a Native Indian subject at the time of the commission of the murder the provisions of Sec. 4, I. P. C., could not apply to his case. The circumstances that after the commission of the offence a person becomes domiciled in another country, or

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1. Lakhya, I. L. R. (1875) 1 Bom. 50.
2. Sunker I. L. R. (1880 6 Cal. 307.
3. Maorga I.L.R. (1881) 5 Bom. 338 (F.B.)
4. Central Bank of India, Ltd. v. Ram Narain, A. I. R. 1955 S. C. 36 at p. 38: 1954 S. C. A. 1305, affirming A. I. R. 1952 Punj. 178:

acquires citizenship of that State, cannot confer jurisdiction on the Courts of that territory restrospectively for trying offences committed and completed at a time when that person was neither the national of that country nor was he domiciled there.[1]

Thus where an accused who had a domicila of origin in the district of Multan and had to be assigned to Pakistan on partition of India, commits an offence in Pakistan, he cannot be tried for that offence by a criminal court in India, after his migration to India and thereafter acquiring the status of a citizen of India. The subsequent acquisition by the accused of Indian domicile cannot affect the question of jurisdiction of Courts for trying him for crimes committed by him while he did not possess an Indian domicile.

6. Form of charge.—In all criminal cases in which it is necessary to frame a charge, it should describe the place of commission of the offence in such a manner as to show whether it is within or beyond India. And where the Court would not have jurisdiction but for the special circumstances here mentioned, the charge should state them. A charge should be worded thus :

> (1) "That you, being a citizen of India (*omit these words if the accused is a foreigner*) on or about the day of , at within the dominions did, etc."

If the offence was committed on the high seas, state—

> (2) "That you, on or about the day of then being an Indian citizen (*omit these words if the accused a foreigner*) on board the Indian ship on the high seas, did etc. and thereby committed an offence punishable, etc."

7. High seas.—Outside the territorial waters of several States, as circumscribed by the maritime belt following she sinuosities of the coast, lie the high seas. These bodies of water, embracing the several oceans, the arms or branches of those oceans, such as Mediterranean Sea, the North, the Baltic, the Carribean and the Black Seas, bays and gulfs too wide at their mouths to be territorial, such as the Bays of Biscay and Bengal, and connecting seas, such as the sea of Marmora and the Red Sea; are open to all nations alike for purposes of navigation, of deep sea fishing, and of submarine cable communication. Upon the high seas no State may claim rights of jurisdiction other than over ships flying its National flag ; and on these the basis of control is personal rather than territorial.[2]

8. Admiralty jurisdiction.—Adverting now to the offences committed on the high seas, which are no man's territory, the jurisdiction of the Indian Court depends upon what is known as the admiralty jurisdiction. It is founded on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying. It extends over all ships of a nation that use its flag, whether they be anchored or sailing, whether on the high seas or in rivers below the

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1. Central Bank of India *v.* Ram Narain, A. I. R. 1955 S. C. 36 at p. 38.
2. *International Law* by Charles C. Fenwick, 3rd Ed., p 417.

bridges where the tide ebbs and flows and where great ships go.[1] And it makes no difference whether the ship is made fast to the bottom of the river by anchor and cable, or to its side by ropes from the quay.[2] In such a case, only two questions arise, the first, a question of place, the second, a question of person. In order to establish the British jurisdiction, all that is necessary is that the ship should be a British ship sailing under the British flag, which may be established by parol, it being by no means essential that the register of the vessel be produced.[3] For if the ship was registered as a British ship and sailed under the British flag, but the owner is not a natural-born British subject, the admiralty jurisdiction will not extend to offences committed upon it.[4] On the other hand, if the owner was a British subject, that jurisdiction will extend to all offences committed thereon, whether the offenders be British subjects or foreigners. In that case, the question how the offender happened to come on board is immaterial. He may have gone there voluntarily or may have been brought there against his will, in any case the Admiralty Court will have jurisdiction over him.[5]

Conditions for the exercise of admiralty jurisdiction.

So far, then, the law is clear and well settled. The only difficulty that the subject presents is with respect to what shall be considered as the line of demarcation between the country and the high seas. Here, too, the jurisdiction of the Court of the country up to a marine league is undisputed. The difficulty, however, arises where the offence committed is in harbours or below the bridges in great rivers which are partially enclosed by land. But here the question is one of fact and not of law, or if the haven, creek or river is within the body of a country both the Amiralty and the Common Law Courts have concurrent jurisdiction.[6]

Difficulty in the line of demarcation of territory between country and high seas.

At one time, offences committed on the high seas were said to be exclusively within the jurisdiction of the Admiralty Court, but they are now placed within the jurisdiction of the ordinary Criminal Courts.[7] The Admiralty Offences Act confers upon all Magistrates jurisdiction to try and dispose of all offences committed by any person "upon the sea or in any haven, river, creek or place where the Admiral or Admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea or in any such haven, river, creek or place shall be brought for trial to

Jurisdiction of Admiralty Court and ordinary Criminal Court.

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1. *Per* Lord Blackburn in Anderson, (1868) L. R. 1 C. C. R. 161 : 38 L. J. (M. C.) 12.
2. Anderson, (1868) L. R. 1 C. C. R. 161 ; Jemot, Old Bailey, Feb. 28, 1812 M. S. cited in Arch. Plead, (32nd Ed.), p. 634 ; Allen, 1 Moo. C. C 154 ; Carr. 10 Q. B. D. 76 at p. 79 ; Lesley, (1860) 29 L. J. (M. C.) 97,
3. Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104) Sec. 106 ; Sven Seberg, (1870) L. R. 1 C. C R. 264 ; Allen, (1866) 10 Cox. 405
4. Adalph Bjornsen, 10 Cox. 74.
5. Sven Seberg, (1870) L. R. 1 C. C. R. 264 ; Benito Lopsez Christian Satiler, (1858) 7 Cox. 431 ; *In re* Susinah, 9 B. & C. 446 ; *In re* Parisot, (1889) T. L. R. 334 ; Savarkar, 13 Bom. L. R. 296 ; Salimullah, I. L. R. 39 Cal. 487 at p. 490.
6. John Bruce, 2 Leach. 1093 ; Essub Ibrahim, (1845) Perry's Oriental Cases, 577; De Sylva, 11 Bom. L R. 221 : I. L. R. 33 Bom. 380.
7. Admiralty Offences Act, 1849 (12 & 13 Vict. c. 96) ; Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60).

any colony."[1] The Merchant Shipping Act, 1894, further makes provision for the trial of such offence by the ordinary tribunals,[2] while the Courts (Colonial) Jurisdiction Act[3] enables the Courts in this country to regulate the procedure at the trial and the sentence by the law of India.[4]

Power of Indian Legislature to legislate for offence committed on high seas.

During the British rule in India the Governer-General-in-Council had no power to legislate for offences committed on the high seas outside the territorial limits of British India, his jurisdiction extending only to the high seas within three miles off its coasts.[5] It was, therefore, held that the Code had no application to offences committed on the high seas and all offences so committed were to be tried under the English law.[6] In *R.* v. *Elmstone* cited above the prisoners Elmstone and Whitwell who were the brokers, resident in Bombay, of a British ship named "*Aurora*", conspired in Bombay with Harriot, her Master, and one Marks, her carpenter, that she should be destroyed before she reached Liverpool, the object of the conspirators being to defraud the underwriters, upon certain cargo shipped by them. The ship sailed from Bombay on the 11th of June, 1870, and when it had proceeded about 50 miles off the harbour prisoners set the ship on fire and in collusion with the Master she was destroyed. The four co-conspirators were arrested and committed for the trial in Bombay. A question that fell for decision was whether those offences came within the Penal Code or the English law. It was held by a Full Bench that while the procedure applicable was Indian, the substantive law applicable to their case was the English law. The same view was taken by another Full Bench of the Calcutta High Court in a case in which the prisoner Thompson had grievously hurt one Ned on board the British ship "*Scindia*" upon the high seas.[7] This, however, is no longer good law. On attainment of independence, India is now a sovereign State and she can legislate for offences committed on the high seas outside its territorial waters as well as within the marine league and she has done so by making appropriate changes in Secs. 3 and 4 of this Code and in Sec. 188 of the Code of Criminal Procedure. Therefore, the law stated in the preceding paragraphs holds good in the case of India also.

9. **Jurisdiction of Indian High Courts.**—It has been already stated before that the Chartered High Courts of Bombay, Madras and Calcutta generally inherited the jurisdiction possessed by the Supreme Court which they replaced. These Courts possessed the jurisdiction of the High Court of Admiralty in England as it stood in 1823.[8] Their jurisdiction in Vice-Admiralty was created by commission from the High Court of Admiralty in England in 1843.[9] With the exception of the Allahabad High Court, which has no Admiralty jurisdiction, the other three Chartered High Courts were, by statute, declared to be Colonial Courts of Admiralty (XVI of 1891) within the meaning of the

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1. S. I. Admiralty Offences Act, 1849 (12 & 13 Vict., c. 96).
2. 57 & 58 Vict., c. 60, Secs 684. 687; also *see ib.* Secs. 689 and 690.
3. 37 & 38 Vict., c. 27, Sec 3.
4. Elmstone, 7 B. H. C R. (Cr. C.) 89; Salimullah, I.L.R. 39 Cal 487.
5. Kastya, 8 B. H. C. R. (Cr C.) 63.
6. 12 & 13 Vict., c. 96, Sec. 2; R. *v.* Elmstone, 7 B H.C.R (Cr.) 86; R. *v.* Thompson, 1 B. L R. (Cr. O. J.) 1; Kastya, 8 B. H. C. (Cr.) 68.
7. R *v* Thompson, 1 B. L. R. (Cr. O. J.) 1.
8. The Asai, 5 B. H C R. (C. J.) 64; Bardot *v.* The Augusta, 10 B H. C 110. *contra* The Portugal, 6 B L.R. 323 at pp. 330-31.
9. As to the meaning of Vice-Admiralty Court, *see* Colonial Courts of Admiralty Act, 1819 (53 & 54 Vict., c 27, Sec. 9).

Colonial Courts of Admiralty Act.[1] These three High Courts therefore possessed the same jurisdiction in Admiralty as the Amiralty Courts in England. This jurisdiction of the High Courts is now preserved by Art. 225 of the Constitution of India which runs as follows :

> "225. *Jurisdiction of existing High Courts.*—Subject to the provisions of this Constitution and to the provisions of any law of the appropritate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of Court and to regulate the sitting of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution :
>
> Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collections thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

10. Mofussil Courts.—As regards the Mofussil Courts, it appears that they did not possess any jurisdiction prior to 1860 when a limited jurisdiction was conferred on them by the Admiralty Jurisdiction (India) Act.[2] This jurisdiction was, however, enlarged in 1894 by the provision of the Merchant Shipping Act, which gave all Courts jurisdiction to try offenders wherever found.[3]

11. Airships and aeroplanes.—Regarding jurisdiction in respect of offences committed in airships and other aircrafts, in para. 45 (p. 125) of the 5th edition of this book it was observed : "On the principle *cujus est solum ejus est usque ad caelum et ad inferos,* the column of air testing on the earth belongs to him who is the owner of the soil. Consequently offences committed in airships and other aerial craft would be ordinarily subject to the law of that country ; though it is possible that by treaty or otherwise some other arrangement might (*sic.*) come to between the nations for determining the value of the offence and the law and procedure applicable to it." But the present section as adapted in 1950 clearly enacts *inter alia* that this Code shall apply to any offence committed by any person on any aircraft registered in India wherever it may be and Sec. 188 of the Code of Criminal Procedure as amended up to date says *inter alia* that subject to the proviso mentioned therein when an offence is committed by any person on any aircraft registered in India, wherever it may be, he may be dealt with in respect of such offences as if it had been committed at any place within India at which he may be found.

Certain laws not to be affected by this Act.

5. Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service

1. 53 & 54 Vict., c. 27.
2. 23 & 24 Vict., c 88, Secs. 1 and 2.
3. Sec. 686, 57 & 58 Vict., c 60.

of the Government of India or the provisions of any special or local law.

SYNOPSIS

1. Amendment.
2 Analogous.
3. Principle.
4. Meaning of words.
5. Saving of other laws.
6. Preservation of Common Law rights.

1. Amendment.—The present section was substituted for the old one by the Adaptation of Laws Order, 1950. Before that the section stood as under:

"5. Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions of the Statutes 3 and 4, William IV, Chapter 85 or of any Act of Parliament passed after that Statute in any wise affecting the East India Company or British India or the inhabitants thereof ; or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of Her Majesty or of any special or local law."

Certain laws not to be affected by this Act.

The words "British India" were substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the words "the said territories" ; after the words "East India Company" or the word "soldiers" and/or "airmen" were introduced by Act X of 1927 and "sailors" by Act XXXV of 1934. Previous to this in 1870, the words "or of the East India Company, or of any Act for the government of Indian Navy" which occurred after the words "Her Majesty" were deleted by Act XIV of 1870.

2. Analogous law.—The provisions of 3 and 4, William IV, c. 85, referred to in the old section or those of the Government of India Act, 1883, apart from this section, could not be affected by legislation in India.[1] This statute was passed for affecting an arrangement with the East India Company and for the better government of His Majesty's Indian territories, till the 30th April, 1854. Several Acts had since been passed by Parliament "affecting the East India Company, or the said territories or the inhabitants thereof", and as they were all Acts of Parliament, they remained as a matter of course, unaffected by the Acts of the Indian Legislature. The Act "for punishing mutiny and desertion of officers and soldiers in the service of Her Majesty was the English Mutiny Act, 1878. Provision for punishment of desertion was made in the Army and Navy Act,[2] confirmed and amended by the Annual Army Acts. This Act provided a Criminal Code of its own,[3] and a special procedure for the trial of offenders by court-martial.[4] It also laid down a list of persons who were subject to military law.[5]

The laws regarding army and air force as applicable to India are now enacted in the Indian Army Act XLVI of 1950, and the Indian Air Force Act XLV of 1950.

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1. 24 & 25 Vict . c. 67, Sec. 22 ; 32 & 33 Vict.. c. 69, Sec. 3. All statutes bearing on the Government of India were formally repealed, and consolidated in the Government of India Act, 1915 (5 & 6) Geo. V, c. 61 ; now *see ibid.*, of 1935 (25 & 26) Geo. V, c. 42.
2. 44 & 45 Vict., c. 58.
3. 44 & 45 Vict., c. 58, Secs. 4—44.
4. *Idid.*, Secs. 45—75.
5. *Itid.* Secs. 175—183.

3. Principle.—This section is enacted *ex majori ex cautela*, for the enactments, purporting to be hereby saved, are from their very nature unaffected by the Code. The saving of special or local law is in accordance with the general principle *generalia specialibus non derogant*.[1] These certainly required to be saved in view of the sweeping provisions of Sec. 2 which, as observed by the Madras High Court, "has either no operation at all, or else, as I believe it to have done, it repealed all existing penal enactments in force on the date from which the Code was to come into operation. Then the effect of Sec, 5 was to qualify this general repeal, and to declare that notwithstanding it, offences defined by special and local laws should continue to be punishable as heretofore. It may be that it was not competent to the local Legislature to repeal or affect the provisions of some of the laws enumerated in Sec 5; but that is immaterial so far as special and local laws are concerned, for clearly they might have been, and but for Sec. 6, would, as I conceive, have been repealed. If, therefore, a person were required to ascertain from the Penal Code what acts and omissions are punishable in British India as offences, he would properly answer that it appeared from Sec. 2 and Sec. 5 that all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws and some other laws enumerated in Sec. 5 and these alone and none others were punishable as offences."[2]

Effect of this section.

4. Meaning of words.—"*Is intended to repeal,*" that is, as there was no intention there should be no effect. Though the words may convey that sense nevertheless they should not be so construed. "*Special or local law*" : "Special law" is defined to be law applicable to a particular subject,[3] e. g. the Opium Act[4] and a "Local Law" is applicable only to a particular part of British India.[5] The meaning of this clause is that where the special or local law is *in conflict* with the Code, the latter shall not apply. But where there is no conflict, effect may be given to both.[6] A distinction should be drawn between an Act creating a new offence with the particular penalty and an Act seeking to enlarge only the ambit of an existing offence by including new acts within its scope with a particular penalty. In the former case the new offence can be punished by the new penalty only while in the latter case the offence may be punished by all such penalties as were applicable before the Act to the offence in which it is included.[7] Clause (*c*) of Sec. 5 (1)

Whether special law repeals provisions of I. P. C.

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1. "General words do not derogate from special." General words do not repeal or modify special legislation—Seward *v.* Vera, 10 A. C. 68; Hawkins *v.* Gatherocole, 6 De M. & G. 1.
2. 3 M. H. C. R. (App.) 11.
3. Section 41, I. P. C.
4. Mc Donell, 3 R 524.
5. Section 42, I. P. C.
6. Ramchandrappa, I. L. R. 6 Mad. 249; Nageshappa, I. L. R. 20 Bom 543; Bayne, 8 Bom. L R. 414; Sadasiva Pillai, 1 Weir 26; Jiwaram *v.* Emperor, A. I. R 1932 All. 69, but *contra* in Chandi Pershad *v.* Abdual Rahman, I. L. R. 22 Cal. 131; *see* also Bishen Sahai, I. L. R. (1937) All. 779; Kaulashia, I. L. R. 12 Pat. 1; Emperor *v.* Gul Muhammad, A. I. R. 1915 Lah. 350 : 26 P. R. (1915) Cr.; Motilal Shah, I. L. R. 55 Bom. 89 : 32 Bom. L. R. 1502; Collector of Bombay *v.* Kamalavahooji Maharaj, A. I. R. 1934 Bom. 162.
7. Balchandra, I. L. R. 54 Bom. 35; but *see* Abdul Hamid, I. L. R. 2 Pat. 134, *per* Das, J.; *see* also Bhup Narain Saxena *v.* State, A. I. R. 1952 All. 35 : 1952 Cr. L. J. 236; 1952 A. L. J. 21 : 1952 A W. R. (H. C.) 98.

Prevention of Corruption Act, 1947, does not create any new offence read with sub-section (2) of Sec. 5, it only makes an act already punishable under Sec. 409, I. P. C., punishable as a criminal misconduct under the Act with imprisonment for a term which may extend to seven years or with fine or with both. The defference between the offence under Sec. 5 (1) (*c*) of the Act and the offence under Sec. 409, I. P. C., so far as it relates to an offence by a public servant lies in the different punishment. It is true that no public servant can be prosecuted for an offence under Sec. 5 (2) of the Act without the previous sanction of the competent authority and in a trial for that offence, the Court is empowered to draw a presumption against the accused under Sec. 5 (3).[1]

Sub-section (4) of Sec. 5 of the Act makes it amply clear that Sec. 5 (1) (*c*) in no way prevents the prosecution of any public servant for an offence under Sec. 409, I. P. C., Even apart from Sec. 5 (4) and on the language of Sec. 5, as it stood before it was amended by the Prevention of Corruption (Second Amendment) Act, 1952, it could not have been held that Sec. 409, Penal Code, so far as it related to offences by public servants stood *pro tanto* repealed by Sec. 5 (1) (*e*) of the Act.[2] The general principle of law is that the Penal Code would apply if the acts fall within its ambit though there may be specific offences and penalties under the special Act. It is idle to contend that a special law repeals the provisions of the Penal Code because both of them deal with offences arising under both Acts.

Two restrictions on prosecutions both under special Act and I. P. C.

There are two restrictions : (1) No prosecution under the special law is admissible, if it appears upon the whole frame of the special Act that it was intended to be complete in itself and to be enforced by the penalties created by it. If the Magistrate proceeds under the Penal Code it is better to drop the charge under the local Act. (2) A person cannot be punished both under the Penal Code and the special law for the same offence.[3] But where a new offence has been created and the particular manner in which the proceedings should be taken is laid down, then the proceedings cannot be taken in any other way.[4] The Indian Penal Code will apply wherever its application is not expressly, or by necessary implication, excluded, and where the requirements prescribed under the Indian Penal Code for the

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1. Madho Prasad *v.* State, A. I. R. 1953 M. B. 139 at p. 141 ; State *v.* Gurcharan Singh, A. I. R. 1952 Punj. 89 diss. Bhup Narain Saxena *v.* State, A. I. R. 1952 All. 35 and *In re* V. V. Satyanarayanamurthy, A. I. R. 1953 Mad. 137 relied); Satya Narayanamurthy, *In re*, A. I. R. 1953 Mad. 137 : A. I. R. 1953 Cr. L. J. 508 : (1952) 2 M. L. J. 777 : 1952 M. W. N. 957 : 65 L. W. 1120. State *v.* Gurcharan Singh, A. I. R. 1952 Punj. 89 diss.).
2. Madho Prasad *v.* State, A. I. R. 1953 M. B. 138 at p. 141 : State *v.* Gurcharan Singh A. I. R. 1952 Punj. 89 diss., Bhup Narain Saxena *v.* State, A. I. R. 1952 All. 35 and *In re* V. V. Satyanarayanamurthy, A. I. R. 1953 Mad. 137 relied).
3. Satya Narayanamurthy, *In re*, A. I. R. 1953 Mad. 137 at p. 137 : (1952) 2 M. L. J. 777 : 65 L. W. 1120 : 1952 M. W. N. 957 ; *see* also Mrs. B. Gervase, *In re*, A. I. R. 1950 Mad. 599 : (1950) 1 M. L. J. 201 : 1950 M. W. N. 42 ; Chandi Pershad *v.* Abdur Rahman, I. L. R. 22 Cal. 131, but in Devki Koeri, I. L. R. 48 All. 496, it was held that a conviction for theft under Sec. 379 of the Penal Code in respect of a certain quantity of opium did not preclude a subsequent trial and conviction under Sec. 9 of the Opium Act, 1878.
4. Balchandra, I. L. R. 54 Bom. 35 ; *see* also Bhup Narain Saxena *v.* State, A. I. R. 1952 All. 35 : 1952 Cr. L. J. 236 : 1952 A. L. J. 21 : 1952 A. W. R. (H. C.) 98.

offence charged are satisfied.[1] This section is, thus, a saving clause to Sec. 2, and might have been added as its proviso. It was, as Innes, J., remarked, perhaps too long to be introduced into Sec. 2 parenthetically, and was, on that account, and also perhaps for greater clearness, placed by itself.[2] If Sec. 2 had stood alone without this section, its effect would have been to render inoperative such parts of the existing criminal law as provided for the punishment of acts and omissions which were contrary to the provisions of the old law but were not contrary to the provisions of the Code.

5. Saving of other laws.—As regardt the exemption of the Acts of Parliament, the section merely enacts what would be the result without it. The saving of any of the provisions of any Act for punishing mutiny and desertion of officers, airmen and soldiers, refers alike to the English Statute. But the saving of any special or local law was necessary. For if the clause had not existed, the result of Sec. 2 would have been necessarily to repeal all such laws. As it is, the clause is no authority for the proposition that the Code has no application to any case covered by any special or local law. For all that the olause enacts is that the Code shall not "repeal, vary, suspend or affect them". Therefore, if the provisions of the Code and the special or local Act coincide, it is perfectly competent to the Court to proceed under either. It is only in case of conflict between the two that the provisions of the special or local Act are preferable to be resorted to, if they are complete in themselves.[3]

Code shall not repeal, vary, suspend or affect special or local law.

Offences strictly following under special law or general law.

It cannot be laid down as a general rule of law that where there is special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts and both may be applicable simultaneously, and the offender may be prosecuted and convicted under either Act. It may however be conceded that where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty.[4] But this case is no authority for the proposition that whenever there is a special law providing a penalty, it alone should be applied to the exclusion of the general criminal law. So where the trustee of a temple misappropriated property belonging to it, the fact that the Regulation of 1817 (Sec. 16) provided for punishment for breach of trust on the part of trustees and managers of Hindu temples is no reason for exoluding the operation of

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1. *In re* Mrs. B. Gervase, A. I. R 1950 Mad. 599 at p. 600 : (1950) 1 M. L J. 701.
2. 3 M. H. C R. (App.) 11.
3. Chandi Pershad *v.* Abdul Rahman, I L. R. 22 Cal. 131 ; Jiwa Ram, A.I R. 1932 All. 69 ; *see* also Jiote Prashad, I L R. 53 All 642 ; Suchet Raut, I.L R 9 Pat. 126
4. Jiwa Ram *v.* Emperor, A. I. R. 1932 All. 69 at pp. 69-70 : 1932 A. L. J. 519, dissenting from *In re* Mohanlal Sexena, A. I. R. 1930 Oudh 497 ; Ouah Bar Association, Lucknow, I. L. R. 6 Luck. 266; *see* also Joti Prasad Gupta, A. I. R. 1932 All. 18 ; Emperor *v.* Ganesh Voman Joshi, A. I. R. 1931 Bom. 140 : I. L. R. 56 Bom. 353.

the Code,[1] unless, of course, there be anything in the special or local Act to exclude its operation.[2]

Hence, where, for instance, the Mutiny Act[3] provides that British soldiers serving in India or its dependencies may be tried by a general court-material, the provision being merely permissive, does not exclude jurisdiction of the civil tribunal.[4] So a person offending against the Police Act and the Code may be proceeded against under either,[5] and the fact that he was convicted under one Act rather than the other is then immaterial,[6] though, of course, in such a case he could not be convicted under both the Acts.[7]

Special or local law providing its own penalties are deemed to be exhaustive.

And so, it is now provided in the General Clauses Act that "where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under any of those enactments, but shall not be liable to be punished twice for same offence".[8] But this, of course, assumes, that there is nothing in the one to exclude the operation of the other. For instance, such would be presumed to be the case where the offence is merely a *delict* under a special Act,[9] which does not expressly save the provisions of the general criminal law. In other words, where a special or local Act prescribes its own penalties they are presumed to be exhaustive, unless there is anything in the Act to save the general law. It may be added that, as a rule, where an act is punishable both under the Code as well as under a special or local law, the preferable course is to convict under the special law and not under the Code,[10] both because *specialia generalibus derogant*,[11] as well as because the special Acts were primarily constituted to punish such delinquencies. But the practice of the Courts on this point lacks unanimity.[12]

6. **Preservation of Common Law rights.**—Besides the special and local laws hereby preserved, the Code has not, it was said, affected the common law rights possessed by the superior Courts of this country. In England the superior Courts of Record have the most extensive jurisdiction in respect of contempt. In all cases of contempt, a superior

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1. Anon, 1 M. 55.
2. Imam Baksh, (1885) P. R No. 10.
3. (1878) 41 Vict., c. 10 (an Act for punishing mutiny and desertion, and for the better payment of the army and their quarters).
4. Maguire, 5 C. 124.
5. Fatteh Khan, (1874) P. R. No. 11.
6. Kasimuddin, 8 W. R. (Cr.) 55; Gopal Sein, 8 W. R. (Cr.) 16.
7. Hussun Ali, 5 N. W. P. H. C. R. 49.
8. Act X of 1897, Sec. 26; Ramchandrappa, I. L. R. 6 Mad. 249; Sadasiva Pillai, 1 Weir 26; Emperor *v.* Bayne, 8 Bom. L. R. 414.
9. Chandi Pershad *v.* Abdur Rahman, I. L. R 22 Cal. 131 at p. 139, a case under the Bengal Municipal Act.
10. Bokoo, (1864) W. R. (Cr.) 21: 3 M. H. C. R. (App.) 11; Kuloda Prasad Majumdar, 11 C. W. N. 100; Rup Deb, 11 A. L. J. 340.
11. "Things special take from things general." In a case (Hussun Ali, 5 N W. P H C. R, 49) where the prisoner had been convicted twice over for the same act both under the Code as well as a special Act, Turner, J., quashed the convictions under the special law, but no reasons are given for the preference—probably the three months sentence already undergone by the prisoner would have been too severe under the local Acts (Cattle Trespass Act).
12. In conflict the Code was applied in Hussun Ali, 5 N. W. P. H. C. R. 49; Ramchandrappa, I. L. R. 6 Mad. 249; special law applied Bokoo, (1864) W. R. (Cr.) 21: 3 M. H. C. R. (App.) 11; Chandi Pershad *v.* Abdur Rahman, I. L. R. 22 Cal. 131; Sadasiva Pillai, (1865) 1 Weir 26; Emperor *v.* Bayne, 8 Bom. L. R 414.

Court may fine the offender, order him into custody, or take security, or take security for this good behaviour, and although an indictable offence has been committed, any further or threatened acts may be restrained by injunction. These inherent powers of summary committal attaching to the superior Courts of England were held available also to the Indian High Courts.

Privy Council's verdict.

So far as regards India, this was settled by a decision of the Privy Council, which held that a contempt of the High Court, being contempt of a Court of Record, was punishable by it, independently of this Code, and that its order was, therefore, not open to appeal or revision.[1] But this power extends only to the imposition of the sentence of fine or imprisonment. It does not confer on the Court the power to disbar an advocate, against which he may appeal.[2]

But, it was said, that there are the powers which the High Courts have inherited for their predecessors, the late Supreme Courts. They are, therefore, the powers which exclusively belong to them; and are possessed by other Courts of co-ordinate jurisdiction, e. g. the Chief Courts are the Courts of the Judicial Commissioner. These and the other inferior Courts have their jurisdiction confined to contempts committed *in facie curiæ* and not to those committed out of Court.[3] It has, however, been held by Sind Chief Court that that Court has power to punish in a summary manner contempt of itself.[4] Nor was the High Court held to possess the jurisdiction to punish as an offence, in a summary proceeding, conduct in relation to a proceeding in the Mofussil Criminal Courts such as comments on a case pending before those Courts, as even in the case of the High Court at Calcutta, such jurisdiction was not inherited from any of its three abolished predecessors—the Supreme Court, the Sudder Dewany and the Sudder Nizamat Adalats—nor was such power vested in any of the other High Courts by the Charter Act,[5] or the Letters Patents, as such conduct is not contempt of the High Court, nor did the High Court's power of superintendence over the Mofussil Courts imply any power of protecting those Courts from improper interference.[6]

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1 Surendranath Banerjee *v.* High Court, I. L. R. 10 Cal. 109 (P. C.), following Rainy *v.* Justice of Sierra Leone, 8 Moo. P. C. 47 at p. 54; McDermott *v.* The Justice of British Guiana, 5 Moo P. C. (N. S.) 466; Moti Lal Ghose, I. L. R. 46 Cal. 169; L. R. *v.* Moti Lal Ghose, I. L. R. 41 Cal. 173; T. Ghose, I. L. R. 63 Cal. 217; M. K. Gandhi, A. I. R. 1920 Bom. 175 (F. B.); Marmaduke Pickthal, A. I. R. 1923 Bom. 8; Purshottom *v.* Navitlal, I. L. R. 50 Bom. 275; D. S. Bukhari, A. I. R. 1917 Lah. 610 (S. B.); Habile, I. L. R. 6 Lah. 528; Murli Manohar, I. L. R. 8 Pat. 323; Purnuswami *v.* Ganapathi, A. I. R. 1924 Mad. 393; Salyabodh, I. L. R. 47 Bom. 76; Harkishan Lal, I. L. R. 18 Lah 69; Chandan Mall *v.* Sardari Lal, I. L. R. (1937) 1 Cal. 345; *see* also 58 Cal. 45; A. I. R. 1931 Mad. 61; I. L. R. 53 Cal. 401.

2. Smith *v.* Justice of Sierra Leone, 3 Moo. P. C. 367 at p. 368, proceedings are of a quasi-criminal character—Weston *v.* Bangalee, 15 C. W. N. 711.

3. Section 228, I. P. C. and Secs. 477 & 487, Cr. P. C.

4. P. C. Tarapore, I. L. R. (1941) Kar. 451.

5. Government of India Act, 1915, Secs. 101, 114 (5 & 6 Geo. V, c. 6) now repealed by *ibid*. of 1935.

6. Governor *v.* Koli Lal, 20 I. C. (C) 81; Davies, (1906) 1 K. B. 32; Venkat Row, 21 M. L. J. 832.

Power of High Court to deal with offenders of contempt of Court.

Where a contempt of the High Court has been committed outside its jurisdiction it can deal with the offender if he happens to be within its jurisdiction. There is, however, difference of opinion as to the power of the High Court to arrest a person for contempt of Court when the contempt was committed outside and he is not to be found in its jurisdiction. The Bombay and Lahore High Courts held that the High Court had no such power.[1] The Allahabad High Court has taken the contrary view.[2]

Contempts of Courts Act.—But though their Lordships of the Privy Council have supported the assumption of jurisdiction by High Courts in cases of contempts, their decision is not easily reconcilable with the provisions of this section. But that uncertainly has now been set at rest by the enactment of the Contempt of Courts Act,[3] which regularises and regulates the jurisdiction of the Courts in dealing with that offence. It must, however, be remembered that this Act does not in any way take away or limit the inherent powers of the High Court to punish contempts on a summary proceeding.[4]

The enactment protects the Courts but the question remains whether counsel in India can invoke the aid of the English Common Law and claim the same absolute privilege which their compeers enjoy in England. That they cannot appears to be clear, though the analogy of cases relating to the contempt of Court might suggest an exception, for which, however, there is no legislative sanction. The subject will be found discussed under Sec. 499.

CHAPTER II

General Explanations

Definitions in the Code to be understood subject to exceptions.

6. Throughout this Code, every definition of an offence, every penal provision and every illustration of every such definition or penal provision shall be understood subject to the exceptions contained in the chapter entitled "General Explanations", though those exceptions are not repeated in such definition, penal provision or illustration.

Illustrations

(*a*) The sections in this Code, which contain definition of offences do not express that a child under seven years of age

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1. *See* Khushal Chand, A. I. R. 1945 Lah. 206 : 47 Cr. L J. 115 : 47 P. L. R. 148 ; Horniman, A I. R. 1944 Bom. 127, relying on I. L. R (1937) 1 Cal 345.
2. B. G. Horniman, I. L. R. (1944) All. 665.
3. Act XII of 1926, now enacted as Act XXXII of 1952.
4. K. L. Gauba, A. I. R. 1942 Lah. 105 at p. 107 : I. L. R. (1942) Lah. 411 : 43 Cr. L. J. 599 ; Harkishan Lal, I.L R. 18 Lah. 69 ; Benjamin Guy Horniman, A. I. R. 1944 Bom. 127 at pp. 128-29.

cannot commit such offences; but the definitions are to be understood subject to the general exception (Sec. 82, I. P. C.) which provides that nothing shall be an offence which is done by a child under seven years of age.

(*b*) *A*, a police officer without warrant apprehends *Z*, who has committed murder. Here *A* is not guilty of the offence of wrongful confinement, for he was bound by law to apprehend *Z*, and therefore the case falls within the general exception of Sec. 76, I. P. C., which provides that "nothing is an offence which is done by a person who is bound by law to do it".

SYNOPSIS

1. Analogous law. 2. Principle.

1. Analogous law.—The first illustration is based on Sec. 82 and the second one on Sec. 76 of the Code.

2. Principle.—This Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms are here defined and explained, and the meanings, thus announced, are steadily adhered to throughout the subsequent chapters. Sri James Stephen suggests that the object of this Chapter is to prevent captious Judges from wilfully misunderstanding the Code, and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those cases where difficulty may arise, when it will be necessary to refer to this Chapter to see what the meaning of the Code is.[1]

Object of Chapter II and this section.

The object of this section is to state that the Code has been drawn upon the assumption of absence of all exceptional and extenuating circumstances which have been brought together under the head of "General Exceptions" and which, therefore, control the entire Code. Therefore, for the purpose of seeing whether any act or omission constitutes an offence, it is not sufficient merely to look within the four corners of the sections, but also to see if the act or omission is covered by the general exceptions. The relegation of exceptions to a general chapter has made the Act more compendious and intelligible, but it is a system which has not been followed in the drafting of several statutes in England.

Neither this section, nor Sec. 221 (5) of the Criminal Procedure Code overrides Sec. 105 of the Evidence Act which deals with the question of burden of proof.[2] It is not for the accused to prove facts constituting the exception in the same way as the prosecution has to prove their case. Is is enough that they have made out circumstances which make it probable that their case is covered by one of the exceptions of the Penal Code.[3]

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1. (1860) Proceedings of Council, p. 1261.
2. Prabhoo *v.* Emperor, A. I. R. 1941 All. 402 at p. 410 : 43 Cr. L. J. 177 : 197 I. C. 625 : 1941 A. W. R. 820 : 1941 A. L. J. 619 (F. B.) : I. L. R. (1941) All. 843.
3. Rajput Bhudhia Devji *v.* Shah Shamji Khimji, A. I. R. 1951 Kut. 11 at p. 12.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Sense of expression once explained.

SYNOPSIS

1. Analogous law.
2. Principle.

1. Analogous law.—This section is in accordance with the maxim of common law : *Inclusio unius est exclusio alterious.*[1] So referring to this clause Holloway, J., said that to say that every expression "shall have a particular meaning everywhere," is to say that it shall have no other meaning anywhere. The point; therefore, is to ascertain the meaning of that explanation, and if the words, taken grammatically, have a definite, certain and unequivocal meaning if they constitute a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only, then, however absurd and pernicious the consequences, that meaning is to be followed. "If, however, the expression does not include the complete thought of the Legislature or if the words are equally susceptible of several meanings, we are to seek in other parts of the same statute, or, in other statutes certainly in those *in pari materia* with this, the one of the several possible meanings which ought to be put upon the words."[2]

2. Principle.—All terms explained in the Code bear the same meaning throughout the Act ; so that, if a term is used in one sense in one place, it must be taken to have been used in the same sense in other places as well.

The meaning of the words defined in the Indian Penal Code and incorporated in the Criminal Procedure Code should be subjected to variation depending on the subject or context.[3]

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

Gender.

SYNOPSIS

1. Analogous law.
2. Principle.

1. Analogous law.—This section really means what is provided by the English Interpretation Act, 1889,[4] which enacts as follows :

"1. In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears ;

(*a*) words importing the masculine gender shall include females ; and

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1. "The inclusion of one is the exclusion of another," *expressio unius est exclusio alterious.* (The mention of one is the the exclusion of another.)
2. *In re* Proceedings of 22nd December, 1866 ; 3 M. H. C. R. (App.) 11 ; *see* also Fateh Chand, I.L.R. 44 Cal. 477 (F. B).
3. Edmund N. Schuster *v.* Assistant Collector of Customs, New Delhi, A. I. R. 1967 Punj. 189 at p. 190.
4. 52 & 53 Vict., c. 63, Sec. 1.

(*b*) words in the singular shall include the plural and words in the plural shall include the singular".

This provision is enacted so far as regards India in Sec. 13 of the General Clauses Act[1] (X of 1897, Sec. 13) which says that in all Central Acts and Regulations, unless there is anything repugnant in the subject or context,—

(1) words importing the masculine gender shall be taken to include females ; and

(2) words in the singular shall include the plural, and *vice versa*.

2. **Principle.**—Though the section states that the pronoun "he" and its derivatives are used of any person whether male or female, the language of the section itself is either inaccurate or inadequate to express the sense it purports to convey. For, if the section be held to declare that the pronoun "he" is everywhere used in the Code even to denote a female, it is only partially true, for there are sections in which the appropriate pronoun has been and could not but be used.[2] And yet having regard to the last section, this should not have been the case. But, though the language of the section is inapt, its meaning is clear, for it means no more than that the pronoun "he" includes also females.

In a recent case from the Madhya Bharat,[3] it has been held that the pronoun "he" used in the expression "that he will thereby outrage her modesty" must be taken under the present section as importing a male or a female. Hence under Sec. 354 a man as well as a woman may be held guilty of the offence of assaulting or using criminal force to any woman with the intention or knowledge that the woman's modesty will be outraged, and be punished for the offence.

9. Unless the contrary appears from the context, words importing the singular number include the plural number and words importing the plural number include the singular number.

Number.

SYNOPSIS

1. Analogous law.
2. Meaning of words.

1. Analogous law.—The section conveys the sense expressed in Sec. 2 of the English Interpretation Act,[4] and Sec. 13 of the General Clauses Act (X of 1855) cited under last section.

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1. E. g. Secs. 354, 375, 493, 494, Expl. 498. As regard Sec. 354, *see* Girdhar Gopal *v.* State, A. I. R. 1953 M. B. 147.
2. *Ibid.*
3. Girdhar Gopal *v.* State, A. I. R 1953 M. B. 147 at p. 148.
4. 52 & 53 Vict., c. 63, Sec. 1 ; Tatia Mahadeo, 17 I. C. (Bom.) 794.

2. Meaning of words.—"*The contrary appears*", that is, unless contrary intention appears.

10. The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.

"Man", "Woman".

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.

1. Analogous law.—The term "man" is here defined in its restricted popular sense as denoting only a human being of the male sex, of any age, but not one in the womb. The term "man" as used in the Representation of the People Act, 1867,[1] was in one case[2] so interpreted overruling the contention made for the suffragettes that it must be interpreted generically as including all persons of the human species; but Byles, J., though conceding that the term was so used in scientific treatises on zoology or fossil organic remains, held that it could not be interpreted in that sense in a Parliamentary Statute.[3]

2. Principle.—In the language of Byles, J., in the case last cited "it is a well-known rule in the construction of statutes, that as they are framed for the guidance of the people, their language is to be construed in its ordinary and popular sense".[4] Therefore, since the ordinary and popular sense of the word "man" is confirmed to denote a male person the utility of the section becomes apparent.

3. Meaning of words.—"*Of any age*" implies that the human being must be sensate. A human foetus, if living, is a human being within the comprehension of this term. A child of six is, of course, a man or woman according to its sex.[5]

11. The word "person" includes any company or association or body of persons, whether incorporated or not.

"Person."

SYNOPSIS

1. Analogous law.
2. Meaning of "person":
   —Incorporate.
   —Includes.
3. Municipal Council, whether can be prosecuted.

1. Analogous law.—The following explanation of term "person" occurs in Sec. 19 of the English Interpretation Act[6] and Sec. 3(42) of the General Clauses Act, 1897 (X of 1897) :

> "*Section* 19.—In this Act and in every Act passed after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."

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1. 30 & 31 Vict., c. 102, Sec. 3.
2. Chairman *v.* Lings, L. R. 4 C. P. 374 at p. 392.
3. *Ibid.*
4. *Ibid.*
5. Tatia Mahadeo, 17 I. C. (Bom.) 794: 13 Cr. L. J. 858: 14 Bom. L. R. 961.
6. 52 & 53 Vict., c. 63.

"*Section* 3 (42).—Person shall include any company or association or body of individuals, whether incorporated or not."

2. Meaning of "person".—The term "person" has not been defined in a technical or narrow sense in the Indian Penal Code. Section 11, I. P. C., defines it in the same way as the term "person", as defined in Sec. 3 (42) of the Central General Clauses Act, 1897 (X of 1897). The definition in Sec. 11, I. P. C. is—

"11. The word 'person' includes any company or association or body of persons whether incorporated or not."

This is hardly a definition, it seems to be only an indication of the intention of the Legislature to use the word "person" in a fairly wide sense so as to include even artificial persons. The word "person" is said to be derived from "persons" which stood for the mask worn by an actor on the stage amongst the ancient Greeks and Romans. In law it implies the juristic personification of an entity which may or may not be an animate being.

An unborn child can be regarded as a living entity with a life of its own. The word "person" is defined in the *Shorter Oxford English Dictionary* in two ways: *firstly*, it is defined as "an individual human being" or "a man, woman, or child", and, *secondly*, as "the living body of a human being". It cannot be denied that an unborn child in advanced stages of pregnancy has a being or life of its own and that it has a body. It may be that its life and body are not independent of the mother's existence so that the unborn child cannot be said to have a separate existence. The word "person" has not been defined in such a way as to involve a separate existence of the living creature spoken of as "a person". As there is no such technical definition, it would be better to adopt the ordinary meaning of the term "person" as including a "child" whether born or unborn. Even if the child is unborn and within the womb of the mother, it is capable of being spoken of as a "person" if its body is developed sufficiently to make it possible to call it a "child". The post-mortem report shows that the child had developed sufficiently to have an identity of its own as a child. That would be enough to satisfy the definition of the term "person" as used in Sec. 304-A, I. P. C.[1] The term "person" in its primary and ordinary sense means and includes a human being, whether a man, woman or child. It is used in that sense in ordinary parlance and in many sections of the Code.[2] But it is not invariably so used. For there it includes not only such natural being but also fictitious persons such as company or association.[3] In this respect, the term follows the connotation which it has received in English law.[4] In a comparatively recent Madras case the question was whether Venkatachalapathi, the idol was a person as defined in Sec. 11, I.P.C. *Held* that the definition was not exhaustive and it must be taken to include artificial or juridical person like idol as well and a document bearing forged signature of the idol would be a forgery.[5]

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1. Jabbar v. State, A.I.R. 1966 All. 590 at at p. 593.
2. E.g., 56, 73, 84-87, 100 105, 114, 137, 139, 141, 149, 151, 153, 157, 159, 170, 192, 216, 220-25, 278, 297, 298, 490, 491, 497, and Chap. XVI.
3. "Club" is a person; Cooke, 23 I. C. (Bur.) 195.
4. *Per* Lord Blackburn in Pharmaceutical Society *v.* London, etc. Supply Association, 5 A.C. 857; so the word "person" in the Legal Practitioners Act, 1879 (XVIII of 1879), Sec. 6, was in view of the context, previous history and genera policy held to exclude a woman—Regina *v.* Garha, I. L. R. 44 Cal. 290 (S. B.).
5. *In re* Vadivelu Arsuthiyar, A. I. R. 1944 Mad. 77 at pp. 77-78 : I. L. R. (1944) Mad. 685: 1943 M. W. N. 712 (1): (1944) 2 M. L. J. 445.

Word "person" used in four senses in accordance with context.

Prima facie the word "person" in a public statute includes a corporation as well as a natural person.[1] The definition makes this authoritatively clear, but as it merely enunciates a permissible rule of construction, it leaves the matter as to the particular sense in which it is used in a particular juxtaposition in the Code undecided. Indeed, the latitude here given may, at least, lead to four senses in accordance with the content and the combination in which the word is used. It may, for instance, mean (*i*) only natural person, or (*ii*) only an artificial person, or (*iii*) invariably both, or lastly (*iv*) sometimes one and sometimes the other. The particular sense in which the term has been used in the various sections will be found discussed in the ensuing commentary. The term is wide enough to include Government as representative of the whole community. And in one case, Melville, J., so held in connection with the term as used in Sec. 27 which enacts that "when property is in possession of a person's wife, clerk, or servant on account of that person, it is in that person's possession within the meaning of the Code". It was accordingly held that possession by a forest officer of wood in the Government forest was possession of the Government within the meaning of that section.[2]

Incorporate.—The term "incorporate" implies legal recognition, incorporation being the formation of a legal body with the quality of perpetual existence and succession, except as limited by the Royal Charter, or Act effecting the incorporation.[3] According to Cl. (39) of Sec. 3 of the General Clauses Act, 1897, the term "person" includes any company, or association or body of individuals whether incorporated or not. But as held in the case of *Daily Mirror Newspaper*,[4] a limited liability company cannot be committed for trial on an indiotment though persons abetting or aiding the company would be liable. Surety bonds cannot be executed by artificial persons.[5]

Includes.—"Including" is a term employed generally where the scope of the class indicated by the words preceding it is wider than that of the class specified by the terms which follow.[6]

3 **Municipal Council, whether can be prosecuted**?—Whether the Municipal Council, a corporate body can be prosecuted as an accused for doing or omitting to do something?

At common law, corporations are now indictable for nuisance and breaches of public duty, whether existing by the common law or created by statute, and whether the breach of duty is by misfeasance or non-feasance. Corporations are often indicted for non-repair or illegal obstruction of highway, and it would seem that a Corporation aggregate is indictable for defamatory libel.

On this principle *prima facie* it seems that the Municipal Corporation can be prosecuted for offences which are only punishable with fine, for, in the very nature of things, imprisonment of a Municipal Council is out of question.[7]

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1. Pharmaceutical Society *v.* London, etc. Supply Association, 5 App. Cas. 857, *per* Lord Selborne, C. J.
2. Hanmanta, I. L. R. 1 Bom. 610 at p. 622.
3. *See* Sec. 41, Indian Companies Act (VI of 1882).
4. (1922) 2 K. B. 530.
5. Edmund N. Schuster *v.* Assistant Collector of Customs, New Delhi, A. I. R. 1967 Punj. 189 at p. 190.
6. Dayabhai Poonambhai *v.* Regional Transport Authority, A. I. R. 1951 M. B. 121 at p. 128 : 52 Cr. L. J. 1305.
7. Girdharilal *v.* Lalchand, 1970 Raj 145 at p. 149.

12. The word "public" includes any class of the public of any community.

"Public."

SYNOPSIS

1. Analogous law.
2. Meaning of "public".

1. Analogous law.—This section only defines "public" as a substantive, but it does not declare that its derivatives shall have allied meanings. For instance, "publication" is communication to the public but not necessarily to the public here described. Again, a "public meeting" may be open to the public in the sense here conveyed, or it may not. A public performance is not open only to "any community", though it is open to the "class of the public" which pays for the admission.

2. Meaning of "public".—In popular parlance the word "public" means the general body of mankind or of a nation, state or community. It is also sometimes used in a more restricted sense of denoting only a particular body or aggregation of people as an author's public (Webster). But as used in the Code it may assume a still further variety. For, as including "any class of the public" the term implies any sub-division of the public ever so small but still large enough to form a "class" and which excludes the possibility of a mere individual. So again, the term "community" is used here interchangeably with "public" and as a community may consist of a sect, race or a body of men united on any given principle, the term is sufficiently wide to include only a collection of men possessing some common bond of union. So a bequest in trust "for the community of the convent at *A* was held to be one for the benefit of the members for the time being of that convent".[1] A class or community inhabiting a particular locality may come within the term "public".[2] The members of a community may, therefore, fluctuate, but the community remains unchanged so long as its central principle remains. But the term "public" is a wider term and means only the people spoken of collectively. It consist of classes and communities, but the principle that they possess in common need not be shared by the public at large. In other words, "public" is a generic term of which class and communities are species.

13. *Queen.* [*Repealed by O.*1950.]

14. The words "servant of Government" denote any officer or servant continued, appointed or employed in India by or under the authority of Government.

Servant of Government.

SYNOPSIS

1. Amendment.
2. Government servant.

1. Amendment.—The original section defined the words, "servant of the Queen". The present section was substituted by the Adaptation of Laws Order, 1950.

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1. Bradshaw *v.* Jackman, 21 I L. R. Ir. 12. Pat. 76.
2. Harnandanlal *v.* Rampalak, I. L. R. 18

2. Governmcnt servant.—The term "Government" is defined in Sec. 17 of the Code as denoting the Central Government or the Government of a State. Therefore a Government servant means an officer or servant continued, appointed or employed either by the Union Government or by the Government of a State.

15. *Definition of "British India"* [*Repealed by the A. O.* 1937.]

16. *Definition of "Government of India". of* [*Repealed by the A. O.* 1937.]

17. The word "Government" denotes the Central Government or the "Government" of a Part A State.

"Government."

SYNOPSIS

1. Amendment.
2. Government.
3. Government stamps.

1. Amendment.—This section as originally enacted ran as follows :

"Government."

The word "Government" denotes the person or persons authorised by law to administer executive Government in any part of British India.

The words "person or persons authorised by law to administer executive Government in any part of British India" were omitted and substituted by the words "Central Government or the Government of Part A State" by the Adaptation of Laws Order, 1950. Subsequently the words "Part A" were omitted by Sec. 3 and Schedule of Act III of 1951.

2. Government.—Under the old section the executive administrator of any part of British India was "Government" and it was not necessary that that part should have been a presidency or a province or even a division. However small that part might have been, if the person was legally empowered to administer executive Government therein he was the "Government" within the meaning of the section. The chief functions of the executive Government being collection of revenue and maintenance of peace, a person who was empowered to collect revenue and maintain peace in a particular place was "Government" of that place. Hence it was held that the Collector or Deputy Commissioner of a district was "Government" of his district.[1] It was further held that the Collector even when acting in the management of a *khas mahal*, the property of the Government, was the Government within the meaning of this section.[2] But this is no longer good law as the section radically changes the definition of "Government" and now the term denotes only the Union Government or the Government of a State.

Old conception of "Government of district".

3. Government stamps.—But the word "Government" has a much wider significance in Secs. 225—263-A, which refer to offences relating to Government stamps in which the term includes "the person or persons authorised by law to administer executive Government in any part of India, and also in any part of Her Majesty's Dominions or in any foreign country". *See* sub-section (4) of Sec. 263-A which was inserted by Sec. 2 of the Indian Criminal Law (Amendment) Act, III of 1895, as a result of the Vienna Convention, at the instance of the post office to prevent the use of fictitious stamps on letters received from abroad.

18. "India" means the territory of India excluding the State of Jammu and Kashmir.

"India."

1. Bajoo Singh, I. L. R. 26 Cal. 158.
2. *Ibid.*

Comment

Amendment.—Before 1937, this section defined the word "presidency" as denoting the territories subject to the Government of a presidency. It was repealed by the Government of India (Adaptation of Indian Laws) Order, 1937. In 1950 another section was inserted in its place by the Adaptation of Laws Order, 1950, which defined a State in the following terms :

The word "State" denotes a Part A State or a Part C State, and the word "States" denotes all the territories for the time being comprised within Part A States and Part C States.

This definition of "State" and "States" was replaced by the present definition of "India" by Act III of 1951, Sec. 3 and Schedule.

"Judge."

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person—.

who is empowered by law to give, in any legal proceeding, civil and criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations

(*a*) *A* Collector exercising jurisdiction in a suit under Act X of 1859,[1] is a Judge.

(*b*) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(*c*) *A* member of a *panchayat* which has power, under Regulation VII,[2] 1816, of the Madras Code, to try and determine suits, is a Judge.

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1. Act X of 1859 (an Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal) has been repealed in the Chota Nagpur Division of Bengal (except as to the District of Manbhum and the tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (Bengal Act I of 1879) ; *see* now the Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908), and in the rest of Bengal (except as to Calcutta, Orissa, and the Scheduled Districts) by the Bengal Tenancy Act, 1885) (VIII of 1885). It is now in force in the district of Manbhum, in the Darjeeling District and in part of the Jalpaiguri District in Bengal and such parts of it as are not inconsisten with the provisions of Act VIII of 188ta which have been extended to the Oriss. Division are in force in that Division5 Act X of 1859 had been repealed in the Province of Agra (except as to certain Scheduled Districts) by the United Provinces Tenancy Act, 1901 (II of 1901), and in the Central Provinces by the Central Provinces Tenancy Act, 1920 (I of 1920).

2. Rep. by the Madras Civil Courts Act, 1873 (3 of 1873).

(*d*) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a judge.[1]

SYNOPSIS

1. Meaning of "Judge".
2. Arbitrators.
3. Meaning of judgment.
4. Legal proceedings.

1. Meaning of "Judge".—In its ordinary and normal sense the word "Judge" means only a Judge of a High Court. It does not mean a presiding officer of any Court. The returning officer who has to scrutinise the nomination papers is not a "Judge" within the meaning of Sec. 19 of the Indian Penal Code.[2] But the term has been enlarged as to its meaning in a number of Acts both here as well as in England, so that, in law, it may now mean any person competent to deliver a definitive judgment. So in the old Code of Civil Procedure,[3] a "Judge" was the presiding officer of a Court, and this definition has been preserved in the present Code. The same extended sense is conveyed by the Code of Criminal Procedure in which "judicial proceeding" is defined to be any proceeding in the course of which evidence is, or may be legally taken or both.[4] Of course, the judicial proceeding as here understood, need not necessarily be of a "Judge" for a person may be empowered to administer oath, and not competent to deliver a definitive judgment. He may be only competent to submit a report or record an opinion Illustration (*d*) furnishes an apt illustration of this. It is thus clear that the term "judicial proceedings" is wider, and does not imply proceedings of a Judge, though all proceedings of a Judge are judicial proceedings.

All proceedings of a Judge are judicial proceedings but all judical proceedings are not proceedings of a Judge.

According to the definition, every person officially designated a Judge is a Judge. Besides Judges of the High Court, Sessions Judges, District Judges, Assistant Sessions Judges and Subordinate Judges are ordinarily persons so designated. In addition, persons who are authorised to give[5] a definitive judgment in a legal pooceeding[6] are also included. Now, what is a definitive judgment? A "definitive judgment" means a final judgment.[6] A person other than one who is officially designated as a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding—revenue, civil or criminal—is concerned he is a Judge, but he is not a Judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of "Judge" when it is empowered by law to give a judgment, such as arbitrators, but arbitrators can come within the term "Judge" only when dealing with a case on reference to their arbitration.[8]

Who are deemed to be Judges.

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1. *Per* Bark, B., in Elsley *v* Kirby, 12 L. J. Ex. 97 ; Kissam *v.* Link, (1896) 1 Q. B. 574 ; Re Noyce, (1892) 1 Q. B 642; Miles *v.* Presland, 4 My. & C. 431 ; Forter *v.* Edwards, 48 L. J. (Q. B.) 767 ; Seth *v.* Reading, 17 Q. B. D. 131.
2. Data Ram *v.* Ved Parkash Chopra, A.I. R. 1970 Punj. 21 at p. 22 : 71 Punj. L R. 999.
3. Section 2, Act XIV of 1882, now *see* Sec. 2 (8), Act V of 1908.
4. Section 4 (*m*), Act V of 1898.
5. "Judgment means the statement given by the Judge, on the grounds of a decree or order," Sec. 2 (10), C. P. C. (Act V of 1908). In the Cr. P. C., Chap. XVI (Secs. 366-373) deals with judgments.
6. Co. Ltt., 39a, 168a.
7. So held subsequently in Emperor *v.* Shanker Sayaji Dalvi, A. I. R. 1938 Bom. 489 at p. 489 : 40 Cr. L. J. 116 : 40 Bom. L. R. 1106.
8. Ram Chandra Modak *v.* King-Emperor, A. I. R. 1926 Pat. 214 at p. 217 : I. L. R. 5 Pat. 110.

An affidavit sworn before him is not a legal affidavit[1] Every member of Panchayati Adalat in U. P. is a Judge.[2] Same is true of member of a Village Pancayat in Madhya Pradesh.[3] A village police Patel deciding a case under Sec. 14 of the village Police Act, 1867, is a Judge.[4] The reason is that Sec. 14 above enables him to try and on conviction to punish, as therein mentioned any person charged with certain petty offences, and when he convicts or acquits he is giving a "definitive judgment". An election officer empowered to remove names from the electoral roll has been held to be a Judge.[5] In *Hemendra Nath's* case,[6] the Patna High Court accorded the same status to the manager exercising functions under Part 4 of the Chota Nagpur Enoumbered Estates Act. A president of a Union Board accepting or rejecting a nomination paper after scrutiny undoubtedly, gives a definitive judgment. It is a Judge within the meaning of Sec. 19, I. P. C., who is protected by Sec. 197, Cr. P. C.[7]

A Panch is a "Judge" within the meaning of that term in this section. Under this section any one of a body of persons which is empowered by law to give a definitive judgment is a "Judge". A Sarpanch of a Panchayat under the Rajasthan Panchayat Act (21 of 1953) is a "Judge".[8]

The Sarpanch of a Nyaya Panchayat comes within the definition of Sec. 19, I. P. C. He can certainly be said to be one of a body of persons, which body of persons is empowered by law to give a judgment.[9]

Section 197 (1) of the Code of Criminal Procedure is very clear and specific and leaves no room for doubt that before a person accused of an offence can claim protection by virtue of being a Judge within the meaning of Sec. 19, I. P. C., it must be shown that at the time when the accusation was made against him he was performing the functions and duties of a Judge. If he has ceased to be a Judge on the date when cognizance of the case is taken against him, the protection afforded by Sec. 197 would not be available to him. This is the plain, natural and commonsense meaning of Sec. 197, Cr. P. C.[10]

2. **Arbitrators**.—There is a stray remark in *Ram Chandra's* case[11] that an arbitrator is a Judge. The Judicial Commissioner's Court at Peshawar has however held that an arbitrator is not empowered to give a judgment at all.[12] The reason is that an arbitrator can only make an award, and it is the Court that can pronounce a "judgment according to the award", and pass a decree.[13] An arbitrator is not empowered to give a "judgment", much less a definitive judgment.

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1. Bishan Lal, A. I. R 1954 H. P. 57 at p. 58.
2. Asharfi Lal *v.* State, A. I. R. 1952 All. 306 at p. 307 : 1951 A. L. J. 551 : 1952 Cr.L. J 621.
3. Kamla Patel *v.* Bhagwan Das, 37 Cr. L. J. 294 at p 294.
4. Emperor *v.* Shanker Sayaji Dalvi, A.I. R. 1938 Bom. 489 at p. 490 : 40 Cr. L. J. 116: 40 Bom. L. R. 1106.
5. Hanumantha Rao *v.* Lakshmanyya, 1937 M. W. N. 740.
6. A. I. R. 1937 Pat. 160 at p. 162 : 38 Cr. L. J. 94.
7. S. C. Abboy Naidu *v.* Kanniappa Chettiar, A. I R 1929 Mad. 175 at p. 176.
8. Prabhu Dayal *v* Milap Chand, A. I. R. 1959 Raj. 12 at p. 14 ; State of Madras *v.* C. S. Rajagopala Iyer, A. I R. 1956 Mad. 613 (D. B.) at p. 615 : 59 M. L. W. 559: (1956) 2 M. L. J. 176 : 1956 Cr. L. J. 1330.
9. Kishan Swarup *v.* Brijindra Singh, (1962) 2 Cr. L J. 408 :1961 A. L. J. 859 : 1961 A W. R (H C.) 689 : I. L. R. (1961) 2 All. 682.
10. *Ibid.*
11. I L R. 5 Pat. 110.
12. Pearey Lal Bhatia *v.* Emperor, A. I. R. 1940 Pesh 41 at p. 43 : 42 Cr. L. J. 68 : 191 I. C. 91.
13. *See* Sec. 17, Arbitration Act.

3. Meaning of judgment.—A judgment here means a formal adjudication upon any point claimed or contested by a party appearing before a court. In the language of the Code it is the sentence of the law pronounced by the Court upon the matter contained in the record.[1] In a criminal case a conviction is a judgment. But a miscellaneous interlocutory order is not.[2] But inasmuch as such orders are ordinarily passed by persons possessing the larger powers of delivering judgment, the distinction is, for the present purposes, immaterial.

4. Legal proceedings.—Since the judgment must be delivered in a "legal proceeding" it is apprehended that a "legal proceeeding" is not different from a "judicial proceeding" as defined in the Code of Criminal Proce dure.[3] In fact, the term "legal proceedings" has been judicially defined as a proceeding regulated or prescribed by law in which a judicial decision is given.[4] A similar definition occurs in the English Banker's Book Evidence Act, 1879, where "legal proceeding" is defined to mean "any civil or criminal proceeding or enquiry in which evidence is, or may be given, and includes an arbitration".[5] The identity of the two is thus clearly established, for it is manifest that the definition of "judicial proceeding" is taken from the definition of "legal proceeding" in the English Statute.

"Court of Justice."

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration

A *panchayat* acting under Regulation VII,[6] 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

SYNOPSIS

1. Amendment.
2. Analogous law.
3. What is a court ?

1. Amendment.—The Criminal Law Amendment Act, 1958 (II of 1958), has added a twelfth clause creating an additional class of public servants ; it has also added another Explanation to define the expression, "corporation engaged in any trade or industry", used in the new twelfth clause. The Government felt that for dealing with the evil of corruption in the public services, it was necessary to bring within the scope of the Anti-Corruption Law the employees of statutory trading corporation and Government companies as defined in Sec. 617 of the Companies Act, 1956 (I of 1956).

2. Analogous law.—The regulation referred to in the illustration has been repealed by the Madras Civil Court Act.[7]

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1. R. *v.* Beggins, 26 J. P. 437.
2. Definition of "Order" in C. P. C (Act V of 1908), Sec. 2 (14).
3. Section 4 (*m*), Cr. P. C.
4. S.C Abboy Naidu *v.* Kanniappa Chettiar, A. I. R. 1929 Mad. 175 at p. 176 : 30 Cr. L. J. 365.
5. 42 & 43 Vict., c. 11.
6. Rep. by the Madras Civil Courts Act 1873 (3 of 1873).
7. Act III of 1873.

3. What is a Court ?—"Court", says Lord Coke, "is a place where justice is judicially ministered, and is derived a *cura quia in curiis publicis curas gerebant.*"[1] But this definition appears to be too narrow. For as Fry, L. J., observed : "A Court may perform various functions. The Court of Parliament is a Court, although many of its functions are not judicial. The members are, however, entitled to have absolute immunity for words there spoken.

Courts and Courts of Justices.

There are other Courts which are not Courts of Justice, but which are rather Courts of investigation, e. g. a "Coroner's Court".[2] So there are several Acts in which the term "Court" has received a definition of its own. Thus Sec. 3 of the Evidence Act defines "Courts" as including all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence. This definition, however, has been held to be not exhaustive but framed only for the purpose of Evidence Act and is not to be extended where such an extension is not warranted.[3] As pointed out in Halsbury's *Laws of England*,[4] the word "Court" originally meant the King's Palace but subsequently acquired the meaning of (1) a place where justice is administered and (2) the person or persons who administer it. The combined effect of the definition of "Judges" in Sec. 19 and of "Court" in Sec. 20 of the Penal Code is that in order to constitute a Court in the strict sense of the term it is essential that the Court should have the power, apart from the trappings of a judicial tribunal,[5] to give a decision or a definitive judgment which has finality and authoritativeness.[6] To be Court, the person or persons who constitute it must be entrusted with judicial functions, that is of deciding litigated questions according to law.' The term "Court" as proved by subsection (2) of Sec. 195 of the Code of Criminal Procedure (Act 5 of 1898) has a wider meaning than the words "Court of Justice" in Sec. 20 of the Penal Code.[8]

What are Courts and what are not-

The Court, here intended, is a Court of Justice which by the terms of the definition means a Judge or Bench of Judges (1) empowered to act judicially and (2) acting judicially. So, when they perform merely administrative functions, they are not a Court of Justice.[9] A Court-martial, holding an enquiry into the conduct of an officer, cannot be said to be a Court of Justice nor is their inquiry a judicial proceeding though a witness examined by them stands in the same position as a witness giving evidence before a judicial tribunal.[10] A meeting of the London County Council for hearing application for music

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1. Co. Litt. 58a.
2. Royal Aquarium *v.* Parkinson, (1892) 1 Q. B 431
3. R. *v.* Tulja, 12 Bom. 36 ; *see* Venkatachala Pillai, *In re* I. L. R. 10 Mad. 151 ; Brajanandan Sinha *v.* Jyoti Narain, A. I. R. 1956 S. C. 66 at p. 69 . (1955) 2 S. C. R. 955 : 1955 S. C. J. 155 : 1956 All. L. J. 164 : 1956 B. L. J. R. 155 : (1956) 1 M. L. J. (S. C.) 4 : I. L. R. 35 Pat. 65 : 1956 Cr. L. J. 156, reversing A I. R. 1954 Pat. 289.
4. 3rd Ed.. Vol. 9, p. 342.
5. To use the striking language of Lord Sankey, L. C., in Shell Co of Australia *v.* Federal Commissioner of Taxation, 1931 A. C. 275 at p. 296 : 100 L. J. P. C. 55.
6. Brajnandan Sinha *v.* Jyote Narain, A.I.R. 1956 S. C. 66 at p. 70 (1955) 2 S: C. R. 955: 1956 S C J. 155 : 1956 A. L. J. 164: 1956 B. L. J R. 155 : (1956) 1M . L. J. (S.C.) 4: 35 Pat.65: 1956 Cr. L. J. 156; S A. Venkataraman *v.* Union of India, A I. R. 1954 S. C. 375 : Virindar Kumar *v.* State of Punjab, A. I. R. 1956 S C. 153 at p. 157 : (1955) 2 S. C. R. 1013 : 1956 S. C. J. 138 : I. L. R. (1956) Punj. 163 : 58 Punj. L. R. 583.
7. Bharat Bank *v.* Employees of Bharat Bank, A. I. R 1950 S. C. 188 at p. 195 : 1950 S. C. R. 459 : (*per* Mahajan, J., as he then was).
8. Nanchand, I. L. R. 37 Bom. 365 ; Bajaji Appaji Kale *v.* Emperor, A. I. R. 1946 Bom 7 at p. 11 ; Raghubans, I. L. R. 17 Cal. 872 ; Nandalal, I. L. R. 45 Cal. 585, but see *contra* Hayat, A. I. R. 1948 Lah. 184 (F. B.)..
9. Royal Aquarium *v.* Parkinson, (1892) 1 Q. B. 431.
10. *Per* Cairns, L. C., in Dawkins *v.* Lord Rokeby, L. R. 7 H. L. 744, on appeal from S. C. L. R. 8 Q. B. 255.

and dancing licences is not a court and, therefore, not a Court of Justice.[1] A Poor Rate Assessment Committee is not a court.[2] But an officer inquiring into an income-tax objection in this country, would appear to be a Court of Justice as regards that inquiry for his proceedings are declared to be judicial by Sec. 37 (4), Indian Income-tax Act, XI of 1922, though otherwise the proceedings are merely administrative and not judicial. The Court of Admiralty, the Vice-Admiralty and Vice-Admiralty Prize Court are Courts of Justice.[3]

"Public servant."

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely,—

First.—(Omitted by the Adaptation of Laws Order, 1950) ;

Second.—Every Commissioned Officer in the Military, [4][Naval or Air] Forces of India ;

[5][*Third.*—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions] ;

Fourth.—Every Officer of a Court of Justice [6][(including a liquidator, receiver or commissioner)] whose duty is as such officer to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court ; and every person specially authorised by a Court of Justice to perform any of such duties ;

Fifth.—Every juryman, assessor or member of a *panchayat* assisting a Court of Justice or public servant ;

Sixth.—very arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth—.Every officer of the Government whose duty it is, as such officer, to preveut offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

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1. Royal Aquarium *v.* Parkinson, (1892) 1 Q. B. 431.
2. R. *v.* St. Mary Abbots, (1891) 1 Q. B. 378.
3. As to all Admiralty jurisdiction *see*, now 15 and 16 Geo. 5, c. 49, Supreme Court of Judicature (Consolidation) Act, 1925, Secs. 22 and 23.
4. The words "Naval or Air Force" were substituted for the word "Naval" by the Repealing and Amending Act, 1927 (Act X of 1927).
5. Subs. by Act No. 40 of 1964, Sec. 2.
6. Ins. by *ibid.*

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep, or expend any properry on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate to or report, on any matter affecting the pecuniary interests of the Government or to make, athenticate or keep any document relating to the pecuniary interest of the Government or to prevent the infraction of any law for the protection of the pecuniary interests of the Government [1][* * *] ;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district ;

Eleventh.—Every person who holds any office in virtue of which he isempowered to prepare, publish, maintain or revise an electoral roll to conduct an election or part of an election;[2]

[3][*Twelth.*—Every person—

(*a*) in the service or pay of the Government or remunerated by fees or commissions for the performance of any public duty by the Government,

(*b*) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in Sec. 617 of the Companies Act, 1956 (1 of 1956)].

Illustration

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Exptanation 2.--Wherever the words "public servant" occur they shall be understood of every person who is in actual possession of the situation of a public servant whatever legal defect there may be in his right to hold that situation.

Explanation 3.—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal

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1. Omitted by Act No. 40 of 1964, Sec. 2.
2. Clause Eleventh and Explanation 3 have been added by Sec. 2 of the Indian Election Offences and Inquiries Act (Act XXXIX of 1920).
3. Subs. by Act No- 40 of 1964, Sec. 2.

or other public authority, of whatever character, the method of selection to which is, by, or under, any law prescribed as by election.

[1][* * *]

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Who are public servants.
5. Tests.
6. In the service of "in the pay of".
7. Statutory public servants.
8. Officers of the Army, Navy and Air Force.
9. Every Judge is a public servant.
10. Officers of a Court of Justice.
11. Specially authorised.
12. Juror, Assessor and Panch.
13. Arbitrators and Commissioners.
14. Policemen, jailors.
15. Peace Officers.
16. Miscellaneous officers of Government.
17. Other cases.
18. Railway servants.
19. Officers of Local Bodies.
20. Employees of statutory trading corporations and of Government companies.
21. Illustration—Commissioner.
22. Not public servant.
23. Explanation I.
24. Explanation II.

1. Anologous law.—The term "public servant" bears some analogy to the term "servant of Government" elsewere defined.[2] Besides the persons comprised in the definition a large body of men have so declared within the meaning of the section, by several local Acts.[3]

1. Omitted by Act No. 40 of 1964, See. 2.
2. Section 14, I. P. C.
3. The following are such Acts or Regulations arranged alphabetically : (*a*) Ajmer Government Wards Regulation (I of 1888) Sec. 11 (2); Allahabad University (XVIII of 1887), Sec. 18 (1); Angul District Railway (I of 1894), Sec. 56 ; Assam Labour and Emigration (VI of 1901), Sec. 4 (2) ; Assam Forest Regulation (VII of 1891), Sec. 69 ; (*b*) Bengal Court of Wards (Bengal Act IX of 1879), Secs. 5, 9-A; Bengal Public Parks (II of 1904), Sec. 7; Births, Deaths and Marriages Registration (VI of 1886), Sec. 14 ; Boilers (V of 1923), Sec. 5 (5); British Baluchistan Forest Regulation (V of 1890), Sec. 36 ; British Burma Pilots (XII of 1882), Sec. 8 (2) ; Broach and Kaira Encumbered Estates (XXI of 1881), Sec. 33 ; Broach Thakur's Relief (XV of 1872), Sec. 17 ; (A Karkun employed to execute revenue process is a Public servant; Isub Musa, B. U. C. 117); Bombay Civil Courts (XIV of 1869), Sec. 33 ; Bombay Court of Wards (Bombay Act I of 1945), Sec. 2 (12) ; Bombay Local Boards (Bombay Act I of 1880), Sec. 71 ; Bombay Municipal (Bombay Act II of 1888), Sec. 521 ; Burma Canal (Burma Act II of 1206), Sec. 167; Burma Embankment (Burma Act IV of 1909), Sec. 12 ; Burma Forest (XI of 1881), Sec. 76; Burma Forest (IV of 1902), Sec. 75 ; Burma Municipalities (Burma Act III of 1898), Secs. 44, 139 ; Burma Steam Boilers and Prime Movers (XVIII of 1382), Sec. 12 ; (*c*) Calcutta Municipal (Bengal Act III of 1899), Sec. 646 ; Cattle Trespass (1 of 1871), Sec. 6 ; Census Act (XVI of 1890), Sec. 3 (2) ; Central Provinces Court of Wards (XXVI of 1899), Sec. 19 (2); Central Provinces Government Wards (XVII of 1885), Sec. 12(2); Chota Nagpur Encumbered Estates (VI of 1876), Sec. 21; Chittagong Port Commissioners (Bengal Act of 1887). Sec. 63; Civil Courts (Bengal Act VI of 1887), Sec. 33; Coroners (IV of) 1871), Sec. 5 ; Court of Wards (U. P.) Act III of 1899), Sec. 30 ; (*d*) Dourine (V of 1910), Sec. 4 (2) ; (*e*) Embankment (XIII of 1877), Sec. 14 ; Emigration (XVII of 1908), Sec. 14 (2) ; Emigration (XXI of 1883), Secs. 16 (4), 18 ; (*f*) Factories (XII of 1911), Sec. 4 (6) ; (*g*) Glanders and Farcy (XIII of 1869), Sec. 4 (2) ; (h) Hazara Forest Regulation (XI of 1893), Sec. 413; (*i*) Inland Steam Vessels (VI of 1884), Secs. 7, 38 ; (*k*) Kanungoes and Patwaries (N. W. P. Act (IX of 1889), Sec. 17; (*l*) Land Record Maintenance (Bengal Act III of 1895), Sec. 33 ; Land Revenue Act (N. W. P. Act XIX of 1878), Sec. 35 ; (*m*) Madras Canals & Ferries (Madras Act II of 1890), Sec. 11 ; Madras District Municipal (Madras Act IV of 1884), Sec. 14 ; Madras Forest (Madras Act V of 1882), Sec. 60; Madras Forest (V of 1882), Sec. 66; Madras Labour Emigration (Madras Act V of 1886), Sec. 3 ; Madras Local Boards (Madras Act V of 1884), Sec. 43; [A Sanitary Inspector is a Public servant, Trivengada, 21 Mad. 428]; Madras Marriage and Divorce (XV of 1865), Sec. 32; Madras Municipal Act (Madras Act I of 1884), Sec. 56; Madras Rivers Conservancy (Madras Act VI of 1884), Sec. 23 , Merchant Shipping (VII of 1880), Sec. 50; (V of 1883), Sec. 14 (2); Municipal (U. P. Act I of 1900), Sec. 58; Museum (Indian) (XXII of 1875), Sec. 14; (*n*) N. W. P. and Oudh Land Revenue (U. P. Act III of 1901), Sec. 27 ; (*o*) Oudh Talukdars' Relief (XXIV of 1870),

2. Principle.—In all civilized countries, persons designated "the public servants" form a class by themselves as requiring special protection of the law and as, on the other hand, deserving specially rigorous treatment for abuse of power. Persons who are the embodiment of law and authority naturally possess many immunities and privileges, and they are visited by the correspondingly severe penalties of law, if they deviate from the course prescribed to them by their duty. The Code has accordingly prescribed exceptional pains and penalties to provide for offences committed by and against public servants.

The too comprehensive nature of the description of "public servant" was objected to at the time of the draft, but the Indian Law Commissioners defended it, adding: "Supposing the several descriptions he (Mr. Norton) specifies to be as comprehensive as he takes them to be, yet it does not appear to us that they are faulty in this respect, with reference to the provisions in the two chapters relating to public servants in the application of which recourse will be had to them. We think they will be found sufficiently distinct and definite for the purpose they are to serve. We have no apprehension that there will be any difficulty in determining who are positively excluded as not falling under any of the descriptions in Cl. 14."[1]

3. Meaning of words.—"*Public servant*": The section describes the term by enumeration. The term may generally be defined to signify any person duly appointed and invested with authority to administer any part of the executive power of the Government or to execute any other public duty imposed by law, whether it be judicial, ministerial or mixed. "*Other person to whom any cause or matter has been referred for decision or report*": The "cause or matter" must be one in controversy.[2] "*Every officer whose duty it is as such officer to take, etc. property*": This means a person employed to exercise to some extent delegated function of Government: he must be either himself armed with some authority of a representative character, or his duties must be immediately auxiliary to those of someone who is so armed.[3] "*Officer in the service or pay of Government*": An officer in the service or pay of Government within the terms of Sec. 21, Penal Code, is one who is appointed to some office for the performance of some public duty.[4] "*Specially authorised*": When a person who has no general power to execute a judicial process is authorised by a court to execute such a process, he is

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Sec. 22; (*p*) Parsee Marriage and Divorce (XV of 1865), Sec. 23; Pegu and Sittang Canal (II of 1881), Sec. 14; Police (V of 1861), Sec. 5; Prisons (IX of 1894), Sec. 23; [A convict warder or overseer is a public servant; Muhammad, (1908) P. R. No. 22]; Punjab Steam Boilers and Prime Movers (Punjab Act II of 1902), Sec. 12; Punjab Military Transport (Punjab Act I of 1903), Sec. 4 (2); (*r*) Railway Act (IX of 1390), Sec. 136 (1); Rangoon Port Commissioners (XV of 1879), Sec. 64; Rangoon Fort (Burma Act IV of 1905), Sec. 107; Rangoon Victoria Memorial (Burma Act I of 1908), Sec. 4; Registration (XVI of 1898). Sec. 84; (*s*) Sind Encumbered Estates (XX of 1896,) Sec. 35; Presidency Small Cause Court (XV of 1882), Sec. 52; Steam Boilers (N. W. P. and Oudh) (I of of 1899), Sec. 12 (3); Steamship (VII of 1834), Secs. 9, 37 (3); (*t*) Telegraph Act (XIII of 1885); (*u*) United Provinces District Boards (U. P. Act III of 1906), Sec. 41; U. P. Steam Boilers and Prime Movers (U. P. Act I of 1887), Sec. 12 (3); Upper Burma Oil Field Regulation (VI of 1910), Sec. 12; Upper Burma Registration Regulation (II of 1897), Sec. 7 (2); (*v*) Victoria Memorial (X of 1903), Sec. 4.

1. First Report, Sec. 7*d*. This section was Cl. (14) in the Draft Bill.
2. Debi Din, (1886) 1 A. W. N. 295.
3. Ramajirao, 12 B. H. C. R. 1; Nizamuddin, I. L. R. 28 Cal. 344.
4. Nizamuddin *v.* Queen-Empress, I. L. R. 28 Cal. 344: 4 C. W. N. 798; Ismail Mohammed Hajee *v.* The King A. I. R. 1941 Rang. 349 at p. 350: 197 I. C. 845: 43 Cr. L. J. 287: I. L. R. (1941) Rang 536.

"specially authorised" within the meaning of the section.[1] "*Village, town or district*" : The Port Trust Estate does not fall within the term village, town or district as used in Cl. (10) of this section.[2] For the meaning of other clauses, *see* below.

4. Who are public servants?—This section does not define public servants, but describes them only by enumeration, which itself is merely illustrative and by a no means exhausitive. Speaking generally, a "public servant" must, firstly, be *servant*, and secondly, a *public* servant. It is not necessary that a servant should receive any salary or emoluments for his work since an honorary servant discharging a public duty is as much a servant as a stipendiary servant in the pay of the Government.[3] Thus a peon who was remunerated by a fee on processes served by him in a Collector's Court,[4] or a candidate entertained without any pay in the tahsil office for learning work in the hope and expectation of eventually being taken on the staff,[5] were both held to be public servants. An unpaid candidate at the request of one of the clerks was assisting one of them in some work connected with the duties of an arms clerk in the office of a Deputy Commissioner, *held* it will not be sufficient to make him a public servant.[6] It is essential that a public servant must be in charge of some *public* duty.[7] Public duty is now here defined in the Code, and no general definition of the word would be complete. It may, however, be said that all persons having to discharge delegated functions of administration of State are public servants.[8] The duty imposed upon such public servant may be ever so exalted or menial, but, as long as he is discharging the public duty, he is a public servant. It matters little that there is some flaw in his appointment, as long as he has in fact "taken the duties and responsibilities belonging to the position of a public servant and he performs those duties, and accepts those responsibilities, and is recognized as filling the position of a public servant."[9]

Public servant must be in charge of some public duties.

Public servants known to the law.

Public servants known to the law are either statutory or those mentioned in this section. The local or special laws have declared certain functionaries as public servants for the purposes of the Penal Code. As they own their status to some statute, they are designated statutory public servants and in their case, it is not necessary to refer to the section, though they must necessarily fulfil its requirements. But they have been so declared in order to place their status beyond contest. A person may be declared to be a public servant by a statute but such declaration would not necessarily make him a public servant within the meaning of this section, unless he possesses any of the qualifications therein described, though he will, of course, be a public servant for other purposes

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1. Emperor *v.* Ram Chandra Sahu, A. I. R. 1933 Pat. 187 : 142 I. C. 580 : 34 Cr. L. J. 391 : I. L. R. 12 Pat. 184.
2. S. E. Neylor, A. I. R. 1941 Sind 30 at p. 31: 42 Cr. L. J. 422: 193 I. C. 358: I. L. R. (1941) Kar. 184.
3. Parmeshar Datt, I. L. R. 8 All. 201, followed in Ram Chandra Sahu, I. L. R. 12 Pat. 184; Mehendra Prasad, I. L. R. 9 Cal. 698.
4. Ramkrishna, 7 B. L. R. 446 : 16 W. R. (Cr.) 27.
5. Parmeshwar Datt, I. L. R. 8 All. 201 ; Subramanya *v.* Somasundaram, I. L. R. 21 Mad. 428 ; Mahendra Prasad, A. I. R. 9 I. C. (C.) 698.
6. Harbilas *v.* Crown, A. I. R. 1950 E. P. 167 at p. 168 : 5 D. L. R. (Simla) 104.
7. Nizamuddin, I. L. R. 28 Cal. 344.
8. *Cf.* 55 & 56 Vict., c. 61.
9. *Per* Straight, J., in Parmeshwar Datt, I. L. R. 8 All. 201 (*vide* Expl. 2 to this section ; *see* also Harbilas *v.* Crown, A. I. R. 1950 E. P. 167).

in accordance with the provisions of the statute. Another important point to note is that a public servant need not necessarily be appointed by Government.[1] This is obvious from the explanation and from the illustration[2] in which a Municipal Commissioner is declared to be a public servant, though he is elected by the suffrage of his constituency subject only to the approval of or confirmation by the Government. The extra department Branch Postmaster agents may also be "public officers" within the meaning of Sec. 2 (17) of the Civil Procedure Code, or "public servants" within the meaning of Sec. 21 of the Indian Penal Code.[3]

Under Sec. 200, Cr. P.C., when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a court or by a public servant acting or purporting to act in the discharge of his official duties.

It can be held that the conciliation officer was a public servant and was acting or purporting to act in the discharge of his official duties, as the complaint is in writing, there would be no illegality if he was not examined upon oath.[4] Again, if a person who is a public servant is to be prosecuted for an offence committed by him while acting or purporting to act in the discharge of his official duty, prior sanction as required by the term of Sec. 197 of the Code of Criminal Procedure is essential before a court can take cognizance of the offence.

Even if a person is in actual possession of the situation of a public servant, he is not a public servant unless he had a right to hold that situation. In determining his right to hold that situation, the legal defect, if any, is to be ignored. For instance, a person has been appointed as a public servant but before the appointment letter is issued to him, he might start doing the work of that post. In that case, the person would come within the meaning of "public servant" even though the actual appointment letter had not been issued. The incumbent had a right to hold the situation as he had already been appointed. But the legal defect lay in the fact that the actual appointment letter had been issued. An interloper in possession of public office is not a public servant.[5]

The term "public servant" would embrace not only public servants properly so-called but also persons in the employment of the Government who carry defective appointments. The term is, therefore, meant to be used in a wide sense; and a public servant under suspension would not cease to be a "public servant" within the meaning of Sec. 21 of the Code.[6]

5. Tests.—The true test in order to determine whether a person is an officer of the Government, is (1) whether he is in the service or pay of the Government and (2) whether he is entrusted with the performance of any public duty.[7] In determining whether a person is a public servant or not, the first thing to see is whether he is a servant. Then enquiry should turn to whether he is not a statutory public servant. It is only then that the section need be referred to, and as the section is of last resort, attention must be paid to its clauses, with a view to seeing if the case in point is covered by any of the twelve clauses here enumerated. On referring to them it will sometimes

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1. Explanation 1.
2. Ill. to "eleventh" clause.
3. Ch. Venkata Swamy *v.* Superintendent, A. I. R. 1957 Orissa 112 at p. 116.
4. State of Bihar *v.* Deodar Jha, A. I. R. 1958 Pat. 51 at p. 58.
5. State of Orissa *v.* Bira Kishore Naik, A. I. R. 1964 Orissa 202 at p. 203 : 30 Cut. L. T. 176 : (1964) 6 Ori J. D. 119.
6. Dhanpal Singh *v.* State, A. I. R. 1970 Punj. 514 at p. 514.
7. The State of Ajmer (now Rajasthan) *v.* Shivji Lal. (1959) 2 S. C. R. Supp. 739 at pp. 743-44 ; G. A. Monterio *v.* State of Ajmer, 1956 S. C. R. 682.

be found that a given case is covered by more than one clause which is quite possible, for the clauses are not mutually exclusive and exhaustive, and only a casual reference to them is sufficient to show that a case might conceivably fall within two or more clauses at the same time. But the fact that a person is a public servant within the meaning of more than one clause does not affect his status, if it is once so established. But in order to apply the test here prescribed, it is necessary to grasp with precision the meaning of each clause, for the clauses are by no means free from difficulty.

6. "In the service of" or "in the pay of".—The expression "in the service of" implies a relationship of master and servant. The test whether or not there is a relationship of master and servant is the existence of right of controlling the manner in which the other does the work. The mode of payment for service, the time for which the servant is engaged, the nature of those services or the power of dismissal may have some relevance. But the right of control as to the manner in which the other does the work is the conclusive test. The word "pay" must be construed in the light of the context and would mean wages or money given for service. "In the pay of" construed in the light of the context of the whole clause would carry the meaning "in the employment of".[1]

One may be a public servant within the meaning of the Indian Penal Code but from that it does not necessarily follow that he is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State within the contemplation of Art. 311 of the Constitution. Clause (12) of Sec. 21 of the Indian Penal Code has got nothing to do with the determination of the question, namely, whether a petitioner is a Government servant within the meaning of Art. 311 of the Constitution.[2]

The *pradhan* of a Goan Sabha though a public servant within the meaning of Sec. 21 of the Indian Penal Code by virtue of Sec. 28 of the Act, he is not a subordinate of the Sub-divisional Officer or even of the State Government The Act has conferred upon the State Government and its delegates, under Sec. 95, certain powers of control and supervision over the Goan Sabha and its office-bearers.

Referring to the power of suspension and removal envisaged by Sec. 95 (1) (*g*) the Supreme Court observed :

> "But that power is admittedly a power to punish. No specific power to suspend a *pradhan* pending enquiry into the charges levelled against him has been conferred on the State Government. This much is conceded."

It was argued before the Supreme Court that the relationship between the State Government and the *pradhan* was that of master and servant and the State Government was, therefore, competent to preclude the *pradhan* from discharging functions under the Act during the pendency of the enquiry into the charges levelled against him, but the argument was repeled and it

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1. Manshanker Prabhashanker Dwivedi *v.* State of Gujarat, A. I. R. 1970 Guj. 97 at p. 103.
2. Malik Ram *v.* Hindusthan Cables Ltd., 72 C. W. N. 398 at p. 401.

was held that the Pradhan was an elected representative and cannot be considered as a servant of the Government and also that there is no contractual relationship between him and the Government much less the relationship of master and servant.[1]

There is no manner of doubt that the *pradhan* of Gram Sabha is an officer within the meaning of the 12th clause of Sec. 21, I. P. C. A *pradhan* can be deemed to be an officer in the service of the local authority.[2]

7. **Statutory public servants**.—A list of the statutes defining such servants has been given elsewhere. An illustretived enumeration may, perhaps, make the scbject further clear. Bailiffs and appraisers of the Presidency Courts of Small Causus,[3] Census Officers,[4] Coroners of Presidency Towns,[5] Emigration Officers,[6] Managers of Encumbered Estates,[7] Factory Inspectors,[8] Forest Officers,[9] Servants and Officers of the Indian Museums,[10] certain officers appointed under the Merchant Shipping Act, 1860,[11] officers excuting warrants of Marine Court,[12] Municipal Commissioners and servants,[13] officers and servants of local and district boards,[14] Canal Officers appointment under the Pegu and Sitting Canal Act,[15] Embankment Officers,[16] Delegates of Parsi Matrimonial Court,[17] Patwaris and Kanungoes,[18] Pound-keepers,[19] Railway servants,[20] Telegraph Officers of Private company,[21] Registering officers,[22] Rrngoon Port Commissioners, their officers and servants,[23] Sanitary Inspectors,[24] Special Judges under Jhansi Encumbered Estate Act,[25] Judge and Assessors of Court of Survey and Ship Surveyors,[26] Heads of village for purposes of Madras Abkari Laws Amendment Act,[27] Conciliation Officers,[28] Clerks appointed under the Broach Thakurs' Relief Act, whose duty it was to receive rents and execute revenue processes,[29] are all statutory public servants and so declared by the several Acts relating to them.

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1. Swami Prasad Pradhan *v.* Hargovind Sahai Mathur, 1970 All. 251 at p. 255 : 1969 A. L. T. 743.
2. Basant Lal Gil *v.* State of U. P. 1968 A. W. R. (H. C.) 117 at p. 119.
3. Section 52, Act XIV of 1882.
4. Section 4, Act IV of 1880.
5. Section 5, Act IV of 1871.
6. Section 14, Act VII of 1871 ; Sec. 3, Act III of 1876 ; Sec. 50, Act V of 1877 ; Sec. 5, Madras Act XV of 1886.
7. Local Encumbered Estates Act, See. 21, Act VI of 1876 (Chota Nagpur) ; Sec. 22, Act XXIV of 1870 (Taluqdars of Oudh); 33 Reg. IV of 1871 (Taluqdars, Thakurs and Jagirdars in Ajmer) ; Sec. 33, Act XXI of 1881 (Broach and Kaira Thakurs, etc.) ; Sec. 33, Act XX of 1881 (Sindh).
8. Section 3, Act XV of 1881.
9. Section 72, Act VII of 1878.
10. Section 14, Act XXII of 1876.
11. Section 50, Act VII of 1830.
12. Section 15, Act IV of 1875.
13. *See* Local Municipal Acts and Sec. 25, Act XV of 1873; Sec. 22, Act VIII of 1874 ; Sec. 56, Madras Act V of 1878 ; Sec. 51, Bombay Act III of 1872 ; Sec. 15, Bombay Act VI of 1873.
14. *See* Local Acts ; Tiruvengada, I. L. R. 21 Mad. 428.
15. 14, Act II of 1855.
16. Section 23, Act XV of 1865.
17. Section 35, Act XIX of 1873 ; Sec. 8 Act XIII of 1882.
18. Section 6, Act I of 1871.
19. Section 27, Act IV of 1879.
20. Section 18, Act I of 1876.
21. Section 84, Act II of 1877.
22. Section 64, Act XV of 1879.
23. Section 29, Act XVI of 1882.
24. Section 12 of Bengal Food Adulteration Act, 1884—Shailesh, I. L. R. 59 Cal. 234.
25. Section 50, Act VII of 1880.
26. Section 24 (*c*), Madras Act V of 1879.
27. Section 17, Act XV of 1872 ; Isub Musa, B. U. C. 117.
28. Section 11 (6), Industrial Disputes Act, XIV of 1947.
29. Dina Nath Gangooly, 8 B. L. R. App. 58 : 17 W. R. (Cr.) 12.

A "Kotwal" in the former Madhya Pradesh was a public servant within the meaning of Cl. (8) of the section.[1]

Clause (2).

8. Officers of the Army, Navy aad Air Force.—Commissioned officers of the Army, Navy and Air Force are those to whom commissions for command over officers and men of the regular forces have been duly issued.

The words of the clause appear to include forces other than the regular forces, e. g. the auxiliary forces, the volunteors, volunteer forces and the militia.[2]

The Soldiers' Board is primarily a private organization though patronized by the Government. The Court was not satisfied as to under what specific portion of Cl. (9) to Sec. 21, I. P. C., the case of the employee-applicant exactly falls. Sentence under Sec. 161, I. P. C., could not be maintained unless the accused has first been shown to be a public servant within the meaning of Sec. 21, I. P. C.[3]

Clause (3).

9. Every Judge is a public servant.[4]—A Judge is defined in Sec. 19, and it is then simple to see what persons fall into this category.

Clause (4).

10. Officers of a Court of Justice.—This clause for the first time introduces the term "officers" without defining it. It is again used in Cls. (8) to (10). It is omitted in Cl. (7) where the use of the term might have been equally apposite. But at the same time if close attention is paid to the several clauses, it will be perceived that the term has been used in a definite sense, and that it is not used as merely a substitute for the word "person". A public servant means some person employed to exercise, to some extent and in certain circumstances, a delegated function of Government. He is either armed with some authority or representative character, or his duties are immediately auxiliary to those of some person who is so armed.

If on the facts of a particular case the Court comes to the conclusion that a person is performing a public duty, he has delegated to him the functions of the Government or is in any event performing duties immediately auxiliary to those of some one who is an officer of the Government and is a public servant in the meaning of Sec. 21, Penal Code.

A Class III servant employed as a metal examiner known as Chaser in the railway carriage workshop is an officer in the service or pay of the Government performing as such a public duty entrusted to him by the Government and was, therefore, a public servant within the meaning of Sec. 21, Penal Code.[5] The appellant was thus, even on a narrow interpretation of the *dicta* of West, J., in *Reg.* v. *Ramajirao Jivaji*,[2] an officer in service or pay of the Government performing as such a public duty entrusted to him by the

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1. Shriram *v.* State of Madhya Pradesh, 1957 M. P. L. J. (Notes) 173.
2. (1881) 44 & 45 Vict., c. 58, 177 (7).
3. Ramniwas Sharma *v.* State, A. I. R. 1951 Ajmer 76 at p. 77.
4. Prabhu Dayal *v.* Milap Chand, A. I. R. 1959 Raj. 12 at p. 14.
5. G. A. Monterio *v.* State of Ajmer, A. I. R. 1957 S. C. 13 at pp. 16, 17: 1957 A. L. J. 5; *see* also Reg. *v.* Ramajirao Jivaji, 12 B. H C. R. 1 and Abad Shah *v.* Emperor, A. I. R 1918 Lah. 152 (2).
6. 12 B. H. C. R. 1.

Government. The appellent was, therefore, an officer within the meaning of Sec. 21 (9) and so a public servant within the meaning of Sec. 21. The conviction and the sentence imposed on him were upheld as quite in order. The decisions cited in the succeeding paragraphs, it may be noted, were given before the decision of the Supreme Court just set out in some detail and the term "officer" used in Cl. (4) and Cls. (9), (10) and (12) must receive the connotation given to that term by the Supreme Court. It may be noted that Cl. (8) above expressly speaks of an "officer of the Government".

Definition of officer.

The word "officer" means some person employed to exercise, to some extent, and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or respresentative character, or his duties are immediately auxiliary to those of some one who is so armed.[1] In this sense, it may include a person in the position of a peon,[2] but not a carter,[3] or the lessee of a village,[4] *Deshmukhs* and *Deshpandes* would be sufficiently within the meaning of the term, as they are appointed to perform for the State a portion of its functions, or to aid those who are its active representatives.[5] Now, understanding the term "officer" in this sense, the clause is intended to include all ministerial officers attached to the Courts of Justice. Clerks of Courts are, as such, required to report on any matter of "law or fact" as whether a plaint, petition or memorandum of appeal is, or is not, within time, and whether it has been presented by a duly authorised person. A record-keeper[6] is a person entrusted with the custody of records of disposed cases, while the *sheristadar* or *peshkar* is entrusted with the custody of pending proceedings. The Nazir is the custodian of Court exhibits and property in suit, while process-servers are entrusted with the duty of executing judicial processes.[7] A Commissioner appointed by a court to divide the properties by metes and bounds in pursuance of a preliminary decree for partition, though he is not a permanent Government servant like an *amin* or a process-server or a clerk, is still an officer appointed specially by a Court of Justice to investigate and report on a question of fact and is, therefore, a public servant within the meaning of this clause.[8]

What public servant includes.

Since one of the duties of *mukaddam* under the C. P. Land Revenue Act is to report the commission of certain offences under the Penal Code he has been held to be a public servant under this section.[9] "Public servant" denotes a person whose duty it is to execute any judicial process and also any

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1. *Per* West, J., in Ramajirao Jivaji, 12 B. H. C. R. 1 ; Nizamuddin, I.L.R. 28 Cal. 334; Emperor *v.* Karam Chand; A. I. R. 1943 Lah. 255 at p. 256 : 209 I. C. 66 : 45 Cr. L. J. 64 : 46 P. R. 166.
2. Ramkrishna, 7 B. L. R. 44 : 16 W. R. (Cr.) 27 ; Nizamuddin, 28 Cal. 344 ; Rajashahi Trading and Banking Corporation Ltd *v.* Surendra Nath, (1942) 2 Cal 108 ; Ram Chandra Sahu, A. I. R. 1933 Pat. 187 : 12 Pat. 184.
3. Nachimuthu, I. L. R. 7 Mad. 18.
4. Reg, *v.* Rama jirao Jivaji, 12 B.H. C.R. 1.
5. Ramajirao Jivaji, 12 B. H. C. R. 1.
6. "It is questioned by one officer whether *jawabnavises*, *gomashtas*, and other servants of the class come under any of the descriptions in this clause so as to be subject to the provisions of Cl. 138 (now Sec. 161) : It seems to us that as servants whose duty it is to 'make' or 'keep documents' they fall under the 5th, 10th or 11th description, according to the department in which they they may be employed."—Indian Commissioner's First Report, Sec. 79.
7. Bhagai Dafadar, 2 B. L. R. (F. B.) 21, in which resistance was held to be criminally punishable and rightly so
8. S. Ramaiah, *In re*, A. I. R. 1951 Mad. 773 at p. 773 : 52 Cr. L. J. 847 : 5 D. L. R. (Mad.) 189 : 5 A. I. Cr. D. 447 : 1951 M. W. N. 200 : (1951) 1 M. L. J. 191.
9. Lankaran *v.* Emperor, 47 Cr. L. J. 636 at p. 637 : I. L. R. (1946) Nag. 714 : 1916 N. L. J. 302 : 221 I. C. 454;

officer whose duty it is to take property. It was undoubtedly a part of the duty of Sales Officer of Co-operative Society to take property in execution of the decrees of the society. He would therefore conform to the definition of a public servant.[1] Notaries Public are, as a rule, appointed to administer oaths, while officers variously described are entrusted with the duty of preserving order in Court. These are the persons ordinarily so employed, but the last clause widens the scope of the rule, for it confers on any persons specially authorised by a court to discharge any of the foregoing functions the status of a public servant.

Section 21 of the Indian Penal Code has described the various categories of persons falling under the expression "public servant". One of the categories, i. e. the tenth is of officers whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district. It will appear from it that an officer whose duty it is as such officer to take, receive, keep or expend any property is a public servant. A *qurq amin* is charged with the duty in that capacity of his to attach properties of defaulters and to realise money. He is hence a public servant. The section does not contemplate in the case of officers who fall within the description included in the above category that they should further be in the employ of the State Government as such or their wages should be payable out of the revenues of State. As a matter of fact Explanation I in Sec. 21 has expressly provided that persons falling under any of the categories, first to eleventh, shall be public servants whether they are appointed by the Government or not. The section does not qualify that persons who are in receipt of any fixed wage alone shall be public servants. As a matter of fact, payment of wage is not the test for determining whether a particular person or officer is or is not a public servant. It is the duty with which he is charged and which he is required to perform that actually determines whether he is or is not a public servant.[2]

Qurq amin and Court *amin* if public servant.

In view of the definition of "public servant" in Cl. (4) of Sec. 21 of the Indian Penal Code, a Receiver in Insolvency is a public servant.[3]

A court *amin* employed to prepare a plan, to inspect a site, or to effect a partition, would thus fall within the last provision, as a person specially authorised by a Court of Justice. A Commissioner appointed by Court to examine a witness would appear to share the same privilege.

11. Specially authorised.—Clause (4) clearly distinguishes between the person who is an "officer of a Court of Justice" and a person who is not such an officer ; the latter is not a "public servant" within the meaning of the section unless he is "specially authorised" by a Court of Justice to perform the duties of an officer of a Court of Justice.[4] Thus where a person having no power to execute a judicial process is authorised by a court to execute such a

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1. *In re* Thimmakka, A. I. R. 1942 Mad. 552 (2) at p. 553 : 55 L. W. 368.
2. Ram Pal Singh *v.* State, 1960 A. W. R. (H. C.) 279 : 1960 A. L. J. 357.
3. State of Orissa *v.* Ganesh Prasad Dutta, (1962) 1 Cr. L. J. 658 at p. 659.
4. Ram Chandra Sahu A. I. R. 1933 Pat. 187 at p. 187 : 142 I. C. 588 : 14 P. L. T. 16 : 33 Cr. L. J. 391 : I. L. R. 12 Pat. 184.

process, he is said to be specially authorised within the meaning of the clause.[1] The words "specially authorised" obviously imply that the delegation of authority is (*a*) legal ; (*b*) by a person who himself possesses the authority to authorise another ; and (*c*) to a person who is a ministerial officer as against a judicial officer.[2] Again, the authorisation must be express though in certain cases it may even be implied.[3] The question whether the authority is or is not properly exercised is immaterial so long as it is clothed with the legality necessary to afford protection to the public servant.[4] Impropriety in the exercise of the authority ought to be distinguished from illegality which totally deprives a person of the privilege given to the public servant.

What specially obviously authorised implies.

12. Juror, Assessor and Panch.—Jurors, assessors and *panches* while on duty, that is, actually engaged in the discharge of their duties, are public servants. This is evident, for they are in the position of Judges and, therefore, possess the Judge's privilege and immunities. Even when assisting a public servant other than a Judge, they are entitled to the same privilege and proteotion as the public servant whom they have come to assist.

Clause (5).

13. Arbitrators and Commissioners.—Arbitrators and Commissioners or other assistants of Courts are public servants whose intervention becomes sometimes necessary, and is not infrequently salutary. But the privilege extends only to persons acting on the motion of the Court or a public servant. It does not extend to officious intermeddlers with public proceedings, or to persons to whose arbitrament the disputing parties may have submitted their cause, with or without the approval of the Court. For, unless the person is made the referee of the Court,[5] or unless some "cause or matter" is referred to him "for decision or report"[6] he is not invested with the immunity which the Court possesses.

Clause (6).

The persons typified in this section are really persons who fill more or less judicial roles and for the limited purposes for which they are appointed they become as it were the *alter ego* of the person appointing them. Of course, in all such cases, only the fact of appointment is material, its propriety being irrelevant.

Persons who fill more or less judicial role.

Court has no inherent power to pass orders appointing a Commissioner to seize the plaintiff's account books upon an application by the defendant that he has apprehension that the plaintiff might make entries in those account books which could go against the case he was setting up in the Court.

Court's power to appoint Commissioners.

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1. Ram Chandra Sahu, A.I.R. 1933 Pat. 187 at p. 188.
2. *Per* Pollock, C.B., in Walsh *v.* Southworth, L. R. 6 Exch. 150.
3. Dharam Chand, I. L. R. 22 Cal. 596, followed in Sheo Progas *v.* Bhup Narain, I. L. R. 22 Cal. 759 ; Abdul Karim *v.* Bullen, I. L. R. 6 All. 385 ; Court Fees Act, Sec. 22 (Act VII 1870). This view is supported by Walsh *v.* Southworth, L. R. 6 Exch. 150.
4. Abdul Gafur, I. L. R. 33 Cal. 896; Satish Chandra *v.* Jadu Nandan, 3 C. W.N. 741; Coville *v.* Kristo Kishore, I. L. R. 26 Cal. 746 ; Durga Charan *v.* Nobin Chandra, I. L. R. 25 Cal. 274.
5. Sundar Majhi, I. L. R. 30 Cal. 1084.
6. *Per* Edge, C. J. and Oldfield, J., in Debi Din, (1886) A. W. N. 295.

Such a Commissioner appointed without jurisdiction cannot be treated to be a public servant within the meaning of Sec. 21, Penal Code. It is necessary for the application of this Explanation that the person concerned should be in actual possession of the pre-existing office of a public servant. If there be no office or post, there could be no question of any person's being in actual possession thereof, and of the person concerned coming within the terms of this Explanation.

The Additional Munsif had no inherent power to pass the order appointing a Commissioner to seize the plaintiff's account books. The order appointing Commissioner for this purpose was therefore an order passed without jurisdiction and was therefore a null and void order.

It is no business of the Court to collect evidence for a party or even to protect the rival party from the evil consequences of making forged entries in those account books.

If the appointment of a Commissioner had been valid, he would have been a public servant in view of the fourth clause to Sec. 21 of the Indian Penal Code.

Where there was neither any existing office of Commissioner nor the Additional Munsif had power to appoint a Commissioner for the purpose of seizing the plaintiff's account books that Commissioner cannot be held to be a public servant.[1]

14. Policemen, jailors.—A police officer is a public servant as defined in Sec. 21 of the Indian Penal Code. Therefore, when cognizance is taken on the report of a Police Officer the requirements of Sec. 11 of the Essential Commodities Act, 1955, are complied with.[2]

Clause (7).

The Officer-in-charge of a Police Station comes within the definition of the term "public servant" as defined in Sec. 21 of the Indian Penal Code.[3] Policemen are persons empowered to *place* any person in confinement, while jailors are persons empowered to *keep* persons in confinement. They are both, therefore, public servants. The test under this head being that the persons should have the authority to take or keep another person in confinement, a person so empowered would be a public servant, though he may himself be in confinement. Where, for instance, a convict-warder is empowered to keep persons in confinement he becomes a public servant, though he is himself kept in confinement by another, who, again, is on that account a public servant.[4] The authorisation here contemplated must, however, be legal ; that is to say, the persons empowered to place and keep persons in confinement must have been so empowered by a competent authority, and as a part of his official duty. The authority must then be general, and not special or relating to any individual case. Where, for instance, a Magistrate orders a person to arrest a runaway offender,[5] that person does not thereby become a public

Test.

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1. Padam Sen *v.* State of Uttar Pradesh, (1961) 1 Cr. L. J. 322 at pp. 324-25,
2. Satyaadeo Sah *v.* State of Bihar, A. I. R. 1970 Pat. 159 at p. 160.
3. Jagannath Prasad Kesari *v.* State of Bihar, A. I. R. 1968 Pat. 506 at p. 508 : 1970 Cr. L. J. 828.
4. Kallachand, 7 W. R. (Cr.) 99 ; Muhammada, (1908) P. R. (Cr.) No. 22 ; Maula Baksh, A. I. R. 1929 Lah. 621 : 30. Cr. L. J. 1103 ; Safin Rasul, A. I. R 1924 Bom. 385.
5. E. g. under Sec. 65, Cr. P. C.

servant, because the arrest made was not made by virtue of any office which he held. The power to arrest or detain arrested persons must be inherent in his office. It must be a part of his ordinary duties. But it need not be a power unqualified or unlimited. For no one possesses such a power. A Forest Officer detecting a person committing an offence against the Forest Act may take him into custody.[1] He is, therefore, a public servant under this clause, thugh he is also declared to be a public servant under the Forest Act.[2] The power may be conferred upon a person either generally by statute or rules and regulations made thereunder, or it may be conferred by or implied in an appointment to an office duly made. A person so appointed would, then, become a public servant if, by virtue of his office, he has the power to confine any person. If he has the power otherwise than by virtue of his office, he is not a public servant. For example, any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence,[3] but all persons are not public servants.

There can be no doubt that a police officer is a public servant as defined in Sec. 21 of the Indian Penal Code. Therefore, a report by a police officer can properly be regarded as a report by a public servant. The language of Sec. 11, Essential Commodities Act, 1955, is wide enough to include a police officer who cannot be excluded from the category of a public servant. Had the intention of the Legislature been to exclude a report by a police officer, the Legislature would have used apt words to exclude suoh a report.[4]

15. Peace officers.—For the meaning of the term "officer" as expounded by the Supreme Court, *see* para. 9.

Clause (8).

Person holding office by virtue of which it is their duty (*a*) to prevent offences, (*b*) to give information of offences, (*c*) to bring offenders to justice, or (*d*) to protect the public health, safety or convenience, are declared to be public servants. Policemen, village watchmen,[5] revenue and police *patels* in Bombay,[6] fall into this class, which, however, is large enough to include even Judges and Magistrates whose duty is as much to prevent offences,[7] as to punish for them. And the clause would include Forest Officers, officers of the Salt, Excise or Opium departments, or indeed, of any department whose duty it is to protect the interests of their department by preventing the commission of offences against it.

Who are public servants under this clause.

Officers appointed to give information of offences may, again, be policemen, village chowkidars, or members of the Criminal Investigation Department, such as detectives or the like. Mere informers and secret agents are not, however, included in the term, because they are not "officers of Goverment whose duty it is as such officers" to give information of offences.

Officers appointed to bring offenders to justice are again policemen, Judges, Magistrates, Public Prosecutors and persons generally or specially charged with the duty of conducting prosecutions. A person appointed by

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1. Section 51, Forest Act (V of 1882).
2. Forest Act (V of 1882), Sec. 62.
3. Section 59, Cr. P. C.
4. Kedar Nath Saharia *v.* State, A. I. R. 1962 Cal. 410 at p. 410: (1962) 2 Cr. L. J. 178.
5. Siddhut, I. L. R. 26 All. 542; Appaji, I. L. R. 21 Bom. 517.
6. Appaji, I. L. R. 21 Bom. 517.
7. *See* Part IV, "Prevention of Offences" (Secs. 106—126), Cr. P. C.

the Government Solicitor with the approval of Government and under an arrangement made by the Governor General-in-Council to act as prosecutor in a police court is thus a public servant.[1] Similarly, officers of the Society for the Prevention of Cruelty to Animals,[2] appointed under the Police Act are public servants,[3] because their duty leads them to bring offenders under that Act to justice. Lastly, Health Officers, Sanitary Inspectors, Bazar Masters, Hackney Carriage Examiners, Engineers of the Public Works and Irrigation Departments, Postal officials, Street Overseers, and, indeed, all persons having similar duties to perform by virtue of their office are public servants. But inn-keepers and dak bungalow cooks are not persons engaged to *protect* public convenience, though their duties are subservient thereto.

16. Miscellaneous officers of Government.—For the meaning of the term "officer" as expounded by the Supreme Court, *see* para. 9.

Clause (9).

The ninth clause is really the *otta porida* of the section, and it includes within its comprehensive grasp a large mixed class of non-descript officers who could not be specially provided for. Generally speaking, this class includes officers who receive or disburse money on behalf of Government, such as Treasurers, Cashiers, Opium and Stamp-vendors employed in the Government treasuries. But a stamp-vendor employed not under the Stamp Act, but under an agreement with the Collector, was held not to be a public servant.[4]

Treasurers Cashiers, etc. are public servants.

Railway servants.

The appellant was a Class III servant and was employed as a metal examiner known as Chaser in the Railway Carriage Workshop. He was working under the Works Manager who was certainly an officer of the Government and the duties which he performed were immediately auxiliary to those of the Works Manager who, beside being an officer of the Government was also armed with some authority or representative character *qua* the Government. The appellant was thus; an officer in the service or pay of the Government performing as such a public duty entrusted to him by the Government and was, therefore, a public servant within the meaning of Sec. 21, Penal Code.[5]

According to Cl. (9), Sec. 21 of the Indian Penal Code, every officer in the service or pay of the Government is deemed to be a public servant.

Lady Health Officers are public servants.

As a person was employed by the Punjab Government and it was the Punjab Government which paid her salary on account of her work as lady health visitor, she should be held to be a public servant employed in connexion with the affairs of the State. The mere fact that the Heath Centre, where she works, is being run by the Municipal Committee, Yamuna Nagar, would not show that she is not working as a public servent or was not employed in connexion with the affairs of the State.[6]

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1. Butto Kristo Doss, I. L. R. 3 Cal. 497.
2. Act XI of 1890.
3. Upendra Kumar Ghose, 3 C. L. J. 475; Nataraja, I. L. R. 46 Mad. 90.
4. Kalyanray, B. U. C. P. 96.
5. G. A. Monterio v. State of Ajmer, A. I. R. 1957 S. C. 13 at p. 17 : 1956 S. C. J. 730.
6. M. B Kanwar, Editor, Printer and Publisher of *Rana Partap*, Ambala v. State, A I. R. 1963 Punj. 201 at p. 205 : 64 Punj. L. R. 1074.

Public Prosecutors are public servants.

By the definition under Sec.21, Cl. (9), I. P. C., a person who is appointed to be a Public Prosecutor under Sec. 492 of the Code is an officer in the service of the Government and is also remunerated by fees for the performance of that public duty and therefore is a public servant for the purposes of the case in which he is appointed as a Public Prosecutor.[1]

Survey Officers.

Persons whose duty it is to make survey on behalf of Government are members of the Geological and Topographical Survey of India, officers connected with the State Railways, Canal and Irrigation departments and the Department of Settlement and Agriculture. As belonging to this department may be mentioned *patwaris*,[2] and other minor officials, who prepare maps and plans of rural areas for the purpose of assessment. A surveyor preparing a map of water-course of a *khas mahal* under the orders of the Collector is a public servant, for "the Collector acting in the management of a *khas mahal*", the property of the Government, is as much the Government within the meaning of Sec. 17 of the Indian Penal Code as when he is exercising any other of the duties of his official position.[3]

Officers who make contracts on behalf of Government are those belonging to the Commissariat and Public Works Department. Officers-in-charge of Excise, Opium, Ganja and Salt have also to make contracts on behalf of Government for their sale, but as these officers are usually Civil Officers of the district, they fall not only into this, but also other clauses of the section.

Revenue Officers.

Persons who execute judicial process have been declared to be public servants in Cl. (4). Following that analogy, revenue process-servers and others assisting the Revenue Officers are, here declared to fall into the same class. For like judicial subordinates, they, too, are exposed to the same temptation and are therefore, equally amenable to the same rules. Peons, whether permanent or supernumerary, attached to the Collector's office, and whether in receipt of fixed pay or fees, are within the rule,[4] and so is a peon in the service and pay of Government but attached to the office of the Superintendent of the Salt Department, though his duties were probably generally to obey the orders of his superior.[5] But such a menial can scarcely be designated an "officer" in the sense in which that word is used in common parlance. The term must then be understood as merely connoting one who is appointed to some office for the performance of some public duty.[6]

Persons protecting pecuniary interests of Government.

Persons empowered to investigate or to report on any matter affecting the pecuniary interests of Government are scattered over almost every department of Government. As such, they become public servants, though they may not be otherwise so qualified. Tax collectors and Tahsil officials are amongst those falling into this class. Persons who "make, authenticate or keep any document relating to the pecuniary interests of Government" similarly form a numerous class. Revenue Inspectors and *patwaris* stand on the lowest rung of the ladder amongst officials of the Dopartment of Survey and

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1. Kuber Nayak *v.* State, A. I. R. 1962 Cal. 195 at p. 196: (1962) 1 Cr. L. J. 409 : 66 C. W. N. 47.
2. Mudsooddeen, (1870) 2 N. W. P. 148.
3. Bajoo Singh, I. L. R. 26 Cal. 158.
4. Ramkrishna Das, 7 Beng. L. R. 446 : 16 W. R. (Cr.) 27.
5. Nizamuddin, I. L. R. 28 Cal. 344.
6. *Ibid.*; Ramajirao Jivaji, 12 B. H. C. 1 (Cr.).

Settlements who make documents relating to the pecuniary interest of Government, namely, the land revenue. Revenue record-keepers and the like are persons who keep documents. Persons who prevent the infraction of any law for the protection of the pecuniary interests of Government are men like customs officials, and those engaged to detect contraband trade against the monopoly of Government. Excise Inspectors are, for instance, employed to prevent the manufacture of illicit liquor or the importation of foreign opium or *ganja*. Consequently, they become public servant under the rule.[1] Every officer in the service or pay of Government is, apart from other considerations, a public servant. But, of course, an officer holding a mere sinecure cannot be called a public servant for there can then be no reason for applying to him the exceptional provisions specially enacted for them in the Code. The clause must, therefore, mean a person who holds a office to which some public duty is attached and which he may be called upon to perform. Consequently, an unpaid apprentice in the office of a Sub-Registrar in Bengal is not a public servant even though his services be reimbursed by the Sub-Registrar out of his allowance.[2] Such was also held to be a Quarter-master's clerk[3] On the the other hand, a Police Sub-Inspector attached to the Finger Print Bureau as an expert and called as such is a public servant and a bribe offered to him would be punishable under Sec. 161.[4]

Roadways bus driver if a public servant.

The first part of this clause says that every officer whose duty it is, as such officer, to "keep" any property on behalf of Government, would be a public servant. The driver of a roadways bus is responsible for proper care and maintenance of the vehicle in his charge. Thus his duty is, as a driver, not only to drive the bus but also to keep the vehicle under proper care and maintenance while he is in charge of it. He is therefore a public servant under the provisions of first part of Cl. (9) of Sec. 21, I. P. C. In any case, he is covered by the second part of the clause which says that "public servant" denotes every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty. He is in the pay of Government, in the service of Government and is also performing public duty of keeping the vehicle in his charge and maintaining the same. The railway also earned profits and thus cannot but be said to be a commercial undertaking of the Union Government. The only difference is that it is a commercial undertaking of the Union Government while the roadways is a commercial undertaking of the State Government. It cannot be said that merely because the petitioner is a Government employee in a commercial undereaking of the Government, he cannot be regarded as a public servant.[5]

17. Other cases.—A Minister in the pay of the State to advise and to aid the Chief Executive whether he be Governor or Rajpramukh, is undoubtedly an officer performing a public duty and is, therefore, a public servant

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1. So held in Fazal Rahman, A. I. R. 1937 Pesh. 52 : 38 Cr. L J. 1042.
2. Mahendra, 9 I. C. (Cal.) 698 ; Bhagwati Sahai, I. L. R. 32 Cal. 664 ; but *cf*. Fula Bhana, (1888) Cr. R. No. 40 of 1888 : (1888) B. U. C. 38.
3. Ahad Shah, (1918) P. R. (Cr.) 18 : 45 I. C. 150.
4. Karam Chand, 69 I. C. (Lah.) 445.
5. Ranjeet Singh *v.* State, A. I. R. 1965 All. 478 at p. 479 ; *see* also State of Maharashtra *v.* Jagat Singh, A. I. R. 1954 S. C. 492.
6. State of Vindhya Pradesh *v.* Shiva Bahadur Singh, A. I. R. 1951 V. P. 17 at p. 35 : 52 Cr. L. J. 561 D. L. R. 1952 V. P. 7 ; Sheo Bahadur Singh *v.* State of U. P., 1953 S. C. 394.

within the meaning of this clause.[1] So also is a Chief Minister.[2] A Secretary who is to carry out the orders of the Minister concerned or the Chief Executive, e. g. a Governor or a Rajpramukh, is also a public servant.[3] It is fallacy to say that it is only those persons, who are enumerated in Sec. 28 of the Act, who can be "public servants" within the meaning of Sec. 21, I. P. C. In fact persons enumerated in Sec. 28, U. P. Panchayat Raj Act are not public servants within the meaning of Sec. 21, I. P. C., and it is only by fiction of Sec. 28, U. P. Panchayat Raj Act that they have to be deemed to be public servants within the meaning of Sec. 21, I. P. C.[4] A clerk in a Government Collectorate is a public servant within the meaning of Cl. (9) of Sec. 21, Penal Code.[5] The *talayri* is a permanent servant of the Government and he exercises some of the functions referred to in this clause when he is assesting the village officer in the matter of the Collection of the rent. Hence he has been held to be a public servant,[6] the toll contractor as well as his servant must be held to be public servants as defined in the Indian Penal Code.[7] A canal mate has becn held to be a public servant.[8] A *lambardar* in Peshawar does the public duty of collecting land revenue and is remunerated by a commission known as *pachotra*. He is, therefore, a public servant within the meaning of the Penal Code. But when he is engaged in collecting *huq bua* and no other dues, he cannot be said to be acting in the execution of his duties as a Government servant for the simple reason that *huq bua* is a village cess and is not recoverable as land revenue.[9]

18. Railway servants.—Chapter IX of the Indian Penal Code consists of Secs. 161 to 171 only, and, it is for the purposes of these sections alone therefore that a railway servant can be called a public servant within the meaning of Sec. 21, Penal Code, and he cannot otherwise be called a public servant for the purposes of Penal Code. If, therefore, the prosecution case is that the petitioners committed offences under Sec. 408, Penal Code, only they cannot call the petitioners public servants.[10] A goods clerk of a railway was held to be outside the category of public servants.[11]

19. Officers of local bodies.—For the meaning of the term "officer" as expounded by the Supreme Court, *see* para. 4.

Clause (10).

This clause compendiously states what is more elaborately stated in the last preceding clause in respect of officers of Government. *Mutatis mutandis*, similar officers, though in the service of

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1. State of Vindhya Pradesh *v.* Shiva Bahadur Singh, A. I. R. 1951 V. P. 17 at p. 35 : 52 Cr. L. J. 561 : D. L. R. 1952 V. P. 7 Sheo Bahadur Singh *v.* State of U. P., A. I. R. 1953 S. C. 394.
2. Ramadittamal *v.* Emperor, A. I. R. 1939 Pesh. 38 at p. 39 : 184 I. C. 10 : 40 Cr. L. J. 487.
3. State of Vindhya Pradesh *v.* Shiva Bahadur Singh, *supra*.
4. Basant Lal Gir *v.* State of U. P., 1968 A. W. R. (H. C.) 117 at p. 118 ; *see* also Emperor *v* Karam Chand Gobind Ram, A. I. R. 1943 Lah. 255.
5. Jugal Singh *v.* Emperor, A. I. R. 194. Pat. 315 at p. 316 : 208 I. C. 219 : 44 Cr. L. J. 745,
6. Karani, *In re*, A. I. R. 1944 Mad. 183 at p. 184 : 45 Cr. L. J. 535 : 212 I. C. 75 : 1943 M. W. N. 804 (2) : (1943) 2 M. L. J. 674.
7. Emperor *v.* Suleman Abba, A. I. R. 1935 Bom. 24 at p. 24: 36 Bom. L. R. 1124.
8. Badr Prasad *v.* State, A. I. R. 1953 All. 494 at p. 495.
9. Said Mohammad *v.* Emperor, A. I. R. 1935 Pesh. 189 at p. 189 : 37 Cr. L. J. 283: 160 I. C. 183.
10. Devi Ram Deep Chand *v.* State, A. I. R. 1954 Punj. 189 at p. 190 : 56 Punj. L. R. 159 ; *see* also Ambika Prasad *v.* State, A. I. R. 1958 Pat. 441 : 1957 B. L. J. R. 714.
11. Zakaria, (1898) P. R. No. 9.

Town or Urban Municipalities,[1] Local Boards, District Councils, San itary Boards or other similar bodies are public servants. Persons who are in charge of religious as distinguished from secular public benevolence are, however, not public servants.

In Sec. 21 (10), I. P. C., the words "whose duty it is, as such officer, to take, receive, keep or expend" qualify the clause "for any secular common purpose of any village, town or district". This clause governs the section and that it must be for a public purpose that the money was received or expended.[2]

Chirman of Managing Committee of a Municipality.

The Chairman of the Managing Committee of a Municipality is a "public servant" as contemplated by Sec. 2 of the Prevention of Corruption Act for rule 68 framed under the Bombay District Municipal Act, 1901 (Bombay Act III of 1901) empowers him to expend money of the Municipality on payment of bills for fixed recurring charges and therefore comes within the purview of the expression "public servant" defined in Cl. (10) of Sec. 21 of the Indian Penal Code. The power to make payment of fixed recurring charges such as pay bills imposes a duty on the Chairman to do so when necessary as the power is vested in the Chairman for the benefit of the persons entitled to receive those recurring charges.

The aforesaid power is conferred on the Chairman for the benefit of the persons who have served the Municipality and have got the right to receive their pay or money for articles provided. There may arise circumstances when any delay in payment may affect those persons adversely. The pay is due on the first day of the month and it may not be convenient to fix a meeting of the committee at a date for early payment of the pay due. A meeting already fixed may have to be adjourned for want of quorum. The passing of the pay bills, in the circumstances, is more or less a formal matter and therefore the rules empower the Chairman of the Managing Committee to order payment of the pay bills in anticipation of sanction by the Committee. The Chairman can exercise this power for the benefit of the employees voluntarily or when requested by those persons to exercise it. The mere fact that this power of the Chairman was to be exercised only with respect to fixed recurring charges and in anticipation of the Committee passing the bills for those charges therefore does not affect the question in any way. Clause (10) of Sec. 21 of the Indian Penal Code merely requires that the person should have the duty to expend property for certain purposes. It is not restricted to such cases only, where there is no limitation on the exercise of that power of expending property.[3]

The Chairman of a Municipal Board constituted under the Rewa Municipality Act, 1946, is a public servant.[4]

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1. Ezekiel, 6 Bom. L. R. 54 (under the City of Bombay Municipal Act, Bombay Act III of 1888); Ramaswami, I. L. R. 13 Mad. 131 (under the Madras District Municipalities Act).
2. Shridhar Mahadeo Pathak *v.* Emperor, A. I. R. 1935 Bom. 36 at p. 36 : 154 I. C. 600.
3. Maharudrappa Danappa Kesarappanavar *v.* State of Mysore, A. I. R. 1961 S.C. 735 at p. 786: 39 Mys. L. J. 464 : (1961) 2 Lab. L. J. 402.
4. Daya Chand *v.* State of M. P., 1960 M. P. L. J. 163 : 1960 Jab. L. J. 141 : 1960 M. P. C. 192.

The tax-collector is certainly a public servant within the meaning of Sec. 21 (description tenth) I. P. C.[1]

Officers of District Board and Municipal Boards who are and who are not public servants.

Municipal Engineers who receive money from the Municipality and pay it out to contractors are, thus, within the difinition,[2] though an Engineer who is merely empowered to sign a bill or cheque upon which a different official pays the money might be conceivably classed otherwise, on the ground that he does not "expend any property" of the Municipality.[3] Municipal or Local Board overseers, octroi and cattle-pound moharrirs, cess collectors,[4] goods clerks,[5] or union *karmans*[6] are persons who take or receive money for their Municipality or Local Boards, as the case may be. They are, therefore, public servants. But a Local Board Sircar who merely supervises road work is not a public servant.[7] A Union Board bill collector falls within the terms of this clause and is therefore a public servant, but when he attempts to enforce a warrant for an amount in excess of what could be recovered by distress he cannot be said to be engaged in the lawful discharge of his public duty.[8] A Vice-Chairman of a Local Board is also a public servant.[9]

A Municipal Councillor is a public servant within the meaning of Sec. 21, Indian Penal Code, prior to the amendment of Sec. 45, Bombay District Municipalities Act (3 of 1901), by Bombay Act 26 of 1930.[10]

The head clerk of a municipality had no authority, merely as head clerk, to prepare the electoral rolls, but the Chairman of the Municipality had appointed him to do so in exercise of the power given by rule 13 (1), Municipal Election Rules. This was, however, before Government divided the Municipality into the sixteen wards for which the general election was to be held. There was no fresh appointment of the petitioner by the Chairman under rule 13 (1) after the Government notification, and it has therefore been urged that the petitioner was not a public servant nor charged as such with the preparation of the rolls, that were delivered to the Chairman. There is, however, no dispute that these electoral rolls included two rolls Exs. 20 and 20/1, written by the petitioner himself. It is also clear that the petitioner wrote these rolls (even though he was not expressly appointed by the Chairman after the notification for the reason that his earlier appointment under the rule was taken to extend to the deferred election, and taken not by the petitioner alone, but by the Chairman as well.

Explanation 2 to Sec. 21, Penal Code, provides that wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

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1. Jogendra Chandra Choudhury *v.* Kshirode Ranjan Bhattacharjee, (1961) 2 Cr. L. J. 564 at p. 566.
2. Naufawram, 6 B. H. C. R. 64.
3. *Per* Gibbes, J., in Naufawram, *supra*,
4. Babulal, I. L. R. 33 Bom. 213.
5. Zakaria, 9 P. R. 1898.
6. Gopalasaminatha Aiyar, Petitioner, 1 Weir 128.
7. Addaita *v.* Kali Dass, 12 C. W. N. 96.
8. Ahmad Jaluddin, 1936 M. W. N. 638.
9. Anna Champat Rao Deshmukh *v.* Emperor, 38 Cr. L. J. 444 at p. 446 : 167 I. C. 752 : 19 N. L. J. 221.
10. Suganchand *v.* Seth Naraindas, A. I. R. 1932 Sind 177 at p. 178 : 141 I. C. 530.

It was held that the absense of a formal appointment is immaterial ; where the petitioner was indubitably "in actual possession of the situation of a public servant" within Cl. 11 of Sec. 21 and the Explanation, Indian Penal Code.[1]

20. Employees of statutory trading corporations and of Government companies.—This clause, newly added, by the Criminal Law Amendment Act, 1958 (II of 1958), further enlarges the scope of the section. The employees of statutory trading corporations and of Government companies fall within the class of public servants as defined in Sec. 21. As a result of the clause, every officer in the service or pay of (1) a local authority, or (2) a corporation which is engaged in any trade or industry whether established by a Central, Provincial or State Act, or (3) a Government company as defined in Sec. 617 of the Companies Act, 1956 (1 of 1956) is a public servant. As the expression "local authority" is not defined in the Penal Code, we must turn to its definition in the General Clauses Act, 1897 (X of 1897), Sec. 3 (31) which runs thus : "Local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund". "Government company" is defined in Sec. 617 of the Companies Act, 1956 (1 of 1956) as follows : "For the purposes of Secs. 618, 619 and 620, Government company means any company in which not less than fifty-one per cent. of the share capital is held by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments". By Explanation 4, also added by the same Amending Act, the expression "corporation engaged in any trade or industry" used in Cl. (12), includes a banking, insurance or financial corporation, a river valley corporation and a corporation for supplying power, light or water to the public.

Clause (11).

Local authority—Meaning of.

What the Indian Airlines Corporation does under the terms of the Air Corporations Act, has all the essential attribute of trading activity. Section 7 of that Act prescribes that the main function of the Corporation is to provide safe, efficient, adequate, economical and properly co-ordinated air transport services, whether internal or international or both, with a view to developing the air transport services to the best advantage and in particular, to ensure that the services are provided at reasonable charges. "Air Transport Service" is defined by Sec. 2 (*n*) as a service for the transport by air of person, mails or any other thing, animate or inanimate, for any kind of remuneration whatsoever whether such service consists of a single flight or a series of flights.

Indian Airlines Corporation has all essential attributes of trading activity.

Section 9 lays down that in carrying out any of the duties vested in it by the Act, the Airlines Corporation shall act so far as may be on business principles. Section 15 (1) enjoins that the Corporation shall maintain proper accounts and other relevant records and prepare an annual statement of accounts, including the profit and loss account and the balance-sheet in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India. Sub-section (2) of Sec. 15 makes proivsion for the annual audit of the accounts of the Corporation by the Comptroller and Auditor-General of India.

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1. Brijebhari *v.* Emperor, A. I. R, 1941 Pat. 539 at pp. 541, 542 : 32 P. L. T. 43

Thus the scheme of the Act makes it abundantly clear that the Indian Airlines Corporation is engaged in the trade of air transport service, and consequently, its employees are "public servants".

Additional category of persons included within the scope of public servants.

In this context, it is worthy of note that by an Act of Parliament, which came into force on the 19th December, 1964—the Anti-Corruption Laws (Amendment) Act (No. 40 of 1964)—the definition of "public servant" in Sec. 21 of the Indian Penal Code has been enlarged so as to bring within its purview certain additional categories of persons including all those in the service or pay of a corporation established by or under a Central, Provincial or State Act, by omitting the words "engaged in any trade or industry" in the twelfth clause of Sec. 21 of the Code and by omitting Explanation 4 altogether; and the effect would be that for purposes of the anti-corruption law, employees of all statutory corporations—whether trading or non-trading would henceforth be treated as "public servant" with all the attendant disabilities. This shows which way the wind is blowing.

Supreme Court's declaration.

In *State of Maharashtra* v. *Jagatsing*,[1] the question arose whether an employee of a Road Transport Corporation was a public servant within the meaning of Sec. 21 of the Indian Penal Code (as it stood before its amendment by Act II of 1958, by which the twelfth clause was added to that section), read with Sec. 43 of the Road Transport Corporation Act, 1950, so as to render him punishable under Sec. 161 of the Indian Penal Code, for having accepted a bribe from an applicant, promising to secure him a job in the office in which the employee was serving. The offence was stated to have been committed in 1956, that is to say, before Sec. 21 of the Indian Penal Code was amended by adding the twelfth clause and *Explanation* 4.

Employees of Road Transport Corporation and Indian Airlines Corporation are public servants.

Dealing with the argument that when enacting Sec. 43 of that Act, it could not have been the intention of the Legislature to throw a cloak of immunity over all corrupt employees of a Road Transport Corporation, their Lordships made the following observations (at page 497), which are material for our purposes :

> "It is urged that in this view all members, officers and servants of a corporation would be free to take bribes and would never be liable to be prosecuted under Sec. 161 and that this could not have been the intention behind Sec. 43. It is certainly unfortunate that such a result should follow from the words used in Sec. 43. But the words are clear and it seems that members, officers and servants of the corporation were intended by the Legislature to be public servants only when they were acting or purporting to act in pursuance of the provisions of the Road Transport Corporation Act or of any other law and not otherwise. As taking of bribe cannot under any circumstances be shown to amount to acting or purporting to act in pursuance of any of the provisions of the Road Transport Corporations Act or of any other law, the person taking a bribe cannot be said to be a public servant within the meaning of Sec. 21 of the Indian Penal Code in view of the clear words of Sec. 43. The difficulty has however now been obviated by the amendment of Sec. 21 by the addition of the twelfth clause therein. But as Sec. 21 stood at the relevant time we have to take recourse to Sec. 43 of the Road Transport Corporations Act and

1. A. I. R. 1964 S. C. 492

the words of that section make it quite clear that members, officers and servants of corporation can only be public servants when they act or purport to act in pursuance of any of the provisions of the Road Transport Corporations Act or of any other law; and taking of a bribe can never amount to acting or purporting to act in pursuance of any of the provisions of the Road Transport Corporations Act or of any other law."

It will be seen that their Lordships' view was that if the twelfth clause of Sec. 21 of the Indian Penal Code could be presed into service in that case, the accused therein would have fallen under the category of a public servant and as such would have been liable under Sec. 161 of the Indian Penal Code. Obviously, what applies to an employee of a Road Transport Corporation, would apply with equal force to an employee of the Indian Airlines Corporation.

For the foregoing reasons it may be said that an employee of the Indian Airlines Corporation, is a "public servant" within the meaning of the twelfth clause of Sec. 21 of the Indian Penal Code.[1]

The Chief Executive Officer of the State Transport Corporation is a public servant.[2]

21. Illustration—Commissioner.—The word "commissiner" in this illustration has been used in the sense of a municipal member or councillor and not in the sense of an officer in the employment of a municipality who is sometimes designated by that name.[3]

22. Not public servant.—The Chairman of Co-operative Credit Society would not appear to have been a "public servant".[4] The President of a Co-operative Society is not a public servant within the meaning of the expression in the Penal Code.[5] Nor its secretary.[6] The Sanitary Inspector of a Panchayat Board is not a public servant within the contemplation of this section. The fact that he is authorised by the President of the Panchayat Board to collect fees for sealing animals before slaughter would not make him a public servant.[7] It was held in a Calcutta case that there was nothing in the Calcutta Municipal Corporation Act[8] to suggest that the corporation was a "public servant".[9] It was, however, conceded that it could be a public

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1. *In re* H. V. Jagdesh, A. I. R. 1966 A. P. 35 at pp. 37, 38, 39.
2. *In re* The Chief Executive Officer, Andhra Pradesh, A. I. R. 1963 A. P. 491 at p. 491 : (1963) 1 Andh. W. R. 12 : 1963 Andh. L. T. 282 : 1963 M. L. J. (Cr.) 298.
3. The State *v.* Bansilal Luhadia, A. I. R. 1962 Raj. 250 at p. 257 : (1962) 2 Cr. L. J 786 : 1962 Raj. L. W. 307 : I. L. R. (1962) 12 Raj. 327.
4. Shridhar Mahadeo Pathak v. Emperor, A. I. R. 1935 Bom. 36 at p. 36 : 36 Bom. L. R. 1133.
5. Karman Siddappa *v.* State of Mysore, A. I. R. 1958 Mys. 82 at p. 83 : I. L. R. (1957) Mys. 68 : 1957 Kut. L.J. 34 : (1957) 1 M. L. J. (Cr.) 71 : 1958 Cr. L. J. 784 ; Sombari Behari *v.* Emperor, 1935 M. W. N. 1337 ; State of Bihar *v.* Amulya Ratan Pathak, A. I. R. 1969 Pat. 173 at p. 180 ; Shanti Rajan Bhattacharya *v.* State, A. I. R. 1970 Cal. 557 at p. 558.
6. Shanti Rajan Bhattacharya *v.* State, A. I. R. 1970 Cal. 557 at pp. 559-60.
7. S.V. Subramania Pillai *v.* G.S. Ponniaho, A. I. R. 1939 Mad. 569 at pp. 569, 570 : 40 Cr. L. J. 822 (2) : 183 I. C. 560 : 1939 M. W. N. 469 : (1939) 1 M. L. J. 729.
8. Act IV of 1877.
9. Municipal Corporation, I. L. R. 3 Cal. 758.

servant under Cl. (10) of the section. But that clause speaks of an "officer" and not a person, and an officer cannot be a juridical person such as a corporation must necessarily be. Indeed there is scarcely any room for doubt that even the term "person" as used in Cl. (8) is used there in its strictly narrower sense as denoting a human being. The section does not appear to contemplate the possibility of including an artificial person within its comprehension.

If one turns to Sec. 21 of the Indian Penal Code, it will appear clear from Cl. 9 therefore that all Government servants, however humble in their office, have been included in the definition of a "public servant".

The concluding portion of Cl. 9 clearly indicates that every officer, either in the service or pay of the Government, or remunerated by fees for the performance of any public duty, is defined to be a public servant within the meaning of Sec. 21. It is well settled that the expression "officer" is used in the sense of functionary, and every functionary, however humble in his station (including even a peon), who is either in the service of the Government or pay of the Government, is a public servant within the meaning of Sec. 21 of the Penal Code. That being the position, one fails to understand, if members of the Home Guards were State Government servants, where was the necessity of making a deeming provision in that behalf in Sec. 9 of the Bombay Home Guards Act. The very fact that under Sec. 9 it has been provided that members of Home Guards under the Act are to be deemed to be public servants within the meaning of Sec. 21 of the Penal Code, indicates that they are not State Government servants, for while enacting Sec. 9 of the Bombay Home Guards Act, it must be presumed that the Legislature had before it the definition of "public servant" as given in Cl. 9 of Sec. 21 of the Penal Code.

Therefore, on a consideration of the scheme of the Bombay Home Guards Act and on a fair reading of the several provisions thereof, it is clear that a member of the Home Gaurds organisation under the said Act is not a State Government servant.[1]

It is a fallacy to say that it is only those persons, who are enumerated in Sec. 28 of the U. P. Panchayat Raj Act who can be "public servants" within the meaning of Sec. 21, Indian Penal Code. In fact persons enumerated in Sec. 28, U. P. Panchayat Raj Act, are not public servants within the meaning of Sec. 21, Indian Penal Code and it is only by fiction of Sec. 28, U. P. Panchayat Raj Act, that they have to be deemed to be public servants within the meaning of Sec. 21, Indian penal Code.[2]

Servants in private employ if a public servant.

Then, again, it appears almost superfluous to add that servants in private employ are not public servants within the meaning of the section. But such a contention was once made in a case in which the cashier of the Bank of Bengal carrying on the treasury business of the Government had received illegal gratification from the Manager of a Court of Wards on deposit of a certain sum on behalf of Government. The cashier was proceeded against for receiving illegal gratification as a public servant, his *status* as such being supported on the ground that he was "an officer whose duty it is, as such officer, to take any property, on behalf of Government".[3] But the Court

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1. Ratanji Ardeshir Dubash *v.* State of Maharashtra, (1969) 72 Bom. L. R. 304 at p. 309.
2. Basant Lal Gir *v.* State of U. P., 1968 A. W. R. (H. C.) 117 at p. 118.
3. Clause (9), *see* para, No. 15, *ante*.

held that the money received by the cashier was for the Bank and not for the Government, and that, therefore, he could not be deemed to be a public servant.[1] But the Manager of a Court of Wards, though not a servant of Government, is yet a public servant, inasmuch as the Court of Wards, being the Government, his duty to receive moneys for the Court of Wards is really a receipt "on behalf of Government".[2] But this case in conflict with a Madras case in which a peon employed by the manager of an estate in charge of the Courts of Wards was held not to be a public servant.[3] Assuming that the peon was a servant of the Court of Wards, he could not but be a public servant if the manager in that Allahabad case was a public servant, for both persons performed the same duties and it is, therefore, submitted that the Madras case was not correctly decided. The correct view was taken by Ainslie and Paul, JJ., in a Calcutta case in which they held a peon of the Collector's Court who received one fixed pay from the Government but was remunerated by fee whenever employed to serve any process and was placed on the Register of Supernumerary peons to be a public servant.[4] So a peon in the service and pay of Government and attached to the office of a Superintendent of the Salt Department is a public servant, though his duties were only to carry out the orders of his official superior, himself a public servant. Of course, labourers and menial servants employed to do work or labour on account of the Government are not "officers" and do not fall within the definition of "public servants" here given,[5]

Examples.

A carter temporarily employed by the Public Works Department could not arrogate to himself the status of a public servant,[6] though a Lascar can, as in Madras.[7] But the receiver of an estate appointed *pendente lite* is not a public servant,[8] for his position is that of a guardian of the estate for the protection of which he is appointed. So a clerk appointed by a Sub-Registrar and paid out of an allowance given to him is not a public servant as his appoint ment is not contemplated by the Indian Registration Act, though it empowers the Registering Officers to keep a proper establishment, but that alone would scarcely convert every employee under that provision into a public servant.[9] So while Municipal Officers may be, and ordinarily are classed as public servants, it does not follow that all servants of the Municipality are also public servants. A Municipal water-rate collector is thus held not to be a public servant : *et hoc genus omne*.[10] Similarly, a Quater-master's clerk[11] stands outside the category of public servants. So is the lessee of a village from Government though he be under obligation to keep an account of the forest revenues and pay the Government a proportion thereof.[12] A villager assisting a headman in the discharge of his public duties is no more a public servant than a person whom a Magistrate may require to assist him in the

1. Modun Mohun, I. L. R. 4 Cal. 376.
2. Mathura Prasad, I. L. R. 21 All. 127. This case was decided under the N. W. P. Act, which does not contain any declaration as to a manager being a public servant, which, however, is expressly provided in the C. P. Courts of Wards Act, Sec. 12 (*ii*), Act XVII of 1885.
3. Arrayi, I. L. R. 7 Mad. 17, relied upon in Nizamuddin, I. L. R. 28 Cal. 344.
4. Ram Krishna Das, 7 B. L. R. 446.
5. Nachmuttu, I. L. R. 7 Mad. 18.
6. *Ibid.*
7. Public Prosecutor *v.* Kamidi Annan Naidu, I. L. R. 48 Mad. 867.
8. Ebrahim, I. L. R. 29 Cal. 236.
9. Bhagwat Sahai, I. L. R. 32 Cal. 664.
10. Gulab, 1 A. L. J. 125, refers to Municipal Act (Act I of 1900), Sec. 51.
11. Ahad Shah, (1918) P. R. (Cr.) 18 : 45 I. C. 150.
12. Ramajirao Jivaji, 12 B. H. C. R. 1.

discharge of his public duties.[1] Such is also the *malguzar* holding an enquiry in the matter of damage done to a Government forest, though it may be his duty under the Forest Act to assist Government.[2]

So far as the receiving of a bribe is concerned, it cannot be brought within the scope of acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law. It cannot be the case of the prosecution that the servant of the State Transport Corporation, while acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law would take the money. Therefore when he took the money from a discharged truck driver from the army in need of employment he could not be said to be acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law. Therefore he could not be a public servant within the language of Sec. 43 which requires that an officer or servant of a corporation should be acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law in order that he may be a public servant within the meaning of Sec. 21 of the Indian Penal Code.[3]

A private person chosen by parties to settle their dispute, though he is referred to on the order of the Court, cannot be regarded as a "public servant" for he was not appointed by the Court.[4]

A person nominated by the Collector under Sec. 69 of the Bengal Tenancy Act is not a public servant because he does not perform any of the duties of a public servant.[5] So again, a public servant would cease to be so on his suspension from duty.[6] A corporation, though a juridical person, is not a natural person so as to be a public servant within the meaning of the section.[7]

A Mukhia (village headman) appointed by the District Magistrate or Sub-Divisional Magistrate under Sec. 45 (3) of the Code of Criminal Procedure (V of 1898) is not a public servant for he is not any person duly appointed and invested with authority to administer any part of the executive power of the Government or to execute any other public duty imposed by law whether it is judicial, executive or ministerial and he is not a servant at all. A Mukhia is not a Government servantt as contemplated by Sec. 5-A of the U. P. Panchayat Raj Act.[8]

23. **Explanation** I.—By this explanation, persons holding offices under local laws and performing duties within any of the descriptions set out in the clauses to the section, are public servants.

24. **Explanation II.**—By virtue of this explanation a person who is actually performing the duties of the office which brings him under one of the olauses of the section is a public servant even though there may be some legal defect in his right to hold the office.[9] The explanation however does

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1. Nag Paw, (1917) 38 I. C. (U. B.) 735.
2. Mebarban, 9 I. C. (All.) 669.
3. State of Maharashtra *v.* Jagatsing Charansing Arora, A. I. R. 1964 S. C. 492 at p. 496-97 : 66 Bom. L. R. 244.
4. Sundar Majhi, I. L. R. 30 Cal. 1084 at p. 1087.
5. Chattar Lal *v.* Thakoor Persad, I. L. R. 18 Cal. 518.
6. Dinanath, 8 B. L. R. App. 58.
7. Municipal Corporation, I. L. R. 3 Cal. 768.
8. Swami Nath *v.* S. D. O., Machhlishahr, A. I. R. 1958 All. 660 at pp. 661, 662, 663 : 1958 A. L. J. 349 : 1958 All. W. R. (H. C.) 471.
9. Ram Krishnadas, 16 W. R. (Cr.) 27 : 7 B. L. R. 446.

not speak of technical defect ; on the contrary it says whatever legal defect there may be in his right to hold that situation.[1]

In *Brijbehari* v. *Emperor*,[2] it was held that "the absence of a formal appointment is immaterial where the petitioner was indubitably 'in actual possession of the situation of a public servant' within the clause and the explanation."

22. The words "moveable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

"Moveable property".

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Moveable property.
5. "What is land" ?
6. Things attached to the earth.
7. Permanently fastened to things attached.

1. Analogous law.—The term "moveable property", here defined differs, on the one hand, from its definition in the Larceny Act,[3] as well as from its numerous definitions in other Acts of the Indian Legislature.[4] In the English Acts, all intangible rights in property are included in the term and such is the case in the Transfer of Property Act and other Acts of the Indian Legislature. But in this section, the term is limited to corporeal property, that is to say, tangible moveable property as distinguished from intangible rights which law regards as property and clothes the holder with rights of ownership therein. The definition, thus, excludes all incorporeal objects such as legal relations and rights which are included in the term in civil law. In other words, it takes no account of rights or interest in things apart from the things themselves.

English law.

Under English law which borrows its terminology from the Roman law property is divided into (*a*) corporeal, or (*b*) incorporeal, sometimes spoken of as tangible or intangible property. Corporeal property is such as can be perceived by the senses, such as land or a coat, while incorporeal property consists merely of legal relations and rights including legal obligations and rights of action.

2. Principle.—Since intangible rights in property are not visible, the Penal Code excludes them from the definition of moveable property. Again things permanently attached to the earth are also exoluded from the definition of moveable property in this section; but in civil law, their character would be determined, not by the mere fact of attachment but by its degree. By excluding intangible rights and including things not permanently attached to the earth, the Code makes that definition at once wider and narrower than what obtains in civil law. It does so to eschew conflict and complications which were sure to arise in the working of the Code if a more comprehensive definition were adopted. This would be clear from the sequel.

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1. Sailesh Chandra Lahiri v. Nehal Chand Marwari, A. I. R. 1932 Cal. 462 at p. 464 : 36 C. W. N. 134.
2. A. I. R. 1941 Pat. 539 at p. 542 : 22 P. L. T. 443.
3. 24 & 25 Vict., c. 96, Sec. 1.
4. *Cf.* Sec. 2 (6) of the General Clauses Act (Act I of 1868) ; Sec. 3 (3) of the General Clauses Act (Act X of 1897) ; Sec. 3 of the Indian Registration Act (Act III of 1887) ; Cl. (9) of Sec. 2 of Act XVI of 1908.

3. Meaning of words.—"*Corporeal property*" is property which may be perceived by the senses in contradistinction to incorporeal rights which are not so perceivable, such as obligations of all kinds. "*Except land*" : Land, being immoveable property, could not have been included in the term "moveable property". It should be noted that the word used in one place is "land", and in another place "earth". The two words are used in senses apart as will be explained in the sequel. "*Things attached to the earth*" : *See* the definition of this phrase as given in the Transfer of Property Act. "*Or permanently fastened, etc.*" which is included in phrase "attached to the earth".[1]

4. Moveable property.—The term "movable property" has been defined here for the special purpose of the Code. As such, its definition is much narrower as compared with its definition elsewhere. For while incorporeal rights are usually classed as movable, the Code exoludes them from the definition of "moveable property" as it may give rise to conflict and complications which would not be conducive to the easy working of the Code. The definition in Sec. 22 of "moveable property" is an inclusive definition. "Moveable property includes corporeal property of every description", but it does not give any information about incorporeal property.

A contract for cutting of trees to be converted into charcoal is an agreement relating to moveable property.[2] It is respectfully submitted that this view is not a sound one and requires reconsideration. The definition is no doubt inclusive, but it includes only "corporeal property". If incorporeal property is also taken to be included, the use of the word "corporeal" before "property" would be meaningless and otiose.

The term "moveable property" then means only visible or tangible things. It does not, of course, include land which is immoveable property. Nor does it include things such as trees and buildings attached to the earth. But earth attached to *the earth* is a part of it only so long as it is so attached. If it is removed from "the earth" or "land" it becomes moveable property, and as such, the subject of theft. So it is provided in Sec. 78 that "a thing so long as it is attached to the earth, not being moveable property, is not the subject of theft, but it becomes capable of being the subject of theft as soon as it it severed from the earth".[3] Thus stones so long as they are imbedded in the earth are immoveable property; being a part of the earth but as soon as they are required and carried away, they become moveable property, and, therefore, the subject of theft.[4] So where a swamp had been taken possession of by the Government, and the accused gathered salt, which had spontaneously formed on it, it was held that the removal of salt from the swamp converted it into moveable property, so that the accused were rightly convicted of its theft. "We cannot distinguish this case," observed the Court, "from theft of wood in a reserved forest, except that salt is actually any part of the soil, while trees are not; yet things immoveable become moveable by severance, and this would apply to served parts of the soil, e.g.

Moveable property means only tangible or visible things and not immoveable property.

Examples.

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1. Section 3, Cl. (*c*), Act IV of 1882, "attached to the earth".
2. Manchersha Ardeshir Devierwala *v.* Ismail Ibrahim Patel, A. I. R. 1936 Bom. 167 at pp. 169, 171 : I. L. R. 60 Bom. 706, following Ali Saheb *v.* Mohidin, 13 Bom. L. R. 874.
3. Ex. 1.
4. Suri Venkatappayya *v.* Madula, I. L. R. 27 Mad. 531 (F. B.), overruling Kottaya, I. L. R. 10 Mad. 255, and following Tamma Ghantayya, I. L. R. 4 Mad. 228 ; Shivram, I. L. R. 15 Bom. 702.

stone, quarried minerals, iron, or salt collected, as well as to timber which has grown or edifice which have been raised on the land."[1] So in another case where the accused were charged with stealing 100 cartloads of earth from the complainant's land the Court upheld their conviction for theft, observing: "It appears to us that earth when dug or ploughed up, so as to be in a state in which it can be put into a cart and taken away, ceases to be land or a thing 'attached to the earth' within the meaning of Sec. 22 of the Indian Penal Code. By the process of digging or ploughing, earth may become severed from 'the earth' or from 'any land' to which it was attached; and may become 'moveable property', within the definition contained in that section.[2] Earth, that is soil, and all the component parts of the soil, inclusive of minerals and stones, when severed from the earth become moveable property by the fact of severance alone from the earth, and regain their immoveable character as soon as they are deposited therein.

Things attached to the earth and things not attached to the earth.

So standing crops growing on land are immoveable property so long as they stand unsevered from the earth upon which they grow, but as soon as they are severed they become moveable property and, therefore, capable of theft. Under Sec. 22, I. P. C., moveable property does not include growing crops.[3] The same is equally true of standing trees.[4] In view of this consideration much of the value of the distinction made between things that should be regarded as "attached" or not attached to the earth loses its significance. But in so far as there may be still theft of things that lie in juxtaposition to the earth but are not attached thereto, the question what things should be considered as attached to the earth has still to be considered. It is not, however, proposed to exhaust the subject here for the subject has received ample treatment in another work to which reference should be made, if necessary.[5]

5. "What is land" ?—Land and things attached to the earth are here excepted from the category of moveable property. In fact "land and things attached to the earth, or permanently fastened to anything attached to the earth" are also immoveable property under the General Clauses Act.[6] Land as such is immoveable property. Land is the solid part of the surface of the earth, as opposed to water as constituting a part of such surface. So in Sec. 145 of the Code of Criminal Procedure—a section referring to "Disputes as to immoveable property"—it is spoken as "land or water", and in Cl. 2 the expression is for the purpose of that section declared to "include buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property". Of course, the term "land" has been used here in a much restricted sense as connoting only the crust of the earth. In ancient times, however, the terms had an even more restricted meaning, for it was used to signify "whatsoever may be ploughed" and "nothing but arable land".[7] But this sense has long since been abandoned, and the word is now used to

Restricted meanings of "land" under criminal law.

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1. Tamma Ghantayya, I. L. R. 4 Mad. 228.
2. Shivram, I. L. R. 15 Bom. 702.
3. Nallemadan Chettiar *v.* Emperor, A. I. R. 1930 Mad. 509 at p. 509 : 31 Cr. L. J. 1196: 58 M. L. J. 509; *see* also Sec. 378, Ill. (*a*) *post*.
4. U Ka Doc, I. L. R. (1929) 8 Rang. 13.
5. 1 Gour's *Law of Transfer* (6th Ed.), Secs. 84-98.
6. Section 2 (5), Act I of 1868; *see* now Sec. 3 (25), Act X of 1897.
7. Shephard's Touchstone, 91.

comprise any ground soil, or earth whatsoever[1] and whatsoever right therein held whether proprietary or leasehold.[2]

Meaning of "land" in civil law.

But land in civil law comprises not only the surface of the ground, but also everything on or over or under it, for *eujus est solum ejus est usque ad coelum et ad inferos*.[3] So land includes mines.[4] And so now under the English Conveyancing Act[5] "unless a contrary intention appears, land includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land".[6] But here the meaning attached to the word is not so large. It it used here merely to denote the surface of the earth, whether dry or covered with water. For land is "not the less land for being covered with water".[7]

6. Things attached to the earth.—Besides water the term "land" includes also "things attached to the earth". It is used here in the same sense, that is, it means things (*a*) rooted in the earth, as in the case of trees and shrubs or (*b*) things *imbedded* in the earth, as in the case of walls or buildings, or (*c*) things attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. The term "attached" does not always mean physically fastened ; it may also mean superincumbent upon, as, for example heavy machinery kept *in situ* by its own weight.[8] So trade fixtures are now usually regarded as attached to the earth, though at one time they were not.[9]

Attached, meaning of.

7. Permanently fastened to things attached.—Things *permanently* fastened either to land or to things attached to the earth are not moveable property. Now the question whether a thing is to be so regarded depends upon the degree and nature of the annexation and the purpose for which it was made. Thus doors and windows being attached to buildings for their permanent beneficial enjoyment are regarded as permanently fastened to them. On the other hand, window blinds, window sashes, shutters, fastenings hangings, tapestry and pier glasses whether nailed or not, beds fastened to the walls

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1. Doe *v.* Ludlam, 7 Bing. 275.
2. Swift *v.* Swift, 29 L. J. Ch. 121 ; Wilson *v.* Eden, 11 Beav. 237 ; Prescott *v.* Barker, (1874) 43 L. J. Ch. 498; Butler *v.* Butler, (1884) 28 Ch. D. 66. In the English clause consolidation statutes of 1845, the word "land" extends to "messuages lands, tenements and hereditments of any tenure" (8 Vict., cc. 16, 18 and 20).
3. Co. Litt. 49; Shephard's Touchstone, 91, 2 Blacke 18, "whoever has the land, to him alone belong even to the firmament, and to the centre of the earth".
4. *Per* Lord Cairns, L. C., in Great Western Railway *v.* Smith, (1877) 3 A. C. 165; Holiday *v.* Wakefield, (1891) A. C. 81.
5. (1881) Sec. 2 (ii).
6. For an exhaustive discourse on these words, *vide* 1 Gour's *Law of Transfer* (6th Ed.), Secs. 84-98.
7. *Per* Patterson, J., in R. *v.* Leeds and Liverpool Navigation Co., 7 A. & E. 685; Regents Canal Co., 6 B. &. C. 720; New Port Dock Co , 31 L. J. M. C. 266 ; Birmingnam Waterworks Co., 1 B. & S. 84 ; Southwark and Vauxhall Waterworks Co. *v.* Hampton, (1899) 1 Q. 273 (C. A.) ; *sub nom* Hampton Urbon Council *v.* Southwark & Co., (1900) A. C. 3 (H. L.).
8. *Per* Esher, M. R., in Tyne Boiler Works Co. *v.* Longhenton, 56 L. J. M. C. 12; Laing *v.* Bishopswearmouth, 3 Q. B. D. 299.
9. 1 Gour's *Law of Transfer* (6th Ed.), Sec. 94.

or ceilings, fixed tables, water-tubs, cupboards, book-cases screwed to the wall, clock-cases, iron ovens, grates, ranges and stoves although fixed in brickwork, iron-back to chimneys, pumps and all articles of domestic utility or convenience being not annexed for permanent beneficial enjoyment to that to which they are attached, are regarded as only moveable property.[1]

"Wrongful gain."

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

Wrongful loss.

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully—Losing wrongfully.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Meaning of "gain".
5. Wrongful gain.
6. Wrongful loss.
7. Wrongful retention or deprivation.

1. Analogous law.—"The term 'maliciously', 'wrongfully' and 'injure' are words all of which have accurate meanings well known to the law, but which also have a popular and less practical signification. An 'intent' to injure, in strictness, means more than an intent to harm. It connotes an intent to do *wrongful* harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its turn the infringment of some rights."[2] And if there be no infringement, there can be no actionable wrong, however vile the motive.[3] The terms "wrongful gain" and "wrongful loss" do not, however, occur in English law, where their place is taken by "malicious act", which is an act done illegally and unreasonably and not in the exercise of a *bona fide* right.[4] So Lord Blackburn observed: "Where any person wilfully does any act injurious to another without lawful excuse" he does it maliciously.[5] In the language of the Code such an act would be said to have been done dishonestly.[6]

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1. Gour's *Law of Transfer* (6th Ed.), Sec. 94.
2. *Per* Bowen, L. J., in Mogul Co. *v.* McGregor, 33 Q. B. D. 598 (O. A.); (1892) A. C. 25, cited with approval, *per* Lord Watson in Allen *v.* Flood, (1898) A. C. 1.
3. Allen *v.* Flood, (1898) A. C. 1.
4. Jenner, 7 L. J. (O. S.) M. C. 79.
5. Pembleton, L. R. 122; Welch, 1 Q. B. D. 23.
6. Section 24, I. P. C.

2. **Principle**—Criminal law takes no note of what is morally wrong for social morality varies with race and locality. It is to a great extent dependent upon the custom and habits of a people. If law were to punish social transgressions, howmuchsoever lots they may cause to society, it would be as uncertain as often incapable of elucidation. Even treachery, envy and jealousy, though universally condemned by the moralist are not under the bane of law—for they, too, are uncertain in their operation and are difficult of proof. The standard, therefore, which criminal law sets before itself is the standard of legal right and wrong. It does not take cognizance of *mala in se* but of only *mala prohibita*. It is true that not a few *mala in se* are also *mala prohibita*, but cognizance is taken of them because they are *mala prohibita* and not because they are *mala in se*. This section is the exponent of this rule. For it lays down that the test of wrongfulness is unlawfulness. Now a thing may be unlawful in two senses: (*a*) as unenforceable by law, (*b*) as punishable by law, for example, an agreement for sexaul immorality which is unlawful in the first sense, is not so in the second.[1] Here the term has, therefore, been used in the second sense.

Standard set by criminal law before itself.

3. **Meaning of words.**—"Unlawful means", i. e. by illegal means as defined in Sec. 43.[2] In order that what happened may come within this Sec. 33 what was contemplated and caused was by unlawful means.[3]

A person may employ unlawful means for a lawful object as where one commits violence for recovery of his own property: "*Wrongful loss is the loss*", which implies total deprivation of the property. If, therefore, the pledgee of goods used them, and thereby caused their deterioration, and not deprivation, it is not wrongful loss.[4] It may be added that the wrongful loss means loss here of the specific property and not loss generally.[5] "*Gain wrongfully*": A person retaining wrongfully cannot be distinguished from one who has acquired wrongfully; for example, one who having received stolen property innocently, retains it after he knows it to be stolen is as much a criminal as one who had received it with guilty knowledge *ab initio*.

4. **Meaning of "gain".**—The word "gain" here then means acquisition of the specific property in respect of which a person causes wrongful loss to another. If, therefore, a person maliciously impounds another's cattle with a view to put him to expense, the latter would be put to pecuniary loss generally, but not of the property in question, and, therefore, the person impounding his cattle cannot be, as stated before, proceeded against for their theft.[6] The term "property" as used here means anything which not only may be, but is, the subject of ownership. Where, for instance, a student forged one certificate to get another so as to secure his admission to a higher class the certificate which he so procured was held to be property within the meaning of this section.[7]

What is property.

On the other hand, a bull dedicated and set at large at the *shradh* of a Hindu in accordance with religious usage, ceases to be the property of its former

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1. *Per* Bramwell, B, in Cowan *v* Mailbourn, L. R. 2 Ex 230 at p. 236.
2. The Code defines "illegal" in Sec. 43, but it does not define "unlawful", but the two concepts bear an identical meaning as is explained by the Law Commissioner's First Report, Sec. 658.
3. *In re* Athi Ayyar, A I. R 1921 Mad. 322 at p. 323; *See* also Nga Fe, 1 Cr. L. J. 730 (Bur.) (F. B.).
4. 3 M H. C R. (App.) 6; Nabi Baksh *v.* Ali Baksh, I L R 25 Cal. 416.
5. Aradhum *v.* Myan Khan, 24 W. R. (Cr.) 7 at p 8.
6. *Ibid.*; Dayal *v* Emperor, A. I.R. 1943 Oudh 280: 44 Cr. L. J. 640: 1943 O. W N. 202.
7. Sashi Bhusban, I. L. R. 15 All. 210.

owner, so that a person capturing and killing it could not be said to cause "wrongful loss" of any property to any one.[1] So Straight, J., in one case remarked: "It was not only not the subject of ownership by any person but the original owner had surrendered all his rights as its proprietor, and had given the best its freedom to go whithersoever it chose; it was, therefore, *nullis proprietas* and as incapable of larceny being committed in respect of it as if it had been *ferae naturae*."[2] The fact that the bull was given rice by the dedicator's family and their permission was taken by the villagers using it for breeding purposes would not convert it into the property of the family.[3]

Wrongful gain and loss mean material gain or loss.

Of course, it is no function of a criminal Code to define what is and what is not property. Its legitimate function is to protect what is admitted property, and if it be a matter of doubt what things are the subject of a certain right, in whom that right resides, and to what that right extends, it must also be a matter of doubt whether that right has or has not been violated. For example, *A* without *Z*'s permission, shoots snipe on *Z*'s ground and carries them away; here if the law of civil rights grants the property in such birds to any person who can catch them, *A* has not, by killing them and carrying them away, invaded *Z*'s right of property. If, on the other hand, the law of civil rights declares such birds the property of the person on whose lands they are, *A* has invaded *Z*'s right of property. If it be a matter of doubt what the state of the civil law on the subject actually is, it must also be a matter of doubt whether *A* has wronged *Z* or not.

A person may wrongfully gain property to which he is not legally entitled, even though it be his joint property. For a person having no right to exclusive possession of property is in principle not to be differentiated from one who had no right to any possession.[4] The wrongful gain and wrongful loss here spoken of mean, of course, material gain and loss, that is to say, some pecuniary gain or loss as distinguished from a mere sentimental gain or loss as, for instance, of honour, dignity or the like. So where a person presented a forged *sanad* to a Settlement Officer with a view to obtaining his recognition to his pretension to bear the title of Loskur, it was held that the accused's conduct was not dishonest as it did not involve any wrongful gain or loss as understood in the Code.[5]

5. Wrongful gain.—Two things are essential to constitute wrongful gain, and its correlative wrongful loss, namely,—(*a*) use of unlawful means and (*b*) unlawful acquisition. The existence of one without the other is not sufficient. As observed before, the term "unlawful" has a double meaning but the word as used in criminal jurisprudence is limited to convey an act which is prohibited as well as punishable by law. An act may be merely prohibited without being punishable, as for instance, immoral acts and contracts which are unlawful because they are prohibited, but which are, however, not punishable. If, therefore, a person hires a house for an immoral purpose, he gains the house by unlawful means,[6] but he does not thereby acquire the house "dishonestly" within the meaning of the next section, nor can it be said that he does not thereby become legally entitled to its possession. For if his possession is illegal, can he be summarily ejected? And even if such were the

"Unlawful" has double meaning.

1. Bandhu, I. L. R. 8 All. 51; Nihal, I. L. R. 9 All. 348; Romesh Chandra *v.* Hiru Mondul, I. L. R. 17 Cal. 852; Sita, I. L. R. 18 Bom. 212.
2. Bandhu, I. L. R. 8 All. 51.
3. Romesh Chandra *v.* Hiru Mondul, I. L. R. 17 Cal. 852.
4. *Cf.* Sec. 425, Expl. 2 and Ill. (*g*).
5. Jan Mohammed, I. L. R. 10 Cal. 54.
6. Cowan *v.* Milbourn, L. R. 2 Ex. 230 at p. 236.

case, how is the definition material to the Code in which such an act is not punishable as a crime? But this sense of the word "unlawful" is not preserved throughout the Code. For there are sections in which the word has been used *ejusdem generis* with "immoral" as in Secs. 372 and 373, where the phrase used is "unlawful and immoral purpose".[1] Here the sense of the word may be said to have been modified by its association with another word, and the general context. But it is sufficient to put one on one's guard against regarding the meaning of even a law term as always rigidly inflexible. (For a further commentary, *see* Sec. 43.)

"Gain" not only means acquisition but relation.

The word "gain" means, as has been subsequently explained, not only acquisition, but also retention. But it must be something more than a mere retention. In other words, it must be an acquisition or retention with the *intention* of appropriation. Where, therefore, the accused, the pledgee of a turban, was convicted of criminal breach of trust for using it, the Court set aside the conviction on the ground that the wrongful beneficial use of property by him, was not a gain to him, nor was it a wrongful loss to the real owner. "For either wrongful loss or gain, the property must be lost to the owner, or the owner must be wrongfully kept out of it."[2] So where a person maliciously impounded another's cattle with a view to cause him expense, inconvenience and annoyance, there being neither wrongful gain nor wrongful loss of the property, he could not be convicted of theft.[3] Again in another case, where a servant being piqued at being wrongly suspected of the theft of a box, removed it and concealed it in a cowshed to give a lesson to his master, the question arose whether his act caused wrongful gain to him, or wrongful loss to his master, so as to justify his conviction for theft. And it was held that there was no wrongful gain or loss, the accused could not be so convicted. "Of course", the Court remarked, "when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily, not with any such intention but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense."[4] But it is submitted that this is a case in which "intention" must be distinguished from "motive", for the two are not the same. For if they were, and if the view of the Calcutta High Court were correct, then what should we say of the case in which the creditor forcibly seized his debtor's goods and detained them with the sole intention of coercing him to pay up his just debts? Here too, the same reasoning should have exonerated the accused, but it did not.[5]

Examples.

Wrongful gain if necessarily a dishonest gain.

But apart from the policy of the rule, the principle is clear. In forcibly taking wrongful possession of his debtor's goods the creditor had certainly the *intention* of causing his debtor loss by unlawful means, but his *motive* was not to appropriate them but to use them as a screw to compel his debtor to pay up. "Wrongful gain" is not neeessarily "dishonest gain", for a person may

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1. Narayan, (1889) B. U. C. 442.
2. Proceeding, 8th Nov., 1866; 3 M. H. C. R. (App.) (vi).
3. Aradhun *v.* Nyan Khan, 24 W. R. (Cr.) 7 at p. 8.
4. Nabi Baksh, I. L. R. 25 Cal. 416.
5. Sumeshar, (1888) A. W. N. 96; Agha Muhammad Yusuf, I. L. R. 18 All. 88; Madaree, 5 W. R. 68; Preonath, 3 W. R. 2; Taribee Prasad, 18 W. R. 8; Sri Churn Chungo, I. L. R. 22 Cal 1017 (F. B.), overruling *contra* in Prosonno Kumar *v.* Udoy Saut, I. L. R. 22 Cal. 667 at p. 676.

acquire property by wrongful means without *intending* to be dishonest. The case of the servant screening his master's box[1] was, it is submitted, wrongful, though it was not dishonest.

A person is not guilty of causing wrongful gain to himself if he cuts down trees standing on his tenancy land, though in doing so he may have committed a civil wrong entitling his landlord to recover damages.[2] The doing of every unauthorised act is not necessarily unlawful, nor is the doing of every unlawful act dishonest so as to expose the doer to the severities of penal law.

Wrongful gain or loss must relate to property.

"Wrongful gain" or "wrongful loss" under this section must (1) relate to property, and (2) arise from the exercise of unlawful means. Thus, the taking out of aircraft owned by Government by a person for an unauthorized flight has in fact given him the temporary use of the aircraft for his own purpose and has temporarily deprived the owner of the aircraft, namely, the Government, of its legitimate use for its purposes, i, e. the use of this aircraft for the Indian Air Force squadron that day. Such use being unauthorised is a gain or loss by unlawful means.[3]

In the above-noted case Jagannadhadas, J., observed in the course of his judgment :

> "The main contention of the learned counsel for the appellant, however, is that there is no proof in this case of any dishonest intention, much less of such an intention *at the time* when the flight was started.

Observations of the Supreme Court.

It is rightly pointed out that since the definition of theft requires that the moving of the property is to be in order to such taking, 'such' meaning 'intending to take dishonestly', the very moving out must be with the dishonest intention. It is accordingly necessary to consider what 'dishonest' intention consists of under the Indian Penal Code. Section 24 of the Code says that 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'. Section 23 of the Code says as follows :

> '"Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> '"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> 'A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.'

> "Taking these two definitions together, a person can be said to have dishonest intention if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. It is further

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1. Nabi Baksh, I. L. R. 25 Cal 416.
2. Reddi Yerranna, 25 I C. (Mad.) 338.
3. K. N. Mehra *v.* State of Rajasthan, A. I. R. 1957 S. C. 369 at p. 372 : 1957 S. C. A. 132 : 957 S. C. J. 192 : 1957 A. L. J 669 : 1957 A. W. R (H. C.) 490 : 1957 M. P. C 566 : (1957) Mad. L. J. (Cr.) 408: 1957 Cr. L. J. 552.

clear from the definition that the gain or loss contemplated need not be a total acquisition or a total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary 'keeping out' of property from the person legally entitled. This is clearly brought out in Illustration (l) to Sec. 378 of the Indian Penal Code and is uniformly recognized by various decisions of the High Courts which point out that in this respect 'theft' under the Indian Penal Code differs from 'larceny' in English law which contemplated permanent gain or loss."[1]

The ingredients which constitute theft under Secs. 378 and 379, I. P. C., it is necessary for the prosecution to establish in a case of theft that certain moveable property was taken out of the possession of a person without his consent and that for the purpose of such taking the said property was moved. When the above facts are established there is another ingredient which has to be established and that is the most important in a case of theft. It is that the accused had the intention to take the said property dishonestly. Dishonest intention has to be established by the prosecution.

Now dishonesty in criminal law is not what it is in common parlance. It has a technical meaning as defined in Sec. 24, I. P. C. A person is said to do a thing dishonestly, if he did it with the intention of causing wrongful gain to himself or wrongful loss to another person. The terms "wrongful gain" and "wrongful loss" have again been defined in Sec. 23, I. P. C. A person is said to cause wrongful gain for himself if he obtains the gain by unlawful means of property to which he is not legally entitled. Again, a person is said to cause wrongful loss to another person, if he causes the loss by unlawful means of property to which the latter is legally entitled.

In a prosecution for theft, the prosecutor in order to prove the dishonest intention of the accused can prove both wrongful gain to the accused and wrongful loss to the owner of the property. In other words, it may be proved that in depriving the person in possession of a property without his consent the accused obtained the gain of the property, to which he was not legally entitled and further that he caused loss of the property to the owner of the property to which he was legally entitled.

But it is not necessary that the prosecution should prove both wrongful gain to the accused and wrongful loss to the owner. It is sufficient if the prosecution proves either of the two. It is absolutely necessary that either wrongful gain to the accused or wrongful loss to the owner is proved. It may be that in causing the wrongful loss to the owner the accused did not intend to cause wrongful gain to himself. But still it will amount to theft .if wrongful loss to the owner is proved.

Now if the prosecution sets out to prove that there was wrongful loss to the owner of the property, but not that there was wrongful gain to the accused, the prosecution has to prove that the property belonged to the person from whose possession it was taken by the accused or in other words that the person from whose possession it was taken was legally entitled to the property. This is absolutely essential. In such a case proof of mere possession with the person from whom it was taken is not sufficient. It has to be established that he was entitled to such possession. Otherwise, the accused cannot be held to be guilty of the intention to cause wrongful loss.

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1. *See* Queen-Empress *v.* Sri Churn Chungo, I. L. R. 22 Cal. 1017; Queen-Empress *v.* Nagappa, I. L. R. 15 Bom. 344.

Hence, when the prosecution seeks to prove that the accused caused wrongful loss to the owner but not that the accused intended to obtain wrongful gain for himself, the accused will also be entitled to show that the person who was deprived of the property was not the owner of the property and did not have legal title for its possession and hence he has not caused wrongful loss. He can show this by proving his own legal title to the property. He need not of course show anything as the burden is on the prosecution to prove the legal title of the complainant.

If, on the other hand, the prosecution seeks to prove that the accused obtained wrongful gain for himself, even though he had no intention of causing wrongful loss to the person in possession of the property, it is not necessary for the prosecution to prove that the person in possession of the property was the owner and legally entitled to such possession. In such a case mere possession of the property with the person in possession is sufficient. A person in possession of property is entitled to retain such possession until a person with a better claim or title to the property comes forward.

Thus if the accused has got legal title to the property which he took away from a person in possession of the property, he cannot be held guilty of the intention to obtain wrongful gain for himself if he deprived the other person of the possession of the property. Thus, in such a case what the prosecution has to prove is that the accused was not legally entitled to the property and that in depriving a person of his possession of a property, the accused had the intention of causing wrongful gain to himself.

The accused will also be entitled to show in defence to such a prosecution case that he was legally entitled to the property. If he shows it, he cannot be held guilty of the dishonest intention, because a person who finds his property in the hands of another will not be guilty of theft if he removes that property from the possession of the other.

In either case, that is, where the prosecution either seeks to prove that the accused had the intention of causing wrongful loss to the owner or of obtaining wrongful gain for himself or if the prosecution sets out to prove both wrongful gain and wrongful loss, the accused will be entitled to show that there was a *bona fide* dispute about the ownership or right to possession of the property or that he had a *bona fide* claim to the property and that the removal of the property was in the assertion of the contested claim.

In such a case even if the Criminal Court finds that the claim of the accused was ill-founded the accused will not be held guilty of theft if his claim or dispute was *bona fide*. This right to the accused to set up a *bona fide* claim or dispute is well recognised. The reason behind this principle is that the ultimate authority to decide the right of possession or the ownership of a property is the Civil Court and not the Criminal Court.

Thus where a Criminal Court finds that a real dispute existed as to the ownership or right to possession of a property and that it was really a matter which had to be decided by a Civil Court, the Criminal Court will not allow the criminal law to be set in motion for the purpose of settling that dispute by accusing one of the disputants or claimants of theft.[1]

6. Wrongful loss.—As the word "property" has the limited significance set out above, it is apparent that "wrongful loss" is the antithesis of wrongful

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1. Dojakhai, Chief of Ningthiching, v. Khamjathan Gangte, (1961) 1 Cr. L. J. 686 at pp. 685-87.

gain. But it would not have been otherwise so. For as in the case of the sacred bull, though its acquisition by the accused would certainly be a gain to him, it did not imply any corresponding loss to any one. But in the sense in which the word is used in the Code the two words are correlated and if one has gained the other must have necessarily lost, and the reason is evident. The Penal Code has been enacted to protect private rights and, therefore, it uses its phraseology in the sense subservient to its object. A person who loses his property by the unlawful means of another is said to suffer wrongful loss. If, therefore, he be in possession of property to which he is not legally entitled, he cannot suffer wrongful loss in respect of it, even though the means employed to deprive him of it be unlawful. Such a case may be supposed of a person in possession of stolen goods, which the rightful owner may regain by the right of re-capture.[1] So where the accused was sold rice by a Famine Relief Officer at 16 seers per rupee on condition that he should sell it at the rate of 15 seers, instead of which he was discovered having sold it at the rate of 12 seers, the question was if his act amounted to a crime, and it was held that it did not, the reason given for the finding being, that as the property on sale became vested in him, it could not be said that his sale at otherwise than the stipulated rate, caused wrongful loss to the Relief Superintendent, nor was there a gain on the part of the accused by unlawful means for the rice having been sold to him and he having paid for it, it was not unlawful for him to sell it again at such prices as he thought fit.[2]

Words wrongful gain and loss are correlated to each other.

Examples.

Such a case is, however, easily distinguishable from one in which the servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it he was to receive a certain quantity for himself and he was to account for the remainder to his master with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he adulterated the liquor with water and sold it at the rate of unadulterated liquor appropriating the profit thus made to his own use. Here he obtained property by unlawful means (namely, adulteration) to which he was not legally entitled and as his intention was apparent, he was rightly convicted of criminal breach of trust.[3] It will be observed that this case differs from that cited last of the grain contractor in that while in this case the property in liquor was not in the seller, in the case of the grain contractor, it had become vested in him. So a milkman who sold adulterated milk could not be convicted of any offence under the Code, for he had caused no wrongful loss to his customers.[4] So where *A*, a horse dealer, showed *B* a telegram purporting to be from his principal refusing *B*'s offer for purchase of a mare whereupon *B* raised the price for which *A* sold the animal, *B* subsequently charging him for cheating, the Court threw out the case on *B*'s admission that the mare was worth the money he paid for it, holding that the false inducement by *A* had caused *B* no wrongful loss.[5] Where legal right to the water intercepted was not proved, one of the elements of wrongful loss as defined in the Indian Penal Code is non-existent.[6] Where the case was that a particular crop belonged to *A*, that *B* by deceit unlawfully reaped it, it was held that the allegations involved that *B* intended to gain unlawfully by taking possession of the crop and to cause loss unlawfully to *A* by doing so.[7] Where the complainants were rebuilding their houses which abut

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1. Section 105, I. P. C. and commentary.
2. Lal Mohammad, 22 W R. 82.
3. Jamsethji, (1888) B. U. C. 395.
4. Hiri, 1888 B. U. C. 367.
5. Dicks, 12 A. L. J. 1258.
6. Tun Aung v. Emperor, 7 Cr. L. J, 448 at p. 449: (1907) 4 P. R 149.
7. Narainda v Kashi Prasad, A.I. R.1935 All. 261 at p. 265: 153 I. C. 763: 1935 A. W. R, 36 : 1935 A L J. 248.

a public street in the village. A portion of the superstructure was alleged to be an encroachment on a portion of the public street and the accused in these two cases are said to have gathered there for the purpose of abating what they considered to be a public nuisance and demolished a portion of the terrace and the walls which stood on the encroached portion.

It was held that the accused were really guilty of the offence of mischief, and as their common object in gathering on the scene was for the purpose of causing wrongful loss to the complainants, they may properly be deemed to have been guilty of rioting also.[1]

Wrongful loss must be the proximate cause of the act.

It would also appear that the "wrongful loss" occasioned by the act of a person must be the proximate cause of that act. If the loss was too remote, it would not be attributed to the unlawful means employed. So, in one case, it was held that the mere permitting of cattle by the accused to stray does not establish his intention to cause, or knowledge that he was likely to cause, wrongful loss or damage to the public or any person.[2]

7. Wrongful retention or deprivation.—Of course, as remarked before, a wrongful act *ab intitio* is not to be distinguished from a wrongful act *ex post facto*. Thus a person may acquire a thing innocently and afterwards retain it wrongfully and in their result the two acts are the same as if he had initially intended to do wrong. It has been held in *Dharmendra Nath Shastri* v. *Rex*[3] that the words "gaining wrongfully" or "losing wrongfully" as defined in Sec. 23 of the Code, need not be confined only to the actual acquisition or to the actual deprivation of property and would cover also cases of wrongful retention of property in one case and wrongfully being kept out of property in the other. Where a village postman made it appear that the parcels (V. P. P.'s) had been received by some person for and on behalf of the addressee and the said postman retained them for himself, the retention was wrongful gain under Sec. 23.[4]

"Dishonestly."

24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Constitution of legal dishonesty.
5. Proof of intention.
6. Claim of right.
7. Analysis of mental process in criminality.
8. Intention and motive distinguished.
9. Legal and popular dishonesty.

1. Analogous law.—It is said that the term "dishonestly" as here defined, is equivalent to "fraudulently" defined in the next section.[5] But as will appear from the next section the two terms are not used in the same sense, nor have they the same legal incidents.

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1. Gujjala Narasimhulu *v.* Nagur Sahib, A. I. R. 1934 Mad. 95 at pp. 95, 97 : 1934 M. W. N. 905.
2. Toorebaj Khan, (1868) Unrep. Cr. C. 11.
3. A. I. R. 1949 All. 353 at p. 358 : 50 Cr. L. J. 550 : 1949 A. W. R. 285 : 1949 A.L.J. 183 : I. L. R. (1949) All. 619.
4. *In re* Mahalingayya Muddayya Pujari, A. I. R. 1959 Mys. 185 at p. 188.
5. Lal Mohammad, 22 W. R. 82 at p. 83, but this view is erroneous; Kedar Nath, 5 C. W. N. 897.

2. Principle.—The definition of "dishonestly" in Sec. 24, I. P. C., applies only to wrongful gain or wrongful loss and although there are conflicting rulings on the question of the definition of the word "fraudulently", the consensus of opinion of courts has been that there must be some advantage on the one side with a corresponding loss on the other.[1] If a person does anything intending thereby to cause wrongful gain to one person or wrongful loss to another person, he acts "dishonestly" within the meaning of this section. In other words, where a person intending to gain by unlawful means gains by unlawful means property to which he is not legally entitled, his act is dishonest within the meaning of the section. Three essential ingredients must, thus, be present to constitute dishonesty in law, namely, (*a*) intention, (*b*) employment of unlawful means, and (*c*) acquisition of property to which one has no right. The question whether the act of an accused was dishonest or not did not as a matter of fact depend on the question whether wrongful gain or loss was actually caused. The determining factor as shown in Sec. 24, I. P. C., is the intention with which payment is made.[2]

Three essential ingredients to constitute dishonesty.

Section 24 is not an exhaustive definition of the word "dishonestly". The section does not say that the word "dishonestly" is applicable only when there is an intention of causing wrongful gain to one person or wrongful loss to another person but properly construed means that cases of intention of causing such wrongful gain or loss are to be considered as coming within the wider class of dishonest actions.

The obtaining of an acquittal by using a forged document is very distinctly the obtaining of an advantage and brings the case within the definition of "dishonestly" in Sec. 24.[3]

Where a village postman made it appear that the parcels (V. P. P.'s) had been received by some person for and on behalf of the addressee and the said postman retained them for himself, the retention was "wrongful gain" under Sec. 23. By doing so, the postman (the accused) acted "dishonestly" within the meaning of this section.[4]

3. Meaning of words.—"*With intent*": The word "intent" by its etymology seems to have metaphorical allusion to archery, and implies "aim" and thus connotes not a casual or merely possible result—foreseen perhaps not as an improbable incident but not desired—but rather connotes the one object for which the effort is made and thus has reference to what has been called the dominant motive.[5] In the definition of "dishonestly" the word "gain" must be taken to mean a material gain.[6]

4. Constitution of legal dishonesty.—As has been observed before nothing is dishonest under the Act, which is not *intended* to be dishonest. But nothing can be said to have been intended by a person, unless it was his immediate and probable intention : or in other words, unless it was his dominant motive. But as

Intention.

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1. Sanjiv Ratnappa *v.* Emperor, A. I. R. 1932 Bom. 545 at p. 547: 347 Bom. L. R. 1090.
2. Dharamdas Lilaram *v.* Emperor, A. I. R. 1932 Sind 169 at p. 173; *see* also Sarsar Singh *v.* Emperor, A.I.R. 1934 All. 711 : 1934 A. L. J. 749.
3. Baju Jha *v.* Emperor, A. I. R. 1929 Pat. 60 at p. 63: 9 P. L. T. 890.
4. *In re* Mahylingayya, Muddayya Pujari, A. I. R. 1959 Mys. 185 at p. 188.
5. *Per* Batty, J. in Bhagwant *v.* Kedari, I. L. R. 25 Bom. 202 at p. 206; Girdhari, I. L. R. 8 All. 653.
6. Nga Ba Thein *v.* King Emperor, A. I. R. 1925 Rang 9 at p. 11.

"intention" is a psychological act, the only means by which the Court can judge of it is by inference from the external acts and conduct of a party. So Sir James Stephen wrote: "The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time as the natural consequence of his conduct."[1] The test to be applied is not the test of a hypothetical reasonable man—but of the person whose intention is to be read. The Court must then put itself as far as possible in his situation for the purpose of seeing what must have been his intention. His habit of life, manner of thought, associations and belief may have influenced him in his action. It is, therefore, essential to take all these elements into consideration. For, in a criminal case, there is no golden rule of conjectural test. The sole test is what was the intention of the accused at the time of the act complained of, for which purpose it was said that only the primary and not the more remote intention of the accused must be looked at.[2]

Possible way of discovering man's intention.

So where an accountant fraudulently paid away money to *B*, held in deposit for payment to *A*, who pressed for its payment, whereupon the accused made false reports to the effect that *A*'s money, held as a revenue deposit, was to be transferred to the Civil Court upon which a cheque for making the transfer was drawn up, which the accused altered to conceal his previous fraud, it was held that the accused's immediate intention being merely to conceal his previous fraud, he could not be convicted of forgery, though he could be convicted of making a false record.[3] So a candidate gaining admission to an examination by presenting a forged certificate which he knew to be forged, was held not to have acted "dishonestly", within the meaning of this section, inasmuch as his primary intention was to gain admission, and not to cause wrongful loss to the university.[4] This case was, however, dissented from in Allahabad on the ground that the certificate was certainly used with intent to support a claim within the meaning of Sec. 463 of the Code,[5] and it has since been overruled.[6] But neither in the Full Bench nor in the Allahabad case was the view of the Calcutta Divisional Bench on the meaning of intention combated, but it was rather conceded. Indeed, it may be now regarded as settled that in judging of a man's intention regard must be had only to his primary and immediate intention, and not to his secondary or more remote intention—if intention it may be called for in reality it is the motive, which law ignores in judging of a man's criminality. So where a person fabricated receipts in lieu of genuine ones which had been lost, he could not be convicted under Sec. 471 of the Code for dishonestly using forged documents.[7]

Examples.

The same principle is illustrated in the case in which the accused's brother felled certain trees without a licence, whereupon the accused fearing detection took the Government marking hammer from the watchman's baggage, marked the trees in order to make it appear that they had been marked with the Forest Officer's permission, and then replaced the hammer: it was held that as the accused did

Intent to commit an offence.

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1. 2 History of the Criminal Law, p. 111.
2. Girdhari Lal, I. L. R. 8 All. 653; Haradhan, I L R. 19 Cal. 380.
3. Girdhari Lal, I. L. R. 8 All. 653; Annasami, 1 Weir 554; Sabapathi, 1 Weir 549; but *see* Rash Behari Das, I. L. R. 35 Cal 450; Balakrishna, I.L.R 37 Bom 666.
4. Haradhan, I. L. R 19 Cal. 380; *contra* in Shashi Bhushan, I. L. R. 15 All 210; Srinivasan, I. L R. 25 Mad. 726.
5. Shashi Bhushan, I. L. R 15 All 210.
6. Abbas Ali, I. L. R. 25 Cal. 512 (F. B.): 1 C. W. N. 255, following Foshack, 4 Cox. 38.
7. Sheodayal, I. L. R. 7 All 450.

not intend to keep the hammer or deprive the watchman of it, there was no dishonest taking within the meaning of this section and, therefore, no theft.[1] So again, since "intent to commit an offence" is the cardinal ingredient of criminal trespass,[2] a person who enters upon property in the possession of another may produce those feelings in the mind of the possessor, but if he did not do with that intention, the result produced is immaterial in determining his criminal liability.[3]

Test to determine criminal responsibility of a person.

The same test determines the criminal responsibility of a person charged with cheating. Suppose the case of a person purchasing, say wool, with delivery of possession, from a firm, agreeing to pay the price on the next day, which he did not, and who, moreover pledged the wool to another and raised money thereon which he himself appropriated, could he be convicted of cheating? It was held not, because there was nothing to show that at the time of purchase he had no intention to pay.[4]

It is not necessary that the intention of the person must be to cause wrongful gain or loss to any person in particular. Indeed, in many cases, e.g. of arson or mischief, it would be impossible to trace precisely the victim of the accused's malice. In England, therefore, it has been expressly provided that in case of arson or forgery it is unnecessary to state or prove that the accused had any intention to injure or defraud any particular person.[5] But there are statutory exemptions which modify the rule.

5. **Proof of intention.**—For conviction of an offence, involving dishonest intention which is an essential ingredient of the offence, such an intention must be established beyond doubt.[6] But as regards the proof of intention, it is not in every case that direct evidence is available or necessary. For while it is true that intent must be proved, it is also true that where a person commits an unlawful act, unaccompanied by any circumstance justifying its commission, it is presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act.[7] If, for instance, a man is proved to have wilfully set a house on fire, it was held that no further proof of intention to injure was necessary.[8] So Blackburn, J., in another case, observed: "I have always thought a man acts maliciously when he wilfully does that which he knows will injure another in person or property."[9] These cases may be defended upon the principle of *res ipsa loquitur*;[10] for, in all such cases the intention is palpably criminal, and no further proof of its criminality is required. These cases are not, therefore, exceptions to the rule, but are rather illustrations of it. For the question is always one of fact and never of law, and the decision must, therefore, depend upon the circumstances of each case.[11]

Question is always of fact and not of law hence depends on circumstances of each case.

In *Sarsar Singh* v. *Emperor*,[12] Bajpai, J., observed: "A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by

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1. Budhu, (1887) P. R. No. 1.
2. Section 441, I. P. C.
3. Sivratri (1885) Weir (3rd Ed.) 329; Rayapadayachi, I L. R. 19 Mad. 240; Po Kin, (1902) 1 L. B. R. 355; Vujeer. (1868) B. U C. 10.
4. Fazul, (1886) B U. C. 312.
5. Arson, 12 Geo. 3 c 24, Sec. 50; Forgery, 36 & 37 Vict, c. 32, Sec. 49.
6. Venkatapathi v Kalawa, 1936 M. W. N. 761; Sarsar Singh v Emperor A. I R. 1934 All.711
7. Lakshman, I. L. R. 26 Bom. 558; Sarsar Singh v. Emperor, I.L. R. 1934 All 711.
8. Farrington, Russ, & Ry. 207; Ali Kasim, 10 I. C. (L. B.) 929.
9. Ward, L R. 1 C. C R. 356.
10. "The thing speaks for itself".
11. Farnborough, (1895) 2 Q B 484.
12. A. I R. 1934 All. 711 at p. 711: 1934 A. L. J. 749.

unlawful means. In the present case the act of the accused in removing the crops when the attachment was illegal is not unlawful *per se* nor were any unlawful means employed in effeting the removal. I am therefore not prepared to presume a dishonest or fraudulent intent . . . . An actual intention to convert an illegal or doubtful claim into an apparently legal one must be deemed to be dishonest."[1]

Where a person takes away a thing with the intention of causing wrongful loss to the proprietor who is entitled to it, it cannot be said that this intention was not dishonest though he had no intention to convert it.[2] When a person makes use of money belonging to another without the latter's consent, and contrary to the purpose for which possession thereof has been given by the latter to the former, the intention of the person so making use of that money must *prima facie* be dishonest within the meaning of Sec. 24, I. P. C.[3]

In nicely balanced cases inference of intent becomes difficult.

But while it is true that sometimes it is supererogatory to adduce evidence of intent, it is also true that cases sometimes arise when the facts are so nicely balanced that any inference as to "the intent" becomes a matter of difficulty. Take, for instance, the case of a creditor who takes possession of his debtor's goods with a view to compelling him to pay up his just debts. Now here it cannot be said that the primary intention of the accused was to deprive his debtor of his property— for that was not his intention. Was he, therefore, guilty of theft which he would be if his intention was dishonest and which, again, means that his primary object was to acquire his debtor's property? At one time, it was held that as that was not his intention, the creditor could not be held guilty of theft.[4] But this view did not long prevail, for the consensus of authorities is, now, in favour of the view that the creditor in such a case would be guilty of theft, and it is indeed, so provided in the Code.[5] And this view may be defended on the ground that the creditor's primary intention was certainly to cause wrongful loss (i. e. loss unauthorised by law), though he did not intend to make wrongful gain. In other words, if a person causes wrongful loss to another, his action may be dishonest, though he does not intend to make any wrongful gain for himself. This is sufficiently clear from the use of the word "or" in the section which shows that it suffices to constitute dishonesty that either wrongful gain or wrongful loss should have been intended.[6] It is not even necessary that wrongful gain and loss should have been actually caused for if it were so, an attempted burglary would be no crime. The section gives prominence to the intention, making all else subordinate thereto.[7]

Section gives importance to intention and not necessarily to wrongful gain or loss.

Examples.

The presence or absence of intention is, therefore, the crux in all offences of which dishonesty is an element. And this may be illustrated by many cases from the reports. Thus where the manager of a joint Hindu family including some minors

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1. Kalyanmal, I. L. R (1937) Nag. 45.
2. Lal Mohammad *v* Emperor, A. I. R. 1931 Pat 337 (2) at p. 338 : 34 Cr. L. J. 739 : 131 I. C. 539: 12 P L T. 556.
3. N. N Bujorjee *v*. Emperor, A. I. R. 1935 Rang. 453 at p. 455.
4. Longhurst, (1858) Mad unrep., cited *per* Curiam in Baburam, I. L. R 32 Cal. 775 at p. 780; Shoshee Bhushun Roy, 4 Shome 14; Prosanno Kumar *v*. Udyo Saut, I.L.R 22 Cal. 669, overruled in Sri Churn Chungo, I. L. R. 22 Cal. 1017 (F. B.). To the same effect, Madaree, 3 W. R 2; Preonath, 5 W. R 62; Gridharee, 10 W. R. 35; Tarinee, 18 W R. 8; Nagappa, I. L. R. 5 Bom 344; Prayag *v*. Arju Mian, I L. R 22 Cal. 139.
5. Section 378, Ill (1), I. P. C.
6. Kotamaraju Venkataroyadu *v* Emperor, I.L.R. 28 Mad. 90 (F B.). *per* White, C J.
7. Dharam Das Lilaram, A. I. R. 1932 Sind 169 at p. 173 : 34 Cr. L. J. 51.

applied to the Collector for payment to him of money due to the joint family, and was, thereupon, told to produce a power-of-attorney or to produce the minors to admit his authority to sign the receipt on their behalf, whereupon he produced some persons to falsely personate the minors and thus secured the money, it was held that inasmuch as he had been authorised to receive the money, his act, in producing wrong persons, could not be construed to be dishonest, as he had caused no wrongful gain or loss as required by the last section, nor was it is intention.[1] In another similar case, where one Koomaree who had agreed to sell land, set out to register the conveyance but fell ill on the way and sent in the accused, who, by personating her, had the deed registered in her name, it was held that, though the accused had committed an offence under the Registration Act, she could not be convicted of cheating, as there was nothing to show that she intended to defraud or injure any one in personating Koomaree, and in doing an act which Koomaree doubtless would have done had she not been prevented by illness from going to the office in person.[2] This principle was, however, somewhat unduly strained in the case of an accused who had applied for the duplicate of a University certificate to the Registrar in the name of another person qualified to receive it. The Court acquitted him holding that his act was neither dishonest nor fraudulent[3] which unquestionably it was, as was pointed out in a later case of the same Court.[4] And so where the accused being anxious to obtain a recognition of his title to "Loskur" which presumably carried no emolument, presented a forged *sanad* to the Settlement Officer, it was held that as the accused's sole object was to secure official recognition to a title of dignity, there was no intent to defraud within the meaning of this section.[5] These cases are sufficient to show that the fact that the conduct of the accused has been dishonest in fact does not support an inference that it is dishonest in law, though, as will be seen presently, not a few of the cases above cited present apt illustrations of what is fraudulent without being dishonest—a distinction which appears not to have been considered in them (*see* Sec. 23, para. No. 4).

Indeed, there may be cases where the accused may be guilty of an offence under a local Act, but his conduct may not be criminal under the Code. Such a case is presented by a person illegally seizing and impounding cattle with the malicious intent of subjecting the owner to the additional expense, inconvenience and annoyance of rescuing them.[6] Here, the conduct of the accused was culpable but not criminal under the Code. But it would have been so, if his intention had been to support a claim for damages against the owner Where the accused improperly obtained possession of a person's account-book and retained it with the intention of using it in a judicial inquiry as evidence against the person to whom it belonged, it was held that the accused had committed no theft, as such temporary retention could not cause wrongful loss to the owner within the meaning of the Code.[7] But there is no difference in principle between this case and the case of a creditor seizing his debtor's goods with a view to compelling him to repay his loan. And, if the test of the Code, as above indicated, be applied, it will be seen that the case was doubtless one of theft and would probably be now so considered. The dishonest intention of a person may be manifested in a

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1. Baburam, I. L. R. 35 Cal. 775.
2. Luthi Bewa, 2 B L R (A. C. Cr) 25.
3. Srinivasan, I. L. R. 25 Mad. 726.
4. Kotamaraju, I.L R. 28 Mad. 90. To the same effect Appasami, I. L. R. 12 Mad. 151; Shashi Bhusan, I. L. R. 15 All. 210; Ali Hasan, I.. R. 28 All. 358; Abbas Ali, I. L. R. 25 Cal. 512 (F. B.); Causeley, I. L R. 43 Cal. 421.
5. Jan Mohamed, I. L. R. 10 Cal. 584.
6. Aradhum v. Mian Khan, 54 W. R. 7.
7. Soshee Bhushan Roy, I. L. R. 15 All. 210: 4 Shome 14.

variety of ways, but the test, in each case, is the same—what was his immediate intention, and was there a wrongful gain or loss as expounded elsewhere. (*see* Sec. 23, para. No. 5). In one case, the accused had seized a boat of the complainant while conveying passengers across a creek which flowed into a river at a point within three miles from a public ferry, his intention being to compel persons who had to cross the creek to use his ferry in the absence of the complaint's boat, and so to increase his income, and it was held that he had committed theft, for though it was not his intention to convert the boat to his own use, or to deprive the complainant permanently of its possession, still inasmuch as he had caused wrongful loss to the complainant and had profited by it, he was guilty of theft.[1] In such a case, the English rule would probably be different. For there it has been held that where a thief takes away the owner's horse to assist him in carrying off the booty and where he rode it for some distance then turned it loose, he could not be convicted of horse-stealing, as he did not intend to appropriate it.[2] So, in another case, where a lover took away his sweetheart's bonnet and carried it to a haymow of his own with the view to inducing the girl to go there where she had been seduced before, the jury thought that the prisoner intended to induce the girl to go again to the haymow, but that he did not intend to deprive her of the bonnet, and that. therefore, he was not guilty of larceny.[3] It is needless to add that such a lover in this country would have a very different verdict to his credit.

Dishonest intention may be manifested in different ways—Test.

6. Claim of right.—The question of dishonest intention, again, plays a prominent part in cases of theft in which the accused asserts a claim of right. In such cases, too, it is the duty of the Criminal Court to determine what was the intention of the alleged offender, and, if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming, of course, that the other facts which constitute the offence are established.[4] It is, sometsmes, said that the mere assertion of a claim of right is enough, even though that right may be ever so ill-founded.[5] But this is scarcely correct, and if it were, it would be a golden rule for all offenders. There is a manifest difference between a mere assertion of a claim of property or right, and a *bona fide* belief in such a claim. The mere assertion of a claim or right is never in iiself a sufficient plea.[6] There must be a claim, though it may not be a good one, but, nevertheless, it must be good enough to be plausible. Where, therefore, a person removes a tree under an honest belief that it belongs to him, but, in doing so, he betrays want of due care and attention, that is, good faith, in ascertaining the ownership of the same, he would be guilty of theft.[7] Good faith, therefore, is another element in determining intention.

7. Analysis of mental process in criminality.—The process of normal mental activity culminating in acts and consequences may be thus described. The initial stage is the rise of some desire in the mind. This desire is accompanied by the idealization of some movement as bringing about its

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1. Nagappa, I. L. R. 15 Bom. 344.
2. Crump, 1 C. & P. 658, to the same effect Phillips, 2 East P. C. 662, but *contra* Trebilok Deals & B. B. C. 453; Peat, 2 East, P. C 557.
3. Dickenson, Rus. & Ray. 420.
4. Budh Singh, I. L. R 2 All. 101 ; Rahmatulla *v.* Rahimulla, I. L. R. 27 Cal. 501.
5. Bhiajee, (1869) B U. C. 22; Khetter Nath *v.* Indro, 16 W. R. 78; Algara, I. L. R 28 Mad. 304 ; Chaitan *v.* Kalachand, 10 C. W. N. 233n.
6. Sabalsang, 4 Bom. L R. 936.
7. *Ibid.*; Nasib *v.* Nannoo, 15 C. R. 47 Ajodhya, 54 I. C (Pat.) 992.

Motive and intention— Distinction.

consummation. The recognition of the casual relation of the action to the result involves a germ of belief in the attainability of the object of desire, or in the efficacy of the action. The action, thus idealized, has now to be carried into effect. Its preparatory stage is reached by volition, which is the exercise of the will leading up to fruition of the desire. Thus then, in voluntary action, the desire of the end is the cause of the desire of the means. The former is the motive and the latter the intention. It is the "solicitation of the motive" or the mere prompting of the mind as yet not followed by action.[1] Next, we have the direction of the active impulse involved in the state of desire into the definite channel of action suggested. This stage of the process of volition is known as the *act*. The impression it produces on the external world is spoken of as its consequence. And since motive involves the anticipation of the final realisation, this consummation is spoken of as the object, purpose or end of the action, and co-relatively the action as the means of gaining or realising the object or desire. These terms are frequently used in criminal jurisprudence, but a reference to the existing case-law would appear to show that their true significance is not always kept in view, and to that cause may be safely ascribed the somewhat unsatisfactory decisions to which the Courts have, in several cases, committed themselves. Take, for instance, the case of the creditor coercing his debtor to pay up. The debtor owes him a debt. It furnishes the creditor with a *motive* to see himself repaid. That motive impels him to take forcible possession of his debtor's property. He thus truly *intends* to take possession of it. That he does so unlawfully is manifest. His taking possession of the property is the act, the consequence or effect of which is the wrongful deprivation of its possession by the debtor. All the elements of dishonesty are thus fully present, and yet the *motive* of the creditor was not criminal, and may have been even righteous. But law does not deal with man's motive. It confines itself to his intention. Therefore, the difference between the two should be clearly appreciated.

8. **Intention and motive distinguished.**—A distinction, therefore, exists and must be made between a man's intention and motive. A person may act from a laudable motive, but if his intention causes wrongful loss, his crime is complete irrespective of his motive. Where, for instance, a Hindu acting under strong religious impulse seized some cows which a Mohammedan was taking to kill, his motive from the standpoint of a person of his own religion was virtuous, but his intention, being to deprive the lawful owner of the possession of his property, and the means employed being unlawful, he was held guilty of theft.[2] The motive, object or design of a person should never be confused with his intention. The motive of the creditor seizing his debtor's goods to coerce him to pay up his debt was certainly not to cause permanent loss of the goods to the debtor— but he did cause him loss, however temporarily, and he did so intentionally. He was, therefore, held guilty of theft. Criminal law regards only a man's intentions and not his motives.[3] To permit a person who has committed an injury to set up his motives as defence or excuse, and to allege that he did the injury from virtuous motives or from a wrongful impression of the law or the facts, would frequently produce a defect

Motive, design or object should not be confused with intention.

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1. 11 Volkmann, Sec. 147; 1 Waits, Sec. 4; Bain's *Emotions and the Will*, Pt. II, Ch. VIII.
2. Ram Baran, I. L. R. 15 All. 299; Parichat, 5 N L. R. 17; *contra* in Raghunath, I. L. R. 15 All. 22; distinguished on the ground that an intention to cause wrongful loss was according to the finding of the Court below absent in that case
3. Balok Khan, 4 S. L. R. 38; Vithoo, 7 N. L. R. 185; Waris Ali, 7 N. L. R. 180: 13 I. C. 919.

in justice, and allow offenders to escape. So the Law Commissioners wrote : "We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply as defence or excuse under a criminal charge. We hold with the English Criminal Law Commissioners that to allow any man to substitute for law his own notions of right would be in effect to subvert the law. To investigate the real motive, in each case, would be impracticable, and even if that could be done, a man's private opinion could not possibly be allowed to weigh against the authority of law."[1] It is, therefore, never a complete defence to say that though intention of a person was criminal, his motive was righteous. So, in England, good motive is no justification of a libel.[2] As Lord Blackburn remarked : "No one can cast about firebrands and cause death, and then escape from being responsible by saying he was in sport."[3]

9. Legal and popular dishonesty.—As observed before (*see* Sec. 24, para. No.4), dishonesty in law is at times different from the dishonesty of the market place. Unless a person employs *unlawful* means, his conduct is not dishonest within the meaning assigned to that word in the Code, however reprehensible his conduct may be, when judged according to the standard of popular morality. So a person may divert the flow of his underground water so as to deprive his neighbour of it; and his right is the same whatever his motive may be, whether *bona fide* to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out : "This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions, in such a question as is now before your Lordships, seem to be absolutely irrelevant."[4] So trust and trade combines are ruinous to the petty trade and they tend to secure a trade monopoly, but as they are not illegal, they may appear dishonest to the layman, but they are not so in the eye of the law. And it is recognised as fair game to exclude a rival trader from competition, or to ruin him by underselling.[5]

"Fraudulently."

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words
4. Defraud
5. "Intent to defraud."
6. "Dishonestly" and "fraudulently," distinction between.
7. Intent : Primary and secondary.
8. Immaterial elements.

1. Analogous law.—The Code does not define what it is to "defraud". As Sir James Stephen writes : "There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural where we consider the different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with

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1. First Report, Sec. 114; Dawkins *v.* Lord Pauler, L. R. 5 Q. B. 94 at p. 112; Bowan v. Hall, 6 Q. B. D. 333 at p. 343.
2. Capital and Counties Bank v. Henty, 7 App. Cas. 74 at p. 772.
3. *Ibid.*
4. *Per* Lord Halsburry, L. C., in Mayor etc of Bradford *v.* Pickles, (1895) A. C. 587 at p. 594, affirming C. A. (1894) 3 Ch. 53; (1895) 1 Ch. 145, following Chasemore *v.* Richards, 7 H. L. C. 349, but the [underground channel must be irregular and indefinite; Grand Junction Canal Co. *v.* Sugar, L. R. 6 Ch 483.
5. Mogul Steamship Co *v.* McGregor Gew & Co., 23 Q. B. D. 598; C. A. (1892) A. C. 25 at p. 49.

the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements, at least, are essential to the commission of a crime ; namely *first*, deceit or an intention to deceive or in some cases, mere secrecy; and *secondly*, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury, by means of that deceit or secrecy. The intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent from being intentional. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known ? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss to someone else ; and, if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."[1]

Though the term "intend to defraud" has not been defined in the Code, the word "fraud" is defined in the Indian Contract Act[2] for the purpose of that Act, and that definition is, therefore, much wider than this section. Fraud is really protean in its form and its definition can never be complete or general. In English law, no attempt has been made at its definition, but it has been understood to mean "something dishonest and morally wrong".[3] But this is its meaning in the civil law, but it is not its sense in the Code, where, however, it appears to have been used in the ordinary acceptation of the word,[4] as denoting the misleading of another by falsehood spoken or acted. According to Le Blanch, J., "By fraud is meant an intention to deceive, whether it be from any expectation of advantage to the party himself, or from ill-will towards the other, the fact is immaterial."[5] The term "defraud" denotes some form of dishonesty and must involve something in the nature of cheating.[6] But though deception is of the essence of fraud, the two terms are by no means interchangeable since deception may be equally innocent as well as fraudulent.[7] Fraud involves two conceptions, namely, "deceit and injury to the person deceived, that is, the infringement of some legal right possessed by one though it may not necessarily involve deprivation of property.[8] The word has nothing to do with wrongful gain or wrongful loss of property, for fraud operates on the mind, and thus produces results which the perpetrator of the fraud had contemplated. Whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime, two elements at least are essential to the commission of the crime ; namely, first, deceit or an intention. to deceive or in some cases, merely secrecy ; and secondly, either actual injury or possible injury, or

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1. 2 History of Criminal Law, p. 121, cited *per* Banerji. J. in Mohd. Saeed Khan, I. L R. 21 All. 113 at p. 115; Surendra Nath Ghose, I L R 38 Cal. 75 at p. 90; Balkrishna, I. L. R. 37 Bom. 666; Sellamuthu, A. I. R. 1940 Mad. 271 : 41 Cr L. J 97 : (1940) 1 M. L. J. 761 : 1939 M. W N 1248 : 51 L. W. 744
2. Act IX of 1872, Sec. 17.
3. *Per* Willes, J., in *Ex parte* Waston, 21 Q B. D. 301.
4. Baburam, I L.R. 32 Cal. 775; Balkrishna, I. L. R 37 Bom. 666.
5. In Haycraft *v.* Creasy, (1903) 2 East 92 followed in Tithai, I. L. R. 13 Bom 515; Khandu Singh, I. L. R. 22 Bom. 768; Lalit Mohan, I.L.R. 22 Cal.313 at p. 322; Rash Behari, I. L. R. 35 Cal. 450; Balkrishna, I. L R. 37 Bom. 666.
6. Visram Valji *v.* Emperor, A. I R. 1935 Bom. 162 at p. 163: 36 Cr. L. J. 1511: 37 Bom. L. R. 102.
7. Baburam, I. L. R. 32 Bom 775.
8. Surendra Nath Ghose, 14 C. W N. 1066; Dhunum Kazee, I L. R 9 Cal. 53 at p 60 ; Ram Chand Gurvala *v.* King-Emperor, A. I. R 1926 Lah 385 at p. 387 ; *In re* Sivananda Mudali, A. I. R. 1926 Mad. 1072

an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent is very seldom the only, or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. .....A practically conclusive test of the fraudulent character of a deception for criminal purposes is this : Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known ? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risks of loss to someone else, and if so, there was fraud.[1]

A person who deceives another and derives benefit or advantage, possibly causing injury to the deceived in body, mind or reputation and such others commits fraud and that even if no corresponding loss or disadvantage to the deceived is established, it can be inferred that if one gets benefit or advantage, someone will incur loss or disadvantage to some extent.[2]

Injury is something other than economic loss, i. e. deprivation of property, whether moveable or immoveable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is any benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. Non-economic advantage to the deceiver or non-economic loss to the deceived need not co-exist.[3]

2. Principle.—The section does not define or describe "fraudulently". On the other hand, it is enacted to limit its sense for the purpose of the Code. As ordinarily understood, fraud is a term which enters largely in the law of contracts and it has there received a meaning much too extensive for the purpose of the Code. The section, therefore, enacts that there can be no fraud unless there was an *intention to defraud*. In other words, the .Code eliminates from its consideration all constructive frauds and only confines use of the term to deception planned and practised.

3. Meaning of words.—"*Fraudulently*"—The choice of an adverb for definition is due to its use, as such, in the Code, and it can only refer to a state of mind as distiguished from the character of the deed. Where property is removed openly in the light of the day and there is no question of concealment, secrecy, clandestine action, deception or of anything else covered by the word, the act cannot be said to be done fraudulently.[4] '*To do a thing*", which includes words merely spoken.[5] *With intent to defraud*", which may or may not imply deprivation of property actual or intended.[6] The word "defraud" has, at least, three meanings : (*i*) to deprive one of right, either by obtaining something by deception or artifice, or by taking something wrongfully without the knowledge or consent of the owner;[7] (*ii*) to withhold wrongfully from another what is due to him, or wrongfully to present one from detaining what he may

Word "defraud" has three different meanings.

1. Daniel Hailey Walcott *v.* State, A. I. R. 1968 Mad. 349 at p. 354 : (1968) 1 M. L. J. 229.
2. *Ibid.*
3. *Ibid* at p. 353.
4. Y. Kothandarama Reddi *v.* Kandra Balarami Reddy, A. I. R. 1937.Mad. 713 at p. 714 : (1937) 2 M. L. J. 802.
5. *See* Sec. 415, I. P. C., Illus. (*a*); Sec. 416, I. P. C., Illus. (*a*) and (*b*).
6. Baburam, I. L. R. 32 Cal. 775.
7. Harajivan Walji, I. L. R. 59 Bom. 174 at p. 185 ; Ratnappa, I. L. R. 50 Bom. 488 at p. 494.

justly claim, or (*iii*) to defeat or frustrate wrongfully. Here the term is used rather in the first, than in the second or third sense. But the three senses together do not convey the precise meaning of the word, which is here used to imply the misleading of one's mind by causing one to believe what is false, or to disbelieve what is true. "*But not otherwise*" : But for the doing of a thing with the intention to defraud there is no fraud, as understood in the Code.

4. Defraud.—The expression "defraud" involves two elements namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property whether moveable or immoveable or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is benefit or advantage to the deceiver, but no corresponding loss to the deceived the second condition is satisfied.[1]

5. "Intent to defraud."—There can be no fraud, unless there was an intention to defraud. Usually that intention is directed to defraud someone in particular,[2] but it is not necessary that it should have been invariably so directed.[3] A person may gild a brass ring and throw it on the road to cheat passersby the object being to make the finder pay a share of its supposed value to the cheat. Here there was clearly an intention to cheat someone though no one in a particular. The finder may believe in the genuineness of the ring and sell it to another who may purchase it without scrutiny. Here, though the purchaser has been "defrauded", the seller had no "intention" to defraud him, and he is, therefore, not guilty of cheating. On the other hand, there may have been an intention to defraud, but no fraud is, in fact, committed in which case it may be said that a man cannot be punished merely for his criminal intention. He must do something, and having done it, intends to "defraud" another. Now, what is to "defraud" a person? The word has not been used elsewhere in the Code. But it must mean something different from what is implied in "dishonestly" described in the last section.[4]

Defraud and dishonesty different.

6. "Dishonestly" and "fraudulently," distinction between.—The difference between an act done dishonestly and an act done fraudulently is this "if there is the intention by the deceipt practised to cause wrongfully loss that is dishonesty but even in the absence of such intention, if the deceitful act willfully exposes any one to risk of loss, there is fraud."[5]

Calcutta Full Bench's view.

In a Full Bench case,[6] the Calcutta Judges remarked: "The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation (of property), and as it is not defined in the Code, and is not so far as we are aware, to be found in the Code except in Sec. 25, its meaning must be sought by a consideration of the context in which the word 'fraudulent' is used. The word 'fraudulently' is used in Secs. 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the

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1. Dr. Vimla *v.* Delhi Administration, A. I. R. 1963 S. C. 1572 at pp. 1576-77: (1963) 33 Com. Cas. 279: 1963 A. L. J. 999.
2. Section 415, I. P. C., Illus.
3. Section 471, I. P. C.
4. Y. Kothandarama Reddi *v.* Balrami Reddi, A. I. R. 1937 Mad. 713.
5. Sukhamoy Maitra *v.* Emperor, A. I. R. 1938 Pat. 165 at p. 169 : I. L. R. 16 Pat. 688.
6. Abbas Ali, I. L. R. 25 Cal. 512 at p. 521 (F. B.).

latter word. If, however, it be held that "fraudulently' implies deprivation, either actual or intended, then apparently that word perform no function which would not have been fully discharged by the word 'dishonestly' and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part." So where a person forged a certificate of competency as an Engine-room First Tindal, and produced it before an officer to obtain another certificate from him entitling him to present himself for an examination as engine-driver of ocean-going steamers, it was held that the certificate was produced fraudulently, though not dishonestly, as it was produced to deceive the officer, and that he was, therefore, rightly convicted under Secs. 465 and 471 of the Code.[1] This case was followed in the case of a European lad who had purchased three revolvers giving in the certificates of purchase names not his own, whereupon the Court held him guilty of forgery in that his conduct though not dishonest, was unquestionably fraudulent.[2] The same view has been taken in the Punjab where the making of a false certificate with intent to procure employment in public department on its strength has been held to be "fraudulent" as its immediate object was to deceive a public officer into a belief that the person holding the certificate possessed a guarantee of efficiency which he did not really possess, and so induced him to grant employment which he might otherwise not have done.[3] But, of course, the same reasoning would not apply to a *sanad* forged to support a barren title, unconnected with any material advantage,[4] though if regard be had to the language of Sec. 471 it is immaterial whether the document used had or had not anything to do with property.

Punjab view.

However, apart from the applicability of Sec. 471, the question whether mere words, falsely uttered and erroneously believed in and acted upon, could be said to constitute cheating came up for decision in an Allahabad case and was decided in the negative.[5] There a person had secured his enlistment in the Police by falsely describing himself as being not a resident of a prescribed district. "Fraud or dishonesty" was, it was said, absent from these circumstances. But it was not stated why fraud was absent. A person may deceive, and thereby secure for himself an advantage, whether measurable in money or not, but if he does deceive, his act is fraudulent, though, as such, it may not be criminal.

Allahabad view.

7. Intent : Primary and secondary.—Where a person uses a forged document,[6] or alters a document,[7] to support a just claim, the question arises whether it is fraudulent because the claimant intends to commit a fraud on the court by making it believe that the document produced is genuine and that he is entitled to recover money upon its basis. In such and similar cases the court not infrequently discriminates between what it calls the primary and the secondary intention. That these have a definite place in mental psychology will be apparent if regard is had to cases in which a person forges receipts to

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1. Abbas Ali, I. L. R. 25 Cal. 512 at p. 521 (F. B.).
2. Causley I. L. R. 43 Cal. 421, following Toshack, 1 Den. C. C. R. 492; Dhunum Kazee, I. L. R. 9 Cal, 53; Abbas Ali, I. L. R. 25 Cal. 512 (F. B.).
3. Abdul Razak, (1895) P. R. No. 2.
4. Jan Mohammed, I. L. R. 10 Cal. 584.
5. Dwarka Prasad, I. L. R. 6 All. 97.
6. Lalit Mohan, I. L. R. 22 Cal. 313; Dhunum Kazee, I. L. R. 9 Cal. 53; Kedar Nath, 5 C. W. N. 897; *contra* Sheodayal, I. L. R. 7 All. 459, dissented from.
7. Gobindo Mal, (1895) P. R. No. 21; *see* also Babu Ram Rai, I. L. R. 32 Cal. 775 at pp. 779-780—to deceive one is not to defraud one.

replace the genuine ones lost,[1] or fabricates an amount to conceal his previous misappropriation,[2] or, in short where his real or primary intention is to say himself, the subterfuges adopted being merely means to attain that end. So in a case of trespass into the house of another with intent to have illicit intercourse the Court regards the secondary intention as sufficient to justify a conviction for trespass.[3] The duality of sense in interpreting the word "intent" is therefore clear, and since the primary intent ordinarily corresponds with what may be regarded as the "motive" it is often a question of some nicety whether the intent is sufficient to charge one with responsibility of a crime.

8. Immaterial elements.—It is to be observed that while, in finding wrongful gain or loss under the last section, it is necessary to see as to what particular person has suffered by the dishonesty, it is not necessary that the intention to defraud must be to defraud any one in particular. In other words, a general intention to defraud without the intention of causing wrongful gain to one person and wrongful loss to another, is sufficient for the purpose of the definition.[4] It is not, moreover, necessary that the purpose intended should have been achieved. As Maule, J., said: "There may be intention to defraud without the power or the opportunity to defraud[5].....It is not necessary that any person should be in a situation to be defrauded."[6] The question, then, that the fraud was fruitless or unnecessary is immaterial. Where, therefore, to person having otherwise a good title, forged a will to support his title though there was no necessity for it, still its user was nevertheless held to be fraudulent. So Norris, J., observed: "Let a person's title the property be ever so good, yet if in the course of action brought against him to gain possession of the property, he uses, by way of supporting his title though there may be no necessity for the use of it, a forged document such as is this *hiba*, I am clearly of opinion that he uses it fraudulently."[7] It is, thus the intention and not the effect that determines the character of the act. A person forging the name of another who has sufficient funds in Bank, to a cheque with his consent merely to try his credit or to imitate his handwriting does not *intend* to defraud, though there might be persons who might be defrauded. His conduct cannot, therefore, be condemned as fraudulent within the meaning of the section. On the other hand, in the case supposed, if the person had no account in Bank which the forger only supposed he had, and on that supposition forged his name, an intention to defraud would be presumed, although no person might or could be defrauded.[8]

Question of fraud being fruitless or unnecessary if immaterial.

26. A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing, but not otherwise.

Reason to believe.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Knowledge and reason to believe.

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1. Sheodayal, I. L. R. 7 All. 459.
2. Lal Gamal, (1870) N. W. P. H. C. R. 11; Jagesbur, (1874) N. W. P. H. C. R. 56; Jiwanand, I. L. R. 5 All. 221; Girdhari Lal, I. L. R. 8 All. 653; Jyotish Chandra, I. L. R. 36 Cal. 955.
3. Lakshman, I. L. R. 26 Bom. 558; Ram Saran, (1906) P. R. 12, followed in Preman, I. L. R. 11 Lah. 298; Jiwan Singh, (1908) P. R. 17: All these cases, dicussed, dissented and overruled in Abdul Majid v. Emperor, A. I. R. 1938 Lah. 534.
4. Dhunum Kazee, I. L. R. 9 Cal. 53 at p. 60; Surendra Nath Ghosh, 14 C. W. N. 1076; Baijnath Bhagat, A. I. R. 1940 Pat. 486.
5. Nash, 2 Dears, C. C. R. 493 at p. 500.
6. *Ibid* at p. 503.
7. Dhunum Kazee, I. L. R. 9 Cal. 53.
8. Nash, 2 Dears, C. C. R. 493 at p. 499.

1. Analogous law.—The phrase "reason to believe" is used in Secs. 411—414 relating to receipt of stolen property. A person can be supposed to know where there is a direct appeal to his senses. A person has "reason to believe", under Sec. 26, I.P.C. if he has sufficient cause to believe the thing but not otherwise.[1] A person who has reason to believe must be put upon inquiry and have grounds for his belief; otherwise he has no such reason.

2. Principle.—No man can be condemned as receiver of stolen property, unless it is at least shown that there existed circumstances sufficient to convince him that the property with which he was dealing was stolen property. A man cannot be punished for so infamous a crime without at least so much precaution; for otherwise a careless or a thoughtless man might be convicted if only he did not make sufficient inquiry to ascertain whether the property he was purchasing ha d been honestly acquired.[2]

3. Meaning of words.—"*If he has sufficient cause*," i. e. if the facts and circumstances are such as should probably have brought home to him the knowledge of a fact or from which he could not but have drawn an inference that the fact existed. The words used are "*if he has* sufficient cause to believe" and not "if there is sufficient cause to believe" which shows that the mere existence of a sufficient cause is not enough, if it was not brought to his knowledge. Sufficient cause must, then, exist and he must know of its existence, otherwise he has no "reason to belive a thing".

4. Knowledge and reason to believe.—"Reason to believe" in Sec. 26 of the Indian Penal Code and the various provisions thereof, such as Secs. 202, 411, 412, 413 and 414, has been used in the Penal Code in a different context; that is to say, in the context of *mens rea* for the purpose of finding out whether or not a person has committed an offence, while in Sec. 132 of the Income-tax Act, 1961, power has been given to an authority to authorise the search and seizure subject to certain conditions if he has reason to believe that it is necessary so to do under Sec. 132.

Under Sec. 26 of the Indian Penal Code a person is said to have reason to believe a thing if "he" has sufficient cause to believe that thing. In this context, therefore, the courts have to see whether the person concerned had sufficient cause to believe. Take a case where grounds exist on which two views may reasonably be possible. The Court will not hold a person guilty if it comes to the conclusion that though the grounds may provide to the offender sufficient cause to believe but the Court holds a different opinion. This section, therefore, is confined to finding out whether an alleged offender could have sufficient cause to believe and, therefore, could be said to have "reason to believe". Such a provision cannot obviously be equated with a provision like Sec. 132 (1) of the Income-tax-Act.[3] Under the Indian Penal law, guilt is sought to be fastened either on the ground of intention or knowledge or reason to believe. As far as Secs. 489-B and 489-C are concerned, it is by "knowledge" or reason to believe".

The two are more or less *ejusdem generis* though "knowledge" will be on a slightly higher plane than "reason to believe"[4]

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1. Emperor v. Latoor, A. I. R. 1930 All. 33 at p. 34 : 31 Cr. L. J. 288.
2. Rango Timaji, I. L. R. 6 Bom. 402 at p. 403; Gulbad Shah, (1888) P. R. No. 37.
3. Balwant Singh *v.* R. D. Shah, A. I. R. 1969 Delhi 91 at p. 99: 71 I. T. R. 550.
4. Hamid Ali *v.* State, A. I. R. 1961 Tripura 46 at p. 48 : (1961) 2 Cr. L. J. 801.

The phrase "knowledge or reason to believe" introduces into criminal law the *presumption* of guilt arising from facts which are, in themselves, insufficient to prove the crime itself. As an accessory to a crime he is as great a danger to society as the criminal himself, and as an accessory words in greater secrecy and with circumspection, it is necessary, on the one hand, that he should not be immune for want of direct evidence. On the other hand, as being charged for a nefarious act, it is also necessary that he should not be hastily concluded to be guilty, unless there is a sufficient cause for it.

What is sufficient cause to justify presumption.

What is a sufficient cause in a given case so as to justify the presumption, is a matter upon which no general statement can be made. For, it must depend upon the facts and circumstances of each case, upon education, intelligence, knowledge, and opportunity for knowledge, and habits of thought of the receiver, the time, place and his manner of receiving the property, and, indeed, a host of other circumstances from which men usually judge of the intention of others. Where, for instance, a Rajput[1] allowed his female child after the mother's death to gradually languish away and die from want of proper sustenance, and it was shown that he had persistently ignored the wants of the child, although repeatedly warned by the police of its condition and the consequences of his neglect of it, and there was nothing to show that the prisoner was not in a position to support the child, it was held that the offence of the prisoner was murder and not merely culpable homicide.[2] In this case the word "know" as used in Sec. 300 was taken to mean the same thing as "reason to believe". These two terms are distinguishable in common parlance, but they appear to express the same idea in law. For, in law a person "knows" a thing not only when he has precise knowledge of it, but also when he is in possession of circumstances leading to the conclusion that the thing exists.[3]

Example.

What *mens rea* implies.

In other words, "guilty knowledge" or *mens rea* does not necessarily imply sensual perception, but belief, founded on the facts and circumstances, is tantamount to knowledge in its narrower sense. An examination of the Code would appear to support this view. For while there are sections[4] in which the word "know" alone occurs, it cannot be said that in these sections the only state of mind postulated is that concerned with direct perception, as distinguished from a mind in which there is conviction from information and belief. Indeed, in some cases, sensual perception is immaterial, as in the case of sale of adulterated drugs[5] by the servant of a chemist who is with his master equally liable; in other cases, it is impossible, as in the case of homicide and murder.[6] For how can a man *know* otherwise than by inference that he is likely by a certain act to cause death, without which there can be no culpable homicide or murder?[7] That this appears to be the sense in which the expression is used in the Code, is made further manifest by the language employed in the other sections,[8] Where the phrase is varied as in Sec. 301, in which the words used

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1. Rajputs being proud of their high lineage do not welcome the advent of daughters who are supposed to lower their dignity by having to find for them husbands whom they have to acknowledge as their superior—a superstition which accounted for the infanticide of other day. The other reason which led to this crime was that daughters did not make bread-winners and could not fight—a distinct disadvantage to a soldierly people.
2. Gunga Singh, (1873) 5 N. W. P. H. C. R. 44.
3. National Bank of Australasia v. Morris, (1892) A. C. 287 at p. 291.
4. E. g., Secs. 200, 231, 232, 255, 259, 263A, 271, 275, 276, 299, 300, I. P. C.
5. Sections 275 and 274, I. P. C.
6. Pharmaceutical Society v. London and Provincial Supply Association, 5 A. C. 857; Hotchin v. Hindmarsh, (1891) 2 Q. B, 180.
7. Sections 299, 300, fourthly, I. P. C.
8. E. g. Secs. 301, 418, I. P. C.

are "knows to be likely to cause death", or Sec. 418 in which cheating is spoken of "with the knowledge that he is likely thereby to cause wrongful loss", etc. which certainly born of direct knoweldge is rendered unnecessary. Therefore a person may know that a certain consequence is inevitable or that the existence of a certain fact is undoubted, but it is not necessary that his knowledge must be direct or sensual, and not indirect or inferential.

"Knows", "reasons to believe" and "suspect"—Distinction.

At the same time it cannot, for all time, be assumed that the degree or knowledge in one who "knows" is the same as in one who has "reason to believe". Indeed, the use of the word singly in some sections and the collocation of the two in other sections,[1] suggests a distinction which must have been present in the mind of Legislature. The word "know" is certainly much stronger than "reason to believe," as the latter is stronger than "suspect."[2] But the three postulate the same kind of knowledge, though they differ in the degree of proof required in each case. But the evidence required is invariably of the same kind, and the facts and circumstances to be proved are similar, though the amount of conviction which their knowledge may produce may differ, and on that differenee will depend the culpability or innocence of the accused. Where therefore, knowledge is essential to constitute an offence, it is insufficient if the facts adduced fall short of that proof. On the other hand, *knowingly* ought not to be read into a statutory offence, unless it is clear that the Legislature intended some such qualification.[3] At one time, it was commonly held that guilty knowledge was the essence of a crime : *Actus non facit reum, nisi meni sit rea.*[4] But this rule has, of course, no application to this country, and it has generally ceased to have any extended application, owing to the greater precision of modern statutes.[5] *Mens rea* or guilty knowledge is still essential to prove all guilt but while in certain statutes this is expressly provided by the insertion of words, such as "knowingly, wilfully, fraudulently," or the like, in others reference to the state, of a man's mind is omitted. But *mens rea* is, nevertheless, necessary in both cases—with, however, this difference that while, in the one case, it must be proved by the prosecution, in the other it need not be so proved but will be presumed, unless its absence is established by the defence.[6]

When *mens rea* must be proved and when it is presumed.

In other words, the only effect of the presence or absence of words implying *scienter* or guilty knowledge is to shift the burden of proof. So in a colonial appeal the Privy Council remarked : "It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by showing that such *mens rea* did not exist. That is a proposition which their Lordships do not desire to dispute ; but the question whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In

Privy Council's view.

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1. E. g., Secs. 201, 202, 203, 258, 411, 414, I. P. C.
2. Rango Timaji, I. L. R. 6 Bom. 402.
3. Betts *v.* Armstead, (1888) 20 Q. B. D. 771.
4. "The Act itself does not make a man guilty, unless his intention were so."
5. Prince, L. R. 2 C. C. R. 154 ; Bishop, 5 Q. B. D. 259 ; Cundy *v.* Le Cocq, (1884) 13 Q. B. D. 207 at p. 210.
6. Sherras *v.* De Rutzen, (1895) 1 Q. B. 918 at p. 921; Osbrone *v.* Chocqueel, (1896) 2 Q. B. 109 at p. 111 (case of dog-bite).

cases where the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent."[1] But while this rule applies to all criminal offences, such as described in the code, it is not a rule without exceptions which fall into three classes, namely, (*i*) acts which are not really criminal but which are in the public interest prohibited under a penalty. e. g. offences against the revenue or those under the Adulteration Acts or Games Laws, etc. ;[2] (*ii*) public nuisance ;[3] (*iii*) cases in which although the proceeding is criminal in form it is only a summary mode of enforcing a civil right.[4] For the purpose of the Code, all then that is necessary to see the degree of knowledge and state of mind essential to constitute a given offence, and the evidence required is commensurate therewith. What evidence is required in each case cannot, of course, be discussed here, for it will have to be discussed under the various sections concerned.

General rule.

Exception.

27. When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Property in possession of wife, clerk, or servant.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk, or servant, is a clerk or servant within the meaning of this section.

SYNOPSIS

1. Analogous law.
2. English view of "possession".
3. Principle.
4. Meaning of words.
5. Limits of constructive possession.
6. Possession of wife on account of the husband may be proved by circumstantial evidence.

1. Analogous law.—The section is analogous to Cls. 17—19 as originally framed which ran thus :

"17. When property is put into the possession of a person's wife or servant in trust for that person, it is put into that person's possession if it was not before in his possession, and continues in his possession if it was before in his possession.

"18. Property in the possession of a child under 12 years of age, of a lunatic, or of an idiot, if such child, lunatic or idiot, be in the keeping of a guardian or guardians, is in the possession of such guardian or guardians.

"19. Property is not said to be in the possession of any party other than a person."

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1. Bank of New South Wales *v.* Piper, (1897) A. C. 383 at pp. 389 and 390.
2. Betts *v.* Armstead, (1888) 20 Q. B. D. 771 at p. 773; Attorney-General *v.* Lockwood, (1842) 9 M. & W. 378; Woodrow, (1846) 15 M. & W. 404; Fitzpatrick *v.* Kelly, L. R. 8 Q. B. 337; Roberts *v.* Egerton, L. R. 9 Q. B. 449 ; Marsh, 2 B. & C. 717; Davies *v.* Harvey, L. R. 9 Q. B. 433; Bishop, 5 Q. B. D. 259; Millins *v.* Collins, L. R. 9 Q. B. 292; Cundy *v.* Le Cocq, 13 Q. B. D. 207.
3. Stephens, (1866) L. R. 1 Q. B. 702 ; Medley, 6 C. & P. 292; Barnes *v.* Akroyd, L. R. 7 Q. B. 474.
4. Morden *v.* Porter, 7 C. B. N. S. 641 ; 8 W. R. 262 ; Lee *v.* Simpson, 3 C. B. 871 ; Hargreaves *v.* Diddam, L. R. 10 Q. B. 582.

The appropriateness of these clauses was the subject of exhaustive comment[1] on the ground that it was both arbitrary and inconsistent to attribute possession to *cestui que trusts*, and to guardians of those things which are put into a wife's or servant's possession in trust for the husband or master, or into an idiot's possession, as, for instance, without the consent or knowledge of the husband, master or guardian. The three clauses were consequently altered and simplified as enacted in the section, which does away with the distinction recognised in English law between "possession" and "custody".

The term "clerk or servant" is borrowed from the English law and has been used in other sections of the Code where it will be found explained (*see* Sec. 381, I. P. C.).

The explanation is, however, in accordance with English law where the word "servant" includes any person acting as a servant for any particular purpose or occasion.[2]

2. English view of "possession".—In English Criminal Law "possession" is distinguished from "custody",[3] possession being used in respect of the owner and custody being used to "mean such a relation towards the thing as would constitute possession if the person having custody had it on his own account. If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession, as distinguished from the custody of it until he has put it into his master's possession, by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing. If a servant receives anything belonging to his master from a fellow-servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant delivers it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master. If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so received it, and not in his custody merely. A moveable thing is in the possession of the husband of any woman or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure."[4]

Possession and custody— Distinction.

3. Principle.—This section eliminates the somewhat subtle distinction observed in the English Criminal Law between "possession" and "custody" so that what amounts to a mere custody in England would be deemed to be possession under the Code. The section does not deal with the possession of a trustee, but it is evident that, as the Code recognises constructive possession only in the cases referred to in this section, the possession of a person in other cases would be his own possession, and not of another, for whom he may be holding it in trust.

4. Meaning of words.—In a case where a wife's possession is relied upon the section can apply only during the continuance of conjugal relationship. If there has been a separation, the possession of property by a person's wife cannot be deemed to be his possession. This is evident from the clause

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1. *See* Commissioner's First Report, Secs. 83 and 84.
2. Stephen's *Criminal Law*, 210; Smith *v.* Webb, 12 T L R. 450.
3. Stephen's *Criminal Law*, 210 and 211.
4. Stephen's *Criminal Law*, 210 and 211; *cf.* Pollock and Wright on *Possession*, 10 Encyclopaedia of the Laws of England, 228 at p. 237.

"*on account of that person*" which means that there must be recognition, express or implied, that the property is held by the other merely as its custodian. So the use by a servant of his master's premises as his private residence is his possession and not the possession of his master.[1] A permanent mistress may be regarded as a "wife" for the purposes of Sec. 27, I. P. C.[2] A Hindu wife in possession of her *stridhan* or ornaments gifted to her by her husband cannot be said to be in possession of them on account of her husband. Moreover, the doctrine of possession cannot be extended to illegal possession of things on her own account, e. g. possession of cocaine,[3] or a pistol without a licence.[4] Where there was no evidence on the record to show that the wife was distilling the liquor on account of her husband, it was held that he could not absolve her under the provisions of Sec. 27 of the Penal Code. Section 27 covers cases of a different type, for instance, where a master goes out shooting and entrusts his licensed gun to his servant who carries the same for his master. Under these circumstances, it could be said that the possession remained with the master and the servant was carrying the gun on account of his master. But Sec. 27 can have no application to a case where the wife does an act, not on account of her husband but for herself, though the husband may also be responsible for it.[5]

5. Limits of constructive possession.—The Indian Penal Code does not define the word "possession" though Sec. 27 says that when property is in the possession of a person's wife, clerk or servant on account of that person it is in that person's possession and this is not always clear. The presumption is rebuttable and the weight attached to it must vary according to circumstances. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family.

Presumption against head of the joint family.

In the case of a family living jointly the presumption against the head of the family also varies according to the improbabilities that the article owing to its size, etc. should have escaped the notice of the head of the family or it was unlikely that such incriminating article would have been found by chance or that any of the sons could have taken possession of the article and hidden it in the house without informing the father or that such article could have escaped notice or could remain concealed in the house without his knowledge.[6]

Proof in case of joint illegal possession.

Similarly, where two or more persons are charged with joint illegal possession, it is incumbent on the State to prove (*a*) that each of the accused had either physical or constructive possession of the property, or (*b*) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter.

What possession implies.

Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. It is not necessary that the physical power of the dealing with the thing should be retained at very moment of time. It would be enough for the purpose of retaining possession if that physical power can be produced at any moment the possessor wishes it.

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1. Margam Aiyar *v.* Mercer, 23 I. C. (Mad.) 177.
2. Banwari Lal *v.* Emperor, A. I. R. 1914 Lah. 455 at p. 456 : 22 I. C. (Lah.) 718.
3. *Ibid.*
4. Chhotey *v.* Emperor, A. I. R. 1923 All. 33 : 23 Cr. L. J. 729 : 20 A. L. J. 855 : 69 I. C. (All.) 457.
5. Sham Kaur *v.* State, (1969) 71 Punj. L. R. 183 at p. 185.
6. *In re* Wahib Basha, A. I. R. 1961 Mad. 162 at p. 165 : (1961) 1 Cr. L. J. 533, *vide* Satyanarayana *v.* State, (1953) 1 M. L. J. 175 : 1953 M. W. N. (Cr.) 967 : A.I.R. 1953 Mad. 534.

To take an example, it would hardly be doubted that a gentleman's watch ly ng on the table in his room is in his possession though it is not in his hand a id though he may not know whether it is on his writing table or on his dnessing table. Possession in order to justify a conviction need not necessarily br in one's exclusive possession. A person can be in possession jointly with ochers. If contraband is found in the joint possession of two persons in otcupation of a house it can be presumed that both are in possession of the acticle. The presumption no doubt is rebuttable and the weight to be attached tor it must vary according to the circumstances of each case. It can be rebutted by showing that the room or the receptacle in question was in the particular or exclusive possession of one member of the family. It can be rebutted by the accused proving that he did not know of the presence of the article, for instance, by showing that it was dumped there without his knowledge or privity. The prosecution, no doubt, should prove that each of the accused had either physical or constructive possession of the property and that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter.[1]

Though Sec. 27 says that possession of the wife is in certain circumstances the possession of the husband, it does not say that such possession is not that of wife also.[2]

This section defines the limits of constructive possession recognised in the Code. It does not define possession as such, which it leaves to the determination of civil law. But what it aims at is to embody a rule and an exception: the rule being that possession, wherever referred to in the Code, must be actual, physical and real and not merely figurative, symbolical or constructive, or through a trustee, the only exception being the possession of a person's wife, clerk or servant, *on account of that person*, that is to say, that it must appear or be proved by those relying upon such possession that those relations were holding the property in trust for him. If the property was held by any other relation, e. g. a son or a brother in trust for him, that is on his account, it would not be deemed to be in his possession by virtue of the rule, since the section prescribes the limit beyond which it cannot stretch the degree of constructive possession. But if such relations live with him as members of a joint family, and an article is found in the house in such place or places, as they or the other persons living in the house may have access to, there is no presumption of law, though the Court may presume, as a fact, that the article was in possession of the head of the house.[3] But it is only a presumption which might be rebutted by proving that some other person was, in fact, in possession of it.[4]

Presumption of possession may be rebutted.

The presumption that the head of the family or the husband is responsible for the incriminating articles recovered from the house occupied jointly by him and others is not an absolute or unconditional one. The presumption is rebuttable and the weight attached to it must vary according to the cricumstances of each case. It can be easily rebutted. It is also of little avail to call in aid Sec. 27 of the Indian Penal Code. The section only says that when property is in the possession of a person's wife, clerk or servant "on account of that person" it is in that person's possession within the meaning of the Code. It cannot be applied to a case where the possession is not proved to be "on account"

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1. State of Kerala *v.* Gopalan, 1961 Ker. L. T. 992.
2. *Ibid.*
3. Sangam Lal, I. L. R. 15 All. 129; Dula Singh *v.* Emperor, A.I.R. 1928 Lah. 272 : 9 Lah. 531, overruled in Emperor *v.* Santa Singh, A. I. R. 1944 Lah. 339.
4. But *contra* in Banwarilal *v.* Emperor, 22 I. C. (Lah.) 748 : (1914) P. R. No. 20 (Cr.) : A. I. R. 1914 Lah. 455 : 15 Cr. L. J. 171, the term "wife" held to include a permanent mistress.

of the accused and especially so in a case where possession itself is a crime and the article is such that the accused might well have been in ignorance that it was in his wife's possession. The fiction that the husband and wife are one and the same person cannot also be extended to say that the wife's crimes are the husband's and *vice versa*. A mental element such as intention or consciousness or knowledge must be established before the possession of illicit liquor can be said to constitute an offence under the Prohibition Act. Possession must be a conscious one and not one to be inferred from the proximity of accused to the article in question. No man can be said to "possess" a thing without his knowledge. In other words, to make the possession culpable the accused must have the *mens rea*. Else many a virtuous and innocent husband should spend his days behind bars if he is unfortunate enough to be married to a woman who has a fancy for contraband articles and think nothing of storing them in the house. Whatever was the position in the past or among the or thodox, in the present set-up it is not uncommon for both husbands and wives to have separate boxes where things are locked up without the knowledge of the other spouse. So the inference that the possession by the wife is possession by the husband is a dangerous one which if drawn invariably without regard to the attendant circumstances can lead to unfortunate result.[1]

Section not applicable to a case where possession is not proved to be "on account" of accused.

Dangerous inerence if possesfsion of wife is inva ably deemedrito be husband's possession.

The question how a person's, wife's, clerk's or servant's possession is to be proved as being on account of him must depend upon the nature of property and the use to which it is put. In the case of personal dress and ornaments, it cannot be said that the things are held on account of the house-master. Even in the case of the wife, her possession must not be readily assumed to be his or on his account, since this fact, at least, must be proved by those who impute to one possession of a thing not found in his physical custody or control. This section merely raises a presumption which will vary according to the nature of the article concerned and the degree of control exercised over it by the husband or the master, as the case may be, and the party found in actual possession of it. Such presumption would fail in a case where it appears that a party may well have held possession of an article, e. g. cocaine[2] without the knowledge of the husband or the master, as the case may be. On the other hand, where the property in question is in the house, such presumption would arise and continue even in his absence therefrom.[3] The temporary possession of the wife should always be attributted to the husband.[4] Possession of the driver and the cleaner of a lorry was possession of their master where it is not pretended that any consent, exprersed or implied, of the master was obtained prior to the taking over of the lorry.

Mode of proof.

It was held that the lorry was taken possession of by the accused without the consent of the person in whom the legal possession vested and thus the offence fell within the purview of Sec. 378, Penal Code.[5]

When a man furnishes a house for his mistress, occupation he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. The prosecution in cases of that kind must prove something more than

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1. Sukumaran *v.* State of Kerala, 1961 Ker. L. T. 584 at p. 585.
2. Banwarilal, 22 I. C. (Lah.) 748.
3. Anant Ram, 59 I. C. (Lah.) 550.
4. Wazir *v.* Emperor, A. I. R. 1935 Pesh. 68 at p. 69: 36 Cr. L. J. 1437 : 158 I. C. 598.
5. H. J. Ransom *v.* Triloki Nath, A. I. R. 1942 Oudh 318 at p. 320: 199 I. C. 557.

that the article was found in the possession of the wife or mistress; they must establish facts from which a court is justified in presuming that such possession was on account of the husband or protector.[1] So a person may employ a clerk or servant only for a temporary purpose or a limited period, but, if the possession was made over to or taken over by them *on his account* that possession continues though the relationship may cease.

The section only requires that if possession is once held by a person's wife or servant for him, he retains it till he recovers it by physical delivery. A person merely acting, though not employed as a clerk or servant, is a servant *pro confessio* within the meaning of this section.

6. Possession of wife on account of the husband may be proved by circumstantial evidence.—It is true that Sec. 27, Indian Penal Code, requires proof that the possession of a wife, which is deemed to be the possession of the husband, must be shown to be on account of the husband. But, the evidence from which it can be inferred that it is a possession on account of the husband is another matter. Section 114 of the Evidence Act can be used to draw inferences which are natural and reasonable. If circumstantial evidence is of such a character against an accused that no inference except that he had taken the stolen box and given it to his wife to keep could be reached, such a conclusion may be arrived at even in the absence of direct evidence of entrustment by him to the wife.[2]

"Counterfeit."

28. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.[3]

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practiced.[4]

SYNOPSIS

1. Analogous law.
2. Principle.
3. Ingredient of counterfeiting.
4. Meaning of words.
5. Counterfeit coin.
6. Intending . . . to practise deception.

1. Analogous law.—The section provides a definition for a word used in Chapter XII in describing offences relating to coin and Government stamp.[5]

2. Principle.—Dishonesty and fraud are not the essential pre-requisites of counterfeiting. Intention to practise deception or knowledge that deception is likely to be thereby practised is alone sufficient. That intention may

1. Banwari Lal *v.* Emperor, 15 Cr. L. J. 172 at p. 174; Margam Aiyar *v.* Merce 23 I. C. 177; Anant Ram, (1821) P. W. R. 8; 59 I. C. 550.
2. Prem Raj *v.* State, 1970 A. W. R. 881 at p. 882.
3. These explanations was substituted for the original explanations by the Metal Tokens Act (Act 1 of 1889), Sec. 9.
4. *Ibid.*
5. Sections 230, 231, 263-A, I. P. C.

now, since the enactment of 1889,[1] be presumed if the resemblance is such that deception may, in fact, be produced.[2]

3. Ingredient of counterfeiting.—The main ingredients of counterfeiting as laid down in Sec. 28 are (*i*) causing one thing to resemble another thing, and (*ii*) intending by means of that resemblance to practise deception, or (*iii*) knowing it to be likely that deception will thereby be practised. Thus if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised or even if there is no intention but it is known to be likely that the resemblance is such that deception will thereby be practised there is counterfeiting. Then comes Explanation 1 to Sec. 28 which lays down that it is not essential to counterfeiting that the imitation should be exact. Ordinarily counterfeiting implies the idea of an exact imitation; but for the purpose of the Indian Penal Code there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation so long as the resemblance is so close that deception may thereby be practised. Then comes the second explanation which lays down that where the resemblance is such that a person might be deceived thereby it shall be presumed until the contrary is proved that the person causing one thing to resemble another thing was intending by means of that resemblance to practice deception or knew it to be likely that deception would thereby be practised. This explanation lays down a rebuttable presumption where the resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved.

Counterfeiting as understood under the Code.

This analysis of Sec. 28 shows that there is no necessity of importing words like "colourable imitation" therein. In order to apply it, what the Court has to see is whether one thing is made to resemble another thing, and if that is so and if the resemblance is such that a person might be deceived by it there will be a presumption of the necessary intention of knowledge to make the thing counterfeit, unless the contrary is proved. What the Court therefore has to see is whether one thing has been made to resemble another thing. If it finds that in fact one thing has been made to resemble another it has further to decide whether the resemblance is such that a person might be deceived. If it comes to the conclusion that the resemblance is such that a person might be deceived by it, it can presume the necessary intention or knowledge (until the contrary is proved) and counterfeiting would then be complete.[3]

Whether words like "colourable imitation" can be imported into the section.

4. Meaning of words.—"*Causes one thing to resemble another*," that one thing may be in itself a coin. A person may, for instance, gild a half-pice, a four-anna silver piece to resemble a half-sovereign. One who *causes* one thing to resemble another is a false coiner, but one who palms off a false coin is a cheat. *Intending . . . to practise deception*" : It is not necessary that deception should, in fact, have been practised. Deception is imposition, the causing one to believe what is false, or disbelieve what is true. Here the word is used to connote the belief by a person that the counterfeit article is the genuine article.

The deception must be the result of resemblance and not any extraneous information supplied. "*That a person might be deceived thereby*" which is not a

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1. Mental Tokens Act (I of 1889), Sec. 9; Qadir Baksh, 4 A. L. J. 776.
2. Amrit Sonar, 51 I. C. (Pat.) 263; Nilmoney Nag *v.* Durga, 30 I. C. (Cal.) 1007; Shaikh Abdul Sovan *v.* Jitendranath Dutt, A. I. R. 1331 Cal, 445: 32 Cr. L. J. 171 : 174 I. C. 446.
3. State of U. P. *v.* Hafiz Mohammed Ismail and Hafiz Jawed Ali, A. I. R. 1960 S. C. 669 at pp. 670, 671: (1960) 2 S. C. R. 911.

pure question of fact, for it depends upon the inference to be drawn from the closeness of resemblance.

5. Counterfeit coin.—This description of counterfeit makes two things clear : *First*, that the *value* of the counterfeit is immaterial. It may, in fact, possess a greater intrinsic value than the genuine article, but it is, nevertheless, a false token because it is not the genuine article which it is made to imitate. *Secondly*, there can be no counterfeit, unless there is some resemblance. It need not be exact, but it must none the less be close enough to suggest that the one was intended to be an imitation of the other.[1] That intention may be gathered in two ways : (*a*) by a legal presumption arising under Explanation 2, from the closeness of resemblance, and (*b*) by proof *aliunde*, which need only be given if the case is not one for legal presumption. As regards the evidence to be adduced in such cases a person counterfeiting may either *intend* to practise deception or he may *know* that deception is likely to be thereby practised. A person who intends to practise deception is, of course, a professional coiner or forger but one who does not intend but knows that his handiwork may be turned to that purpose may be wholly innocent of guilty knowledge, but he is a counterfeiter all the same, because though not intending it, he knows of the crimes that may be committed thereby. A person who strikes off cheap imitation sovereigns, or currency notes or stamps, not for passing them as currrent, but for the purpose of ornaments or adorning an album, would thus be within the deception. A thing may be an exact *replica* of another, but if there is anything thereon to show that it is not the genuine thing, there is no counterfeiting. A currency note marked "specimen" across it in bold letters would, thus, cease to be a counterfeit within the meaning of the rule. On the other hand, an used stamp altered to resemble an unused stamp may amount to counterfeiting if it is passed off as such.[2]

Value of counterfiet is immeterial.

There must be some resemblance.

Intention to be gathered in two ways.

Of course, since counterfeiting, here spoken of, is the manufacture of spurious articles in imitation of genuine articles, it follows that a person who palms off a one-anna stamp for a rupee stamp, does not counterfeit a rupee stamp,[3] though he may thereby commit the offence of cheating.

Where the edges of alleged counterfeit one rupee coins are irregular and none would have been deceived by those coins cannot be counterfeit coins and Sec. 343 has no application.[4]

6. Intending . . . to practise deception.—The deception meant is with regard to the nature of the coins. It is deception through the resemblance of the true coin with the false, and it means that someone must be led to believe that the false coin is a true one. When the persons manufacturing the coins did not wish the police or any one to be deceived about the real nature of the coins at all, it was held that they did not counterfiet these coins.

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1. Nilmoney Nag *v.* Durga, 19 C. W. N. 957; *see* also Local Government *v.* Seth Motilal, I. L. R. (1938) Nag. 192: A. I. R. 1937 Nag. 341.
2. Ram Lal *v.* Emperor, 60 I. C. 785: 22 Cr. L. J. 289: A. I. R. 1921 Nag. 86 (2).
3. Shuroop Chander, 2 W. R. 65.
4. Ramchhod Mula *v.* State, (1961) 2 Cr.L.J. 472.
5. Sahebrao Awadhut Marahta *v.* Emperor, A. I. R. 1938 Nag. 444 at p. 445 : I. L. R. (1939) Nag. 534 : 39 Cr. L. J. 838 : 176 I. C. 985.

Deception is one of the ingredients of the definition of "counterfeit" in this section. Though the resemblance between the counterfeit coin and the genuine coin need not be exact (*see* Explanation 1), the counterfeit must be of such a character that it would be possible to pass it off as genuine coin and unless that is so, it would not be possible to practise deception. Therefore, having regard to the opinion of the expert which was that their counterfeit half rupee coins would not be passed off as genuine coins it cannot be said that the accused has been guilty of the offence under Sec. 243, Penal Code.[1]

Deception is one of the ingredients of counterfeit.

If the intention of the person who makes or causes coins to be made is to use them in order to commit some other offence such as giving false information against an enemy, that intention *prima facie* is not to practise such deception. If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of "counterfeit coins".[2]

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used, as evidence of that matter.

"Document".

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing direction or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures of marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

SYNOPSIS

1. Analogous law.
2. Meaning of words.
3. What is a document?

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1. Gulam Rabbani Gulam Umam v. State, A. I. R. 1956 Bom. 511 at pp. 512: 1956 Cr. L. J. 882.
2. Velayudham Pillai v. Emperor, A. I. R. 1937 Mad. 711 at p. 712 : I. L. R. (1938) Mad. 80 : 171 I. C. 951 : 39 Cr. L. J. 51 : (1937) 2 M. L. J. 232 : 46 L. W. 141 ; 1937 M. W. N. 551,

1. Analogous law.—The term "document" has been also defined in two other Acts of the Indian Legislature.[1] The definition of "document" here given differs from the definition of 'writing" in the English Criminal Law. The English word applies to the *material* on which words are written, whereas it applies here not to the material but to the *matter* written.[2]

2. Meaning of words.—"*Matter described*" means matter delineated, e. g. a map or plan, or a picture *upon any substance*, e. g. stone, tree or clay.[3] *Letters*, *figures*, *or marks*, i. e. whether in language, numbers, pictures or symbols.[4]

3. What is a document ?—The definition above set out and the description given in the section make it clear that the word "document" is used in law to denote not the substance upon which human ideas are delineated, but the ideas themselves, as expressed in conventional signs addressed to the eye. But the mere expression of ideas does not convert writing into a document unless the writing was "intended to be used or which may be used a' evidence of that matter". So a draft complaint purporting to have been written by a fictitious person charging a certain Raja with murder of a Fakir, the object of the writer being to levy a blackmail, was a "document" though the writer was apprehended in the act of preparing the draft which, of course, was not to be used as evidence. But the Court held that, though the writing was merely a draft, still, since it *might* have been used as evidence it was a document within the meaning of the Code, and as it was a false document, it was a forgery.[5] But in England, it has been held that an avouchment or declaration, whether written or printed, of the character or quality of a chattel, is not a document, which, if false, would be a forgery. So it is said that the writing of a false signature of an artist's name to a picture to pass it off as a work of the artist,[6] or the imitation of a trademark on a wrapper enclosing spurious goods,[7] would not be documents. which, if false, would be forgeries. But, if so, English law must differ from the law of this country, for, in both cases, they would be documents within the meaning of the section, since in the one case the signature, and in the other case, the pictorial device were *intended* to be used as evidence of the matter, inasmuch as the signature was intended to be signature of the artist—which it was not and the wrapper was intended to be that of the firm which used it for the sale of genuine goods. The term "evidence" is not here used in the sense of admissible or legal evidence as defined in Indian Evidence Act.[8] The word "evidence" or the word "evident" only means "that which can be seen with the naked eye". It is not necessarily synonymous with the word "proof".[9] The word "document" occurs in Sec. 464, I. P. C., and there is no doubt that the printed marriage institutes fall within the definition of Sec. 29, I. P. C.[10]

Interpretation of term "document" under English law differs from Indian law.

Term "evidence" used in this section is in large sense that in Evidence Act.

1. *Cf.* Sec. 3 (18) of the General Clauses Act (Act X of 1897), [The earlier General Clauses Act (Act I of 1868) did not define this term] and Sec. 3 of the Indian Evidence Act (Act 1 of 1872).
2. Law Commissioner's First Report, Sec. 88.
3. Emperor v. Krishnappa Khandappa. A. I. R. 1925 Bom. 327 at p. 328 : 27 Bom. L. R. 599 : 87 I. C. 838 : 26 Cr. L. J. 1014.
4. *Ibid.* at p. 328 ; A. v. Joseph, I. L. R. 3 Rang, 11.
5. Shifait Ali, 2 B. L. R. (A. Cr.) 12 ; Ramaswami, I. L. R. 41 Mad. 589.
6. Cross, Dears & B. 460.
7. Smith, 27 L. J. M. C. 225.
8. Act I of 1872, Sec. 2.
9. Dharmendra Nath Shastri v. Rex through Sheoraj Singh, A. I. R. 1949 All. 353 at p. 355 : I. L. R. (1949) All. 619.
10. L. K. Siddappa v. Lalithamana, A. I. R. 1954 Mys. 119 at p. 120.

"Valuable security."

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security".

SYNOPSIS

1. Analogous law.
2. Meaning of words.
3. Characteristics of a valuable security.
4. No security.
5. Legal right.

1. Analogous law.—The term "document" has been defined in the last section. A document creating or extinguishing legal rights is a valuable security. The document must be the original and not merely a copy, for it must of itself create or extinguish legal rights.[1] Consequently, it must not be a spent or cancelled document. So the Law Commissioners wrote: "Sir H. Seaton asks, would not a cancelled instrument be a valuable security under this clause? We think not; for an instrument available for the purpose for which it was made is clearly what the clause intended; a cancelled instrument, therefore, though by the cancelling of it a legal right may be extinguished, inasmuch as the instrument upon which such right depended is thereby voided, does not fall within its scope."[2]

The term "valuable security" is used in Secs. 329—331, 247, 384, 420, 467 and 477 of the Code.

2. Meaning of words.—"*Or purports to be*": An unstamped deed is a valuable security, though, being unstamped, it may not be admissible in evidence.[3]

3. Characteristics of a valuable security.—A valuable security is a document of value, that is to say, a document which of itself creates or extinguishes legal rights, or at least *purports* to create or extinguish them. If, therefore, the document is executed by a minor[4] or is unstamped, or contains blanks, or does not specify the name of the executee or the date or place of execution,[5] or is infected with any other form of invalidity[6] it is, nevertheless, a valuable security, because "it purports to be one".[7] So the fact that it is incomplete, or contains blanks to be filled in is immaterial, provided it is intended to be used as a valuable security. In a Patna case it has been found as a fact that the accused intentionally puts *R* in fear of injury

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1. Khushal Hiraman, 4 B. H. C. R. 28; Naro Gopal, 5 B. H. C. R. 66.
2. First Report, Sec. 89.
3. 7 M. H. C. R. (App.) 26; Ramasami, I. L. R. 12 Mad. 148.
4. Ram Narain Shahu v. Emperor, A. I. R 1933 Pat. 601 (1) : 135 Cr. L. J. 123 : 146 I. C. 519 (i) : 15 P. L. T. 66.
5. Jawahir, I. L.R. 38 All. 430.
6. Ram Harakh, 90 I. C (All.) 913: I.L.R. 48 All. 140.
7. Ramasami, I.L.R. 12 Mad. 148; Kashi Nath Naek I.L.R. 25 Cal. 207; Jawahir, I.L.R. 38 All. 430.

to himself and thereby dishonestly induced him to place his thumb-impression upon certain pieces of paper, being in each case something signed which could be converted into a valuable security under Sec. 30, I. P. C. It has been held that the documents which were extorted from *R* were "valuable securities" and the ingredients of Sec. 347 were present in the circumstances which have been found.[1] Though the documents cannot be said to be stamped in accordance with law, these documents must be held to be, as they stand, "valuable securities" within the meaning of Sec. 30, I. P. C. A document which had not been stamped, and was, therefore, not admissible in evidence, might nevertheless be a valuable security. Where documents purport to be documents whereby a legal right is created they are valuable securities within the meaning of Sec. 30, I. P. C.[2] Certain signatures were forged on each of two printed forms, one intended to be used as a promissory note, and the other as a recipt. One-anna stamp was affixed on the top of each paper, but the stamps were neither signed across nor cancelled in any way. They both contained blank spaces left for entering particulars of the amounts, the name of the person in whose favour the document was to have been executed, the date and place of execution, and the rate of interest. It was contended that the documents could not be said to "purport to be" valuable securities, but the contention was overruled on the strength of cases[3] which, however, did not cover the point raised. It appears that an incomplete document like the last could scarcely be designated a valuable security, nor could it be held "to purport to be one" for its very incompleteness. These words do not refer to an incomplete document but rather to a completed document which, though intended to be a valuable security, has not that effect in law.

What would be valuable security.

So a rough account containing figures only with no particulars and unstamped, though signed by the obligor, is a valuable security, because it purported to create a legal obligation on the part of the obligor, and, as such, it satisfied the requirements of the section.[4] Indeed, in such a case, the document would still have been a valuable security even if it had not been signed by the debtor, since it is not invariably necessary that the document should create or convey any right of itself, it being sufficient if it evidences an obligation upon which the right follows.[5] If therefore it is mere statement of account containing no promise to pay and not even the signature of the obligor, it is still a valuable security.[6] Such is the counterfoil of a paying-in-slip which purports to be an acknowledgment of the sum paid into the bank.[7] A title page of an account book of a firm containing the names of the several partners and showing the capital contributed by each, if signed by the partners, may amount to a valuable security.[8] So a document the registration of which was refused does not, on that account cease to be valuable security,

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1. Batisa Singh v. Emperor, A. I. R. 1932 Pat. 335 at p. 336 : 34 Cr. L. J. 81 : 13 P. L. T. 588.
2. Jawahar Thakur v. Emperor, (1916) Cr. L. J. 203 at p. 205: 34 I. C. 375.
3. Reference, 7 M C. R. 27 ; Ramasami, I. L. R. 12 Mad. 148, followed in Jawahir, I.L.R. 38 All. 430.
4. Ramasami, I. L. R. 12 Mad. 148; Idu Jolaha v. Emperor, A. I. R. 1918 Pat. 274: 19 Cr. L. J. 709: 46 I.C. (Pat.) 203. To the same effect, *per* Alderson, B , in Boardman, 2 M. & Rob 147.
5. Kahalavaya, 2 M. H. C. R. 274 ; Idu Jolaha v. Emperor, A.I.R. 1918 Pat. 274 : 46 I.C. (Pat.) 293 : 19 Cr. L. J. 709.
6. *Ibid* ; but *see* Hari Prasad v. State, A.I.R. 1953 All. 660 : 1953 A. L. J. 318.
7. Turner, 39 I.C. (Cal.) 243: 52 Cal. 636.
8. Hari Charan, I. L. R. 33 Cal. 68.

for it purports to continue a valuable security.[1] So is a forest pass though only its duplicate is used to transport forest produce.[2]

Clause (*a*) of the declaration under an insurance proposal signed by the proposer stipulates that, in the event of the proposal being accepted by the company and the proposer failing to take up the policy he shall pay to the company the initial expenses incurred by it in connection with the proposal. This is sufficient to make Ex. P-2 a valuable security as defined by Sec. 30 of the Indian Penal Code.[3]

A deed of divorce is a valuable security because it extinguishes a legal right of the parties.[4] A *kabuliyat* is, for the same reason, a valuable security.[5] But a copy of a lease cannot be so regarded[6] because it, of itself, does not purport to be a document affecting legal rights. But the counterpart of a document is, of course, not a copy and would, therefore, be a valuable security. There is no doubt that the import licence which the accused attempted to obtain from the office of the Chief Controller of Imports was a valuable security, because the import licence would be evidence of the title of the person possessing it to import foreign goods into India.[7] The discharge receipt is on the face of it a valuable security within the meaning of Sec. 30, I. P. C. or a "document purporting to be an acquittance or receipt acknowledging the payment of money" within the meaning of Sec. 467, I. P. C.[8]

What would not amount to valuable security.

4. No security.—Now, what is a legal right? It is a right of a civil nature recognised by law, that is to say, a right the infraction of which gives rise to a cause of action. For instance, the grant of an easement is the conferment of a legal right, for such a grant may be made the subject of a suit. But a claim to a mere office of dignity, as to the title of *Laskur*, is not a legal right, and a *sanad forged* to support that title does not, therefore, amount to the forgery of a valuable security.[9] An acknowledgment of receipt of an insured parcel is not a valuable security inasmuch as it is merely evidence of its delivery and does not operate as a discharge of any liability.[10] Where the offence alleged to have been committed by the accused consists in his destroying an order of the Court by which the Nazir of the Court was asked to take a document of suretyship from the accused for his being released on the bail. The order was signed by the Superintendent and addressed to the Nazir. It was held that it cannot be said that this administrative order of the Superintendent addressed to the Nazir by itself created any legal right in favour of the Nazir and is not valuable security.[11] Where the accused gave a cheque for the amount of the bill and receipt was acknowledged on the bill by writing upon it "Received by cheque No. A-7,55,136", it was held that the receipt does not extinguish or release any legal right. And the giving of the receiptability does not cancel or extinguish,

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1. Kashi Nath Naek, I.L.R. 25 Cal. 207.
2. Doulat Ram, I. L. R. 59 Cal. 1238.
3. K. R. Kumaran v. State of Kerala, (1961) 2 Cr. L. J. 98 at p 101.
4. Azimuddin, 11 W. R. 15.
5. 6 W. R. (Cr.) 2 ; Nasiruddin, (1883) A. W. N. 59 ; Ismail Panju, 88 I. C. (Nag.) 283.
6. *Per* Couch, C. J., *arguendo* in Kushal Hiraman, 4 B. H. C. R. 28 ; *per* Warden, J., *arguendo* in Naro Gopal, 5 B. H. C. R. 56.
7. Durga Das Tulsiramsood v. State, A.I. R. 1955 Bom. 82 at p. 88 : 56 Bom. L. R. 188.
8. Harol Narmada Prasad Singh v. State of Vindhya Pradesh, A. I. R. 1956 V. P. 30 at p 32 : 1956 Cr. L. J. 1246.
9. Jan Mohammad, I. L. R. 10 Cal. 584.
10. Arura, (1913) P. R. No. 10 : 20 I. C. 596.
11. Emperor v. Sher Alam Khan Sahib, A. I. R. 1933 Bom. 494 at p. 495 : 35 Bom L. R. 1062.

as it amounts only to an acknowledgment that a cheque No. A-7, 55,136 has been received.[1]

The test of enforceability, though it may be a normal one, is not the only test for determining a legal right. A legal right may be one recognised by rule of law, either by Municipal law or International Law, without the capacity of being enforced. A legal right may be asserted even before administrative agencies. It includes the liberty of freedom from penalty. In short, it can be said that a legal right is one which is either enforceable or recognised.[2]

"Valuable security" as defined by Sec. 30 of the Penal Code denotes a document which is or purports to be a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledges that he lies under legal liability or has not a certain legal right.

Any document whereby a person acknowledges legal liability is not a valuable security unless the person in whose favour the acknowledgment is made has a right to that document.[3]

The account-books are not "valuable security" and therefore no offence under Sec. 477, Indian Penal Code, is made out against the accused even if they had secreted the *kachhi-rokar* and the *nam-jakar bahis* of a firm.[4]

5. Legal right.—Legal right is a difficult concept. It is not defined. It is, therefore, necessary to note carefully what the eminent jurists have said about this concept of legal right. Roscoe Pound in his *Jurisprudence* (Vol. IV, Chap. 21, p. 70) stated as follows :

> " . . . . by the end of the last century a legal right had come to be defined as a secured interest, or as a capacity of asserting a secured interest or as a claim that could be asserted in the Courts."

Roscoe Pound prefers to follow the English analytical jurists and thinks of legal right lies in the capacity of assertion rather than of an assertable claim. In the same page, it is stated :

> "The capacities of asserting it (legal right) before Courts and administrative agencies by which the interest is given efficacy are some conferred and some recognised."

At pages 70 and 71, it is stated :

> "The capacities of creating, divesting and altering legal rights in the stricter sense or of creating liabilities, as means of securing recognised interests (legal powers) are some conferred and some recognised . . . . The exemption on certain occasions from liability for what would otherwise be infringements of legal rights, are sometimes conferred, as in case of emergency privileges. . . . in all of these juristic conceptions through which recognised and delimited interests are secured, there is a capacity of asserting them before Courts and administrative agencies."

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1. H. K. Shaw v. Suresh Chandra Mitter, A I R. 1936 Cal. 324 at pp. 324, 325.
2. Daniel Hailey Walcott v. State, A. I. R. 1968 Mad. 349 at p. 355: (1868) 1 M.L.J. 229.
3. Prayag Das v. State, A. I. R. 1963 All. 131 at p. 132 : 1963 A. W. R. (H. C.) 184.
4. Hari Prasad v. State, A. I. R. 1953 All. 660 at p. 661 : 1953 A. L. J. 318.

At pages 74 and 75, Roscoe Pound again says :

> "I should put the juristic conceptions by which legally recognised and delimited interests are secured as legal rights (in the stricter sense) powers, liberties, privileges, duties and liabilities."

Salmond on *Jurisprudence* (12th Ed. at p. 224) states that a legal right in the generic sense may be defined as any advantage or benefit conferred upon a person by a rule of law. Again at page 233, under the headnote "The kinds of legal rights," it is stated:

> "A perfect right is one which corresponds to a perfect duty ; and a perfect duty is one which is not merely recognised by the law, but enforced .... In all ordinary cases, if the law will recognise a right at all, it will enforce it. In all fully developed legal system, however, there are rights and duties which though undoubtedly recognised by the law, yet fall short of this typical and perfect form. ... Examples of such imperfect legal rights are claims against foreign States or sovereigns, as for instance due on foreign bonds .... No action will lie for their maintenance ; yet they are, for all that legal rights and legal duties for they receive recognition from the law."

C. W. Panton in his *Text-book of Jurisprudence*, 3rd Ed. at page 250 states as follows :

> ".... The characteristic mark of a legal right is its recognition by a legal system .... Enforceability by legal process has, therefore, sometimes been said to be the *sine qua non* of a legal right.... There are certain rights sometimes called imperfect rights, which the law recognises but will not enforce directly."

At page 251, he again says :

> ".... In some systems Courts of Justice do not control an adequate machinery for enforcement. Thus in international law there is no power in the Court to enforce its decree. Hence, ultimately, the answer to the question whether the essence of a legal right lies in its enforceability will depend on our definition of law. Dicey distinguished between constitutional conventions and laws, the test of the latter being that they will be enforced by the Courts, whereas the conventions will not. Many constitutional lawyers point out, however, that if we apply rigorously the test of enforcement in a Court of law, we are left with too narrow a view of constitutional law.... Because of the difficulties which sometimes arise in the enforcement of particular rights, it is better to define a legal right in terms of recognition and protection by the legal order. This does not unduly narrow the meaning of legal right. Thus an International Court would recognise any rights granted by international law and would protect them so far as it could, even although there was no machinery for direct enforcement. The element of enforceability is important in question of jurisdiction and private international law."

From the statements made by the jurists noted above, the following principles can be deduced broadly to understand what a "legal right" is : (1) Legal right in its strict sense is one which is an assertable claim, enforceable before Courts and administrative agencies ; (2) in its wider sense, a

legal right has to be understood as any advantage or benefit conferred upon a person by a rule of law ; (3) there are legal rights which are not enforceable, though recognised by the law ; (4) there are rights recognised by the International Court, granted by International Law, but not enforceable ; and (5) a legal right is a capacity of asserting a secured interest rather than a claim that could be asserted in the Courts.[1]

31. The words "a will" denote any testamentary document.

"A will."

Analogous law.—The term "will" has been defined in the Indian Succession Act[2] "as the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death".[3] The General Clauses Act defines it to "include a codicil and every writing making a voluntary posthumous distribution of property".[4]

A will is really a wish of a person as to the disposal of his property after his death, and, as such it is revocable by him at pleasure, and, if not revoked it takes effect only after his death. So it is said in an old book: "A testament is the true declaration of our last will of that we would to be done after our death."[5] "Will means the whole testamentary instruments including codicils."[6] The term has been used in Secs. 467 and 477 of the Code.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.[7]

Words referring to acts include illegal omissions.

SYNOPSIS

1. Act and omission.
2. Burden of proof.
3. Not illegal.

1. Act and omission.—An act is, properly speaking, a determination of the will producing an effect in the sensible word. It means something voluntarily done by a human being, as for example, walking, speaking or writing. It involves an operation of the mind as well as of the body. But, as understood in the Code, the term may only signify an operation of the mind ; for it includes also illegal omissions, or bodily inaction. But this meaning has only been adopted for compendiousness of expression. The illegal omission, here spoken of, must, no doubt, be such as to have an active effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred.[8] It need not be the result itself nor need it be its logical or proximate cause. For instance, a policeman tortures a person for the purpose of extorting a confession. Another policeman stands by and

Omission to preform is abetment of offence:

1. Daniel Hailey Walcott v. State, A. I. R. 1968 Mad. 349 at pp. 354-55 : (1968) 1 M. L. J. 229.
2. Act XXXIX of 1925.
3. *Ibid.*, Sec. 2 (*h*).
4. Act X of 1897, Sec. 3 (64).
5. Terms de la Ley.
6. Pigot v Wilder. 24 Beav. 92.
7. Illegal Omission. *see* Sec. 43, *post*.
8. Thornoti, 1 Weir 495; *see* also Basharat v. Emperor. A. I. R. 1934 Lah. 813 : 36 Cr. L. J. 308 : 36 P. L. R. 37 (No doubt an omission must be illegal).

watches it unmoved. Now, since it is the duty of every policeman to prevent tortures, his omission to perform his legal duty is an illegal omission the result of which is the same as if he had abetted the first policeman in using the torture.[1] And if his duty was clear, it was no defence that the torturing policeman was his superior officer, or that the torture had been ordered by his superior to commit the crime.[2] Nor would it be any defence to say that he was not present at the time of the torture if its commission was facilitated by his absence, or if he had absented himself from the company of the prisoner, when it was his duty to be present, which gave his torturer the chance.[3]

Criminal fastens liability for omission to perform duty.

As a similar duty is cast upon the Magistrate, a Magistrate who was present while certain police constables were wrongfully confining and causing hurt to a villager with a view to extorting a confession, was similarly convicted of abetment.[4] In both these cases there was an omission, and it was illegal within the meaning assigned to that term by Sec. 43. Whether an omission to do a thing is or is not illegal must then be judged by the terms of that section. For instance, in the examples above cited, the duty of the Magistrate and the policeman to prevent the commission of a crime was a matter of legal obligation the failure of which constituted an illegal omission within the meaning of this section. If, therefore, the same offence had been committed in the presence of another person, say a village chowkidar,[5] not charged with the same duty, he could not have been charged with abetment because his omission was not illegal.[6] Criminal law fastens liability on persons who omit to perform the duty required by law such as to provide food, clothing, shelter or medical aid to another, but a refusal to perform acts of mere charity or mercy not coupled with a legal duty, does not entail legal punishment even if death ensues from such refusal or neglect.[7]

2. Burden of proof—The onus lies on the prosecution to show that the omission, which is being treated as an act, was either an offence or was prohibited by law or was one which furnished ground for a civil action as required by Sec. 43, Penal Code.[8]

3. Not illegal.—While this section makes an illegal omission tantamount to act, it draws a line at illegality. A neglect, however gross, does not have that effect unless it is expressly penalized, e. g. in Secs. 279, 289, 304, 304-A, 337 and 338. The fact is that gross neglect is never criminal unless it is also "illegal" as declared by the Code in the sections quoted as also by Secs. 102 and 128 of the Railways Act.[9]

"Act", "Omission".

33. The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

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1. Latif Khan, I L. R. 20 Bom. 394.
2. Behary Singh, 7 W. R. 3; Sanoo, 10 W. R. 48.
3. Kali Charan, 21 W. R. 11.
4. Krishna Setti, 1 Weir 50; Appannee Hegade, 1 Weir 52.
5. Gopal Chunder v. Foolmani, I. L. R. 8 Cal. 728; Lakshami, (1886) Unreported Cr. 303; Khaja Noorul Hoosein v. Fabre Tonnerre, 24 W. R. 26; Khadin Sheikh 4 B. L. R. (A. Cr.). 7.
6. *Ibid*.
7. Om Prakash Tilak Chand v. State, A.I.R. 1959 Punj. 134 at p. 145 : 60 P.L.R. 563.
8. Basharat v. Emperor, A. I.R. 1934 Lah. 813 at p. 814 : 36 Cr. L. J. 308 : 36 P. L. R. 37.
9. F. C. Woodward v. Crown, A. I.R. 1925 Sind 233 at p. 234.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Act.

1. Analogous law.—This section is dictated by the same principle as the last section, both sections being enacted to simplify the language of the Code.

2. Principle.—The combined effect of the last section and this is that the word "act" alone is sufficient to signify both a series of acts as well as a series of omissions. But though an "act" and an "omission" include a series of acts and omissions, it does not follow that a number of acts and omissions would, in that sense, constitute only one offence. For whether the acts and omissions constitute one or more offences depends upon other considerations which are not overriden by the section.[1]

3. Act.—The word "act" whether in the General Clauses Act or in the Criminal Procedure Code must be construed in the light of commonsense, and not in a metaphysical sense.[2] "Act" is nowhere defined. It must necessarily be something short of a transaction which is composed of a series of acts, but cannot, in the ordinary language be restricted to every separate willed movement of a human being; for when courts speak of an act of shooting or stabbing, it meant the action taken as a whole and not the numerous separate movements involved.[3] Where an accused has done more than one act closely following upon, and intimately connected with, each other, they are not to be separated and assigned the one to one intention and the other or others to another intention. On the other hand, they must all be ascribed to the same original intention which had prompted the doing of those acts and without which nether or none of them could have been done.[4] An act may constitute an offence under two or more enactments.[5] But a person cannot be punished twice over for the same act.[6]

Act done by several persons in furtherance of common intention.

34. [7][When a criminal act is done by several persons, in furtherance of the common intention of all; each of such persons is liable for that act in the same manner as if it were done by him alone.]

SYNOPSIS

1. Analogous law.
2. Scope and applicability.
3. Right of private defence.
4. Constructive liability.
5. Sections 34 and 35.
6. Sections 34 and 37.
7. Sections 34 and 107.
8. Sections 34 and 114.
9. Sections 34 and 120-A.
10. Sections 34 and 149.
11. Sections 34, 120-A and 149.
12. Principle.
13. Procedure and practice.
14. Charge.
15. Meaning of words.
16. Criminal act.
17. Done by several persons.
18. Common intention ; what is ?
19. Distinction between common intention and common object.

1. Section 235, Cr. P. C
2. Emperor v. Bhogilal Chimanlal Nanavati, A. I. R. 1931 Bom. 409 at p. 410 : 33 Bom. L. R. 648 : 32 Cr. L. J 1145, *per* Beaumont. C. J.
3. *Ibid.*, *per* Murphy. J.
4. Nihal Mahto, I. L. R. 18 Pat. 485.
5. General Clauses Act, Sec. 26 ; *see* also V. Sesha Ayyar v. Venkatasubba Chetty, A. I. R. 1924 Mad 487 at p. 488 : 25 Cr. L. J. 422 ; 1924 M. W. N. 268 : 19 M. L. W. 201, *per* Odgers, J
6. General Clauses Act, Sec. 26 ; Emperor v. Bhogilal Chimanlal Nanavati, A. I. R. 1931 Bom. 409 at p. 410.
7. Subs. by the Indian Penal Code (Amendment) Act, 1870 (27 of 1870), Sec. 1, for the original section.

20. In furtherance of common intention of all.
21. Presence at time of commission of offence.
22. Inference of common intention.
23. Proof of common intention.
24. Common intention, when not established —Effect of.
25. Applicability to offences under Sec. 304, Part II.
26. Joint liability.
27. Cases of joint responsibility.
28. No joint responsibility.
29. Sentence in case of joint liability.
30. Section inapplicable.
31. Meeting of minds.

1. Analogous law.—The words "in furtherance of the common intention of all" did not exist in the original Code, and were added by the amending Act of 1870.[1] They make all the difference between the old section and the new, for without those words the Code would be widely at variance with the English law where a person not cognizant of the intention of his companions to commit, say, murder, was never held liable, though he may have joined their company to commit an unlawful act.[2]

This view was adopted by the Courts in India, even before the section had been formally amended.[3]

2. Scope and applicability.—This and the following sections (Secs. 34—38) enunciated the general doctrine of joint liability in crime: As such, they form a class apart and not really belong to the chapter dealing with the interpretation of terms. As for the section it is framed to meet a case in which it may be difficult to distinguish between the acts of the individual members of a party, or to prove precisely the part taken by each individual.[4] The reason why all are deemed guilty in such cases, is that the presence of accomplices affords encouragement, protection and support to the persons actually engaged in committing the crime.

Foundation of constructive liability is the common intention.

This section requires that there must be a general intention shared by all the persons concerned in the offence, that is to say, when several persons unite with a common purpose to do any criminal offence, all those who assist in the accomplishment of the object would be equally guilty. The foundation of constructive liability is the common intention animating the accused to the doing of criminal act, and the doing of such act in furtherance of such intention. It follows, therefore, that common intention is an intention to commit a crime actually committed and every one of the accused should have participated in that intention.

In *Barendra Kumar Ghose* v. *Emperor*,[5] Lord Sumner stated thus:

Privy Council's view.

"Section 34 deals with the doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole section covered by a 'criminal act' in the first part because they refer to it".

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1. Act XXVI of 1870, Sec 1.
2. Duffey's case, (1830) 1 Lewin C: C 194.
3. Gorachand Gope. B. L. R. (Sup. Vol.) 443 (F B.). It is this judgment which influenced the amendment of 1870.
4. Nga Po Sein, (1902) 9 Bur. L R 16; Nga Tha Htin v. Emperor. A. I. R. 1935 Rang. 304 : 36 Cr. L. J. 1393.
5. A. I R. 1925 P. C, 1.

Thus there will be no liability by reason of Sec. 34 except in a case where there was a common intention to commit the particular offence which resulted. A similar intention would not be enough to bring the case within the meaning of the section. Suppose several persons each acting independently of the others, intend to commit a crime and all of them chose the same moment and commit the crime which each of them intended separately, there would be no common intention in such a case. Each of them would be liable for his act, but not vicariously for the act of another or others.

Common and similar intention explained.

In *Mahbub Shah* v. *Emperor*,[1] the Privy Council laid down that Sec. 34 enacted a principle of joint liability in the doing of a criminal act, that the essence of that liability was to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention and that to invoke the aid of Sec. 34 successfully. It must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all.

Principle of joint liability stated by Privy Council.

On that principle it was held that common intention within the meaning of the section implied a pre-arranged plan and to convict the accused of an offence, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Their Lordships of the Privy Council held that the inference of common intention should never be reached unless it was a necessary inference from the circumstances of the case. It was, however, pointed out that although it m ght be difficult if not impossible to procure direct evidence to prove the intention of an individual and in most cases it had to be inferred from his act or conduct or other relevant circumstances of the case, the inference of common intention within the meaning of Sec. 34, I. P. C., should never be reached unless it was a necessary inference deducible from the circumstances. In *Pandurang* v. *State of Hyderabad*,[2] Bose, J., summarised the position thus :

Evidence of common intention.

Law summarised by Supreme Court.

> "Now in the case of Sec. 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them.[3] Accordingly, there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan."

In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others ; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder, however clearly an

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1. A. I. R. 1945 P. C. 118.
2. A. I. R. 1955 S.C. 216 at p. 222.
3. Mahbub Shah v. Emperor, A I. R. 1945 P.C. 118 at pp. 120-21.

intention to kill could be proved in his case.[1] As their Lordships say in the latter case "the partition which divides their bounds is often very thin: nevertheless,the distinction is real and substantial and if overlooked will result in miscarriage of justice".

In a recent case in *Krishna Govind* v. *State of Maharashtra*,[2] Subba Rao, J., stated :

> "It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence, if that be so, before a court can convict a person under Sec. 302, read with Sec. 34 of the Indian Penal Code, it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or unnamed, for committing the said offence."[3]

The circumstances in the case *Ram Autar* v. *State*,[4] were that a body of persons armed with *lathis* and accompanied with bullocks and a plough were going with the avowed object of upturning the crop which had previously been sown by the appellants. There was no doubt about their intention and as a matter of fact they admitted that they were going to commit the very act which the accused apprehended. There was no time for having recourse to lawful authorities because the police station was five miles away. In those circumstances, the restriction imposed by Sec. 99, I. P. C., did not come into play. While the appellants were asserting their right and protecting their property they were doing a perfectly legitimate act and the assembly was not an unlawful assembly. It was held that the person from amongst the appellant who exceeded that right and gave the blow which caused Shanker's death did exceed that right but it was his individual act and he alone was liable for the consequence thereof. There was no evidence whatsoever to fix the identity of that individual and the result was that the Court could not convict anyone of the appellants for an offence under Sec. 304, I. P. C. There being no unlawful assembly the provisions of Sec. 149, I. P. C., could not be invoked so as to make the persons who did not give any blow vicariously liable for the acts of their comrades. It was further held that Sec. 34, I. P. C., as well did not apply, because there was no pre-arrenged plan and all the appellants were given the benefit of doubt. The position in *Mithu Pandey* v. *State of Bihar*[5] was similar.

Section 34 is only a rule of evidence and does not create a substantive offence. It means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually.[6]

Section 34 is intended to meet a case where members of a party acted in furtherance of the common intention of all but it was difficult to prove exactly the part played by each of them. The principle which the section embodies

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1. Barendra Kumar Ghose v. King-Emperor A. I. R. 1925 P. C. 1 at pp. 5, 6 and Mahbub Shah v. Emperor, A. I. R. 1945 P. C. 118.
2. A. I. R. 1968 S. C. 1413.
3. *See* also Sankaran Nair Chellappen Nair v. State of Kerala, A. I. R. 1965 Ker. 248 at p. 252 : 1965 Ker. L. T. 292 : 1965 Ker. L. J. 412.
4. A. I. R. 1954 All. 771.
5. A. I. R. 1966 Pat. 464.
6. M.K. Paramerwara Kurup v. N. Krishna Pillai, A.I.R. 1966 Ker. 264 at p. 265.

is the participation in some action with the intention of committing a crime, once such participation is established Sec. 34 is at once attracted.[1]

This section does not create a distinct offence but lays down principle of joint criminal liability.

It is well settled that Sec. 34 of the Indian Penal Code does not create a distinct offence: it only lays down the principle of joint criminal liability. The necessary conditions for the application of Sec. 34 of the Code are common intention to commit an offence and participation by all the accused in doing act or acts in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the said offence; that is to say, if two or more persons had common intention to commit murder and they had participated in the acts done by them in furtherance of that common intention, all of them would be guilty of murder.[2] The question of common intention in Sec. 34 of the Penal Code has relevance only to the commission of the offence and not to the right of private defence. Thus where in a case all the accused were liable for committing the murder of a person by doing an act or acts in furtherance for the common intention, they would not be liable for the said act or acts done in furtherance of common intention, if they had the right of private defence to voluntarily cause death of that person. Subba Rao, J., in the above-noted case while discussing the scope of applicability of Sec. 34 of the Penal Code, observes: "What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence. To illustrate, if a person was guilty of murder by doing an act in furtherance of a common intention with others to commit murder, he could sustain the plea of the right of private defence only by establishing that he had the right to cause death of that person. It is true that, in acertaining whether a group of persons had common intention only to murder, the evidence adduced by the defence that they had common intention only to cause hurt is relevant. But once it is established that the common intention was to commit murder, the question of separate individual liability in the context of private defence would be out of place."

Principle of joint criminal liability.

In *Jaikrishna Das Manohardas Desai* v. *State of Bombay*,[3] Shah, J., discussed the principle of joint criminal liability under Sec. 34 of the Code and said : "But the essence of liability under Sec. 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under Sec. 34 is not, on the words of the statute, one of the conditions of its applicability. A common intention—a meeting of minds—to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of Sec. 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary but such is not the case in respect of other offences where the offence consist of diverse acts wnich may be done at different times and places. In *Shree Kantiah's* case,[4] misappropriation was committed by removing the goods from a Government depot and on the occasion of the removal of the

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1. Jagir Singh v. State of Punjab, A. I. R. 1968 S. C. 43 at p. 45.
2. Gurdatta Mal v. State of Uttar Pradesh, A. I. R. 1965 S. C. 257 at p. 260.
3. A. I. R. 1960 S. C. 889 at p. 892.
4. A. I. R. 1955 S. C. 287: (1955) 1 S. C. R. 1177.

goods the first accused was not present. It was, therefore, doubtful whether he had participated in the commission of the offence, and this Court in those circumstances held that participation by the first accused was not established. The observation in *Shree Kantiah's* case[1] in so far as they deal with Sec. 34 of the Indian Penal Code must, in our judgment, be read in the light of the fact established and are not intended to lay down a principle of universal application." Thus, where one of the accused persons committed various acts which constituted offences for which he was convicted by the Court and where other accused did not participate in the commission of these acts of the convicted accused, although earlier to the commission of those offences those accused might have done something in that direction, still those acts did not form any ingredient of the offence committed by the convicted accused and as such it cannot be said that other accused had participated in the commission of the criminal acts of the convicted accused. Under the circumstances Sec. 34 of the Penal Code is not attracted.[2]

Principle of joint liability.

The section embodies a principle of joint liability in the doing of a criminal act, and the essence of that liability is the existence of a common intention.[3] It is only a rule of evidence and does not create a substantive offence.[4] It is not a penal provision but only one which enunciates the principle of criminal liability.[5] It does not lay down any general formula or prescribe a standard to suit a combination of all possible circumstances in relation to a criminal act.[6] The section simply gives statutory recognition to the commonsense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.[7] The use of the words "in furtherance" suggest that the section is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise the words would not be needed at all.

Common intention to commit crime.

The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention, or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention.[8] The section makes it quite clear that the liability of all the conspirators is for the criminal act actually done and not for the common intention, e.g. the act jointly intended by them. What the commcn intention was, is therefore not to be considered at all in deciding for what the conspirators are liable. The section does not punish the conspirators for the act jointly intended by them, it

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1. A. I. R. 1955 S. C. 287 : (1955) 1 S. C. R. 1177.
2. Shiv Prasad Chuni Lal Jain v. State of Maharashtra, A. I. R. 1965 S. C. 264 at p. 268 : 1964 M. L. J. (Cr.) 546 : (1964) 2 S. C. J. 485, *per* Raghubar Dayal, J.
3. Chikkarange Gowda v. State of Mysore, A. I. R. 1956 S. C. 731 at p. 736 : 1957 Ker. L. T. 25 : 1956 Cr. L. J. 1365; Mahbub Shah v. Emperor, A. I. R. 1945 P. C. 118 : 72 I A. 148 : I. L. R. (1945) Lah 367 : 1945 A. L. J. 344 : 47 Bom. L. R. 941 : 49 C. W. N. 678 : 26 P. L. T. 229 : 46 Cr. L. J. 689.
4. B. N. Srikantiah v. State of Mysore, A. I. R. 1958 S. C. 672 at p. 676 : 1958 S. C. J. 918 : 1958 M. L. J. (Cr.) 721; King-Emperor v. Barendra Kumar Ghose, A. I. R. 1924 Cal 257 : 28 C. W. N. 170 : 25 Cr. L. J. 817 (F. B.).
5. Sheoram v. Emperor, A. I. R. 1948 All. 162 at p. 162 : 1947 A. L. J 657.
6. Mokdum v. State, 54 Mys. H. C. R. 237; *see* also Bashir v. State, A. I. R. 1953 All. 668 : I. L. R. (1954) 1 All 214.
7. Waryam Singh v. Emperor, A. I. R. 1941 Lah. 214 at p. 215 : I. L. R. (1941) Lah. 423 : 42 Cr. L. J. 660 : 195 I. C. 58 : 43 P. L. R. 159; *see* also Bashir v. State, A. I. R. 1953 All. 668 : I. L. R. (1954) All. 214.
8. Bashir v. State, A. I. R. 1953 All. 668 at p. 674.

punishes them for the act actually done.[1] Thus when more persons than one join in causing injury to a third person in such a manner that each one of them must know that the result may be the death of the injured person, all of them are responsible for the death, for everyone of them must be taken to have intended the probable and natural consequences of acts in which he joined and none of them can be heard to say that his individual act did not cause death and he was therefore not liable for the death.[2] Only those persons can be held liable under Sec. 34 who had a common intention to commit the crime which was actually committed.[3]

Operation of section dependent on two conditions.

The section operates only when it is found as a fact that the criminal act done by an individual is in furtherance of the common intention and not without it.[4] Where a number of persons jointly commit an offence in the circumstances mentioned in Sec. 34 of the Indian Penal Code, the legal position is that each one of those individual committed that offence. It may, in many cases, be difficult to decide whether the criminal act in question has been done by several persons in furtherance of the common intention of all. But, once it is decided that the act is so done by a number of persons in furtherance of the common intention of all, the legal position that results is that each person shall be held to have committed the entire criminal act.[5] It is necessary for the application of this section that the criminal act must have been done by all the accused. Where, therefore, two accused merely entered into a conspiracy and one of them stole the *ghee*, the other would not be guilty by virtue of this section.[6] The section requires two conditions to be fulfilled for its application : (1) the accused person must be present on the scene of occurrence and (2) there must be a prior concert or pre-arranged plan.[7]

The view[8] that Sec. 34 applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by some person other than the latter, is not a correct view. The section would be applicable equally to those cases in which criminal act done in furtherance of the common intention of several persons is the act of a single individual.[9]

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1. Bashir v. State, A. I. R. 1953 All. 668 at p. 675 ; Raja Ram v. Emperor, A. I. R. 1938 Oudh 256 : I. L. R. 14 Luck. 328 : 178 I. C. 162 : 40 Cr. L. J. 14 : 1938 O. W. N. 1057 : 1938 A. W. R. 92 (2).
2. Sultan, I. L. R. 12 Lah. 442 ; Nga Po Sein, (1902) 1 L. B. R. 232.
3. Raja Ram v. Emperor, A I. R. 1938 Oudh 256 at p. 258 : I. L. R. 14 Luck. 328: 178 I. C. 162: 40 Cr. L. J. 14 : 1948 O. W. N. 1057 : 1938 A. W. R. 92 (2) ; Zahid Khan v. Emperor, A. I. R. 1939 Oudh 49 : 14 Luck. 878 : 179 I. C. 338 : 40 Cr. L. J. 187 : 1939 O. W. N. 7 : 1939 A. W. R. 27 ; *see* also Bashir v. State, A. I. R. 1953 All. 668 : I. L. R. (1954) 1 All. 214; *see* also Mehtab Singh, 10 J. & K. L. R. 9.
4. State of Bihar v. Lala Mahto, A. I. R. 1955 Pat. 161 at p. 169 : 1955 Cr. L. J. 161 (D. B.) : I. L. R. 33 Pat. 397.
5. Matiullah Sheikh v. State of West Bengal A. I. R. 1965 S. C. 132 at p. 134 : (1964) 1 S. C. W. R. 501.
6. Banwarilal v State, A. I. R. 1956 All. 341 at p. 343 : 1956 Cr. L. J 664 (D. B.).
7. Bijaysingh Dangal v. State of Madhya Bharat, A. I. R. 1956 M. B. 170 at p. 172: 1955 Madh. B. L. J 27 : Madh. B. L. R. 1956 (Cr.) 87: 1956 Cr. L. J. 897 (D. B.).
8. *Cf.* Stephen, J., in King-Emperor v. Nirmal Kant Roy, I.L.R. 41 Cal. 172.
9. King-Emperor v. Barendra Kumar Ghose, A I R. 1924 Cal. 257 : 28 C. W.N. 170; Irshadullah Khan v. Emperor, A.I.R. 1933 All. 528 at p. 533 : I. L. R. 58 All. 607 : 34 Cr. L. J. 1234 : 1933 A. L. J. 1242 ; Emperor v. Ranchhod Sursingh, I. L. R. 49 Bom. 84.

It would be useful at this stage to recall the observations of the Supreme Court in *Bharwad Mepa* v. *State of Bombay*[1] :

> "As to the application of Sec. 34, I. P. C., we consider that the legal position does not admit of any doubt or difficulty. Four persons have been convicted of murder on the finding that all of them and some others had the common intention of killing three brothers; the appellants took part in the assault in furtherance of the common intention, and it is not disputed that the common intention was achieved by murdering the three brothers, Kurji, Harji and Mitha. The number of convicted persons is more than one, and it does not fall below the required number. What then is the difficulty in applying Sec. 34, I. P. C.? Learned counsel says : 'We do not know who gave the fatal blows.' We accept the position that we do not know which particular person or persons gave the fatal blows ; but once it is found that a criminal act was done in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. The section is intended to meet a case in which it may be difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The principle which the section embodies is participation in some action with the common intention of committing a crime ; once participation is established, Sec. 34 is at once attracted. In the circumstances, we fail to see what difficulty there is in applying Sec. 34, I. P. C., in the present case. In the course of his arguments learned counsel has suggested that some of the acquitted persons might have given the fatal blows and as they have been acquitted, the appellants cannot be constructively liable for their acts. We do not think that this a correct way of looking at the matter. We are proceeding in this case on the basis that the acquittal is good for all purposes, and we cannot bring in the acquitted persons for an argument that they or any o them gave the fatal blows.
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> "It is necessary to refer now to two decisions of this Court with regard to the application of Sec. 34, I. P. C. Learned counsel for the respondent has relied on *Wasim Khan* v. *State of Uttar Pradesh.*[2] In that case the High Court found that the appellant along with two others committed the offences of robbery and murder ; but the two co-accused were acquitted. It was observed that on the finding of the High Court the appellant could be convicted by the application of Sec. 34, even though the two co-accused of the appellant were acquitted. That was a case in which the number came down to one by the acquittal of the two co-accused. The present case is a much stronger case in the matter of the application of Sec. 34, because the number of convicted persons who participated in the criminal act in furtherance of common intention of all is four. In *Prabhu Babaji Navle* v. *State of Bombay*,[3] the appellant along with four others was charged under Sec. 302 read with Sec. 34, I. P. C. ; four others were acquitted. The question was if the appellant could be convicted under Sec. 34, after the acquittal of four others. Here again

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1. (1962) 2 S. C. R. 172 at pp. 186-88.
2. (1956) S. C. R. 191.
3. A. I. R. 1956 S. C. 51.

the number fell to one, that is, below the required number. It was observed :

> 'If these four persons are all acquitted the element of sharing a common intention with them disappears ; and unless it can be proved that he shared a common intention with actual murderer or murderers, he cannot be convicted with the aid of Sec. 34.
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> 'Of course he could have been charged in the alternative for having shared a common intention with another or other unknown. But even then, the common intention would have to be proved either by direct evidence or by legitimate inference. It is impossible to reach a conclusion on the evidence in this case once the co-accused are eliminated because the whole gravamen of the charge and of the evidence is that the appellant shared the common intention with those other four and not with others who are unknown.'

"This decision can be distinguished on two grounds : (1) the number fell below the required number and (2) it was not possible to reach a conclusion in that case that the appellant shared the common intention with another or others unknown. In our case the number of convicted persons is four and each of them had the necessary common intention ; secondly, there is a clear finding that they shared the common intention with some others whose identity was not established. The decision in *Prabhu Babaji Navle* v. *State of Bombay*[1] does not, therefore, stand in our way."

Participation in the crime if an essential ingredient. Two persons charged for murder, one acquitted—Effect.

In an Allahabad case where the act on the basis of which the appellants were charged was a joint act done by him and his son in furtherance of their common intention. There was no other person named in the charge who might have shared in the act except these two. The evidence also was not to the effect that there was any other person along with them who might have committed the act. One of them, namely *A*, had been acquitted. There was, therefore, left no one with whom *R* could share his intention in furtherance of which that act might have been committed. *R*, therefore, could not be convicted of an offence under Sec. 302 read with Sec. 34 of the Indian Penal Code or Sec. 201 read with Sec. 34 of the Code. It was held that his conviction no doubt had been recorded under Sec. 201 of the Indian Penal Code but, in fact, it was one under Sec. 201 read with Sec. 34 of the Indian Penal Code. In view of the proposition arising out of Illustration (*i*) in *Krishna Govind Patil* v. *State of Maharastrha*[2] the conviction of the appellant for an offence under Sec. 302 read with Sec. 34 of the Indian Penal Code had not been correctly recorded. He could not possibly be convicted under Sec. 302, I. P. C., as there was no evidence that it was he who had committed the murder. If he could be convicted on the evidence that had been produced in the case he could be convicted only for an offence under Sec. 302 read with Sec. 34 or Sec. 201 read with Sec. 34 of the Indian Penal Code, but as for such an offence more than one person was necessary who might have participated in the crime and the case was definite that the appellant and his son and these two alone were the persons who participated and the son had been acquitted, there was left no one who could have committed the act resulting in the murder

1. A. I. R. 1956 S. C. 51.
2. 1963 A. L. J. 48 : A. I. R. 1963 All. 413

of Ram Bachan along with the appellant in furtherance of their common intention. The appellant had, therefore, to be acquitted. He can thus neither be convicted of an offence under Sec. 302 or 201 read with Sec. 34, I. P. C., nor an offence under Sec. 302 or 201 *simpliciter*.

In *Bisheshar Dhani Ram* v. *State*,[1] the conclusion arrived at by the Bench which heard that case was that there were at least three persons who must have taken part in the crime though the Court was unable to establish the identity of two persons among them. The third was convicted under Sec. 302 read with Sec. 34 of the Indian Penal Code. In the instant case the conclusion was not that one of them participated in the crime and the other was unknown though the appellant is known but the conclusion arrived at is that though the act was said to have been committed by two known persons in furtherance of their common intention and by those two persons alone and no other, one of them was not there at all. It could not, therefore, be said that the act was done by the known person alone or by him in concert with an unknown person in furtherance of their common intention.[2]

3. Right of private defence.—Deceased entering accused's house at night in prosecution of intrigue with accused's daughter. Accused and his companions causing injuries to the deceased resulting in death—Accused commits no offence. He cannot be convicted under Sec. 302—Neither Sec. 149 nor Sec. 34 applicable.[3]

4. Constructive liability.—Section 34 does not create any specific offence. It is a principle of constructive liability. A person could be convicted of an offence read with Sec. 34 if the facts of the case justify and if the accused had understood the evidence led against him, of such facts irrespective of the fact whether the section was expressly mentioned in the charge or not.[4]

Like Sec. 149, Sec. 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Sec. 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Sec. 34. In some ways the two sections are similar and in some cases they may overlap. But, nevertheless, the common intention which is the basis of Sec. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Sec. 34 can be applied disclose an element of participation in action on the

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1. (1963) 1 Cr. L. J. 645 All.).
2. Ram Din Sarabjit v. State, (1964) 1 Cr. L. J. 579 at p. 583.
3. Ragbunath Singh v. State, I. L. R. (1960) 2 All. 235.
4. *In re* Pandurangā Rao *alias* V. P. Naidu, A. I. R. 1962 A. P. 257 at p. 260 : (1962) 2 Cr. L. J. 21.

part of all the accused persons. The acts may be different ; may vary in their character, but they are all actuated by the same common intention. It is now well settled that the common intention required by Sec. 34 is different from the same intention or similar intention.

Common intention within the meaning of Sec. 34 implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.[1]

5. Sections 34 and 35.—The provisions of Secs. 34 and 35 are complementary inasmuch as the principle embodied in Sec. 35 supplements the principle embodied in Sec. 34. Thus, where several persons are concerned in committing an act which is criminal only by reason of its being done with a criminal knowledge, each of such persons who joins in the act with such knowledge is liable for the act in the same manner as if the act were done by him alone with that knowledge.[2]

6. Sections 34 and 37.—"The distinction between Secs. 34 and 37 is that while the former requires a common intention for a criminal act done by several persons (i. e. "a unity of criminal behaviour which results in a criminal offence") in which case each actor becomes liable as if that act were done by him alone, Sec. 37 deals with intentional co-operation (which, it was pointed out by Lord Sumner in *Barendra Kumar Ghose* v. *Emperor*,[3] may not be the same as a common intention) in an offence committed by means of several acts, and punishes such co-operation (provided it consists in doing any one of those acts either singly or jointly with any other person) as if it constituted the offence itself. Now if, as Lord Sumner says, intentional co-operation may not be the same as a common intention, it must, in my opinion, include action which contributes to the offence and is done with the consciousness that the offence is on foot, though without sharing intention to commit that offence."[4]

In *Makka* v. *State*,[5] Misra, J., observed as follows :

> "The applicants were charged with the offence of causing simple and grievous hurt by use of *lathis* and it is not possible to say that there were several acts which resulted in the offence of causing grievous or simple injuries. The use of Sec. 37, therefore, in convicting the applicants was misconceived. It is clear however that the case falls under Sec. 34 for there is no doubt that there was a common intention amongst the applicants to commit a crime punishable under the Penal-Code."

7. Sections 34 and 107.—Comparing this section with that defining abetment,[6] it will be seen that, while the latter punishes an *instigator simpliciter* the section demands his closer association in the actual act of crime.

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1. Mohan Singh v. State of Punjab, A I. R. 1963 S. C. 174 at p. 181 : 1962 A. W. R. 8.
2. Ghurey v. Rex, A. I. R. 1949 All. 342 at p. 345 : 1949 A. L. J. 87.
3. A. I. R. 1925 P. C. 1 : I. L. R. 52 Cal. 197.
4. Emperor v. Itwa Munda, A. I. R. 1938 Pat. 258 at pp. 261-62 · 39 Cr. L. J. 554 : 175 I. C. 300 ; 19 P. L. T. 476, *per* Dhavale, J. ; *see* also Makka v. State, A I. R. 1952 All. 435 : 1951 A. W. R. (H. C.) 315 : 6 D, L. R. (All.) 138 : 5 A. I. Cr. D. 328 : 1952 Cr. L. J. 707.
5. A. I. R. 1952 All. 435 at p. 436.
6. Section 107.

Generally speaking, an abetment is complete, though the act abetted may or may not be committed,[1] secondly, the person abetted may or may not be one capable by law of committing an offence,[2] thirdly, the person abetted may or may not have the same guilty intention or knowledge as that of the abettor,[3] fourthly, the abettor's presence may or may not be necessary at the scene of the offence[4]—all of which are the pre-requisites of one's liability under this section.

So far as Sec. 34, Indian Penal Code, is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109, Indian Penal Code, on the other hand, may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission.[5]

8. Sections 34 and 114.—The whole object of Secs. 34 and 114 is to provide for cases in which the exact share of one of several criminals cannot be ascertained, though the moral culpability of each is clear and identical. Neither of those sections should be so interpreted as to defeat the very object underlying them.[6] But Sec. 34 is wider than Sec. 114 which is, however, merely evidence evidentiary and deals with only one aspect to abetment. The one creates liability in one for an act done by the other, whereas Sec. 114 and the other sections dealing with abetment deal with a closer association of one criminal with another.

9. Sections 34 and 120-A.—There is not much substantial difference between conspiracy as defined in Sec. 120-A of the Penal Code and acting in furtherance of a common intention as contemplated by Sec. 34. While in the former the gist of the offence is the bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under Sec. 34 is the commission of a criminal act in furtherance of a common intention of all the offenders – which means that there should be a unity of criminal behaviour resulting in something for which an individual would be punishable if it were all done by himself alone.[7] If evidence as to conspiracy under Sec. 120-B, I. P. C., has been rejected the same evidence cannot be used for finding a common intention proved under Sec. 34, I. P. C.[8]

Section 34, I. P. C., requires not only common intention but also participation in the crime. When a specific offence is committed by some of the conspirators in pursuance of the conspiracy, the common intention of all

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1. Section 108. Expl. (2).
2. Section 108, Expl. (3).
3. *Ibid.*
4. *Ibid.*
5. Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra, (1971) 1 S. C. J. 43 at p. 47.
6. Jaimangal v. Emperor, A. I. R. 1936 All. 437 at p. 439 : 37 Cr. L. J. 864 : 163 I. C. 848 : 1936 A. W. R. 298 : 1936 A. L. J. 462.
7. Provincial Government, C P. & Berar v. Dinanath. Lala Ganpatrai, A. I. R. 1939 Nag. 263 at p. 264 : I. L. R. (1939) Nag. 645 : 184 I. C 412 : 41 Cr. L. J. 27 : 1939 N. L. J. 373.
8. Ram Nath Madhoprasad v. State of Madhya Pradesh, A I. R. 1953 S. C. 420 at p. 424.

would not be enough to fasten the guilt on all of them. It is only those who had actually participated in the crime that would be held responsible for its commission. The number of persons figuring in the specific charges would not, therefore, necessarily be the same as in the conspiracy charge and the difference in number would not amount to any inconsistency in the charges. Section 34, I. P. C., is applicable when some criminal act is done jointly in furtherance of the common intention of all while a conspiracy is merely an agreement to commit a crime. Addition of Sec. 34 to a charge does not convert it to a conspiracy charge. There was, therefore, no defect in the charges.

The specific charges being linked by the common charge of conspiracy their joinder at one trial was not illegal [1]

10. Sections 34 and 149.—There is a clear distinction between the provisions of Secs. 34 and 149, I. P. C., and the two sections should not be confused. The principal element in Sec. 34 is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation Sec. 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. On the other hand, there is no question of common intention in Sec. 149. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or is such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence although there may have been no common intention and no participation by the other members in the actual commission of that offence.[2]

Under Sec. 34 when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The words "in furtherance of the common intention of all" are a most essential part of Sec. 34 of the Indian Penal Code. It is common intention to commit the crime actually committed. This common intention is anterior in time to the commission of the crime. Common intention means a pre-arranged plan. On the other hand, Sec. 149 of the Indian Penal Code speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between "common intention" under Sec. 34 and "common object" under Sec. 149 is of vital importance. The aspect of the accused persons being likely to cause death would be relevant under Sec. 149 and not under Sec. 34 of the Indian Penal Code for the obvious reason that under Sec. 34 it has to be established that there was the common intention before the participation by the accused.[3]

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1. Ram Raj Singh v. State of West Bengal. A. I. R. 1969 Cal. 481 at p. 488.
2. Mannam Venkatdri v. State of Andhra Pradesh A. I. R. 1971 S. C. 1467 at pp. 1472-73.
3. Devilal v. State of Rajasthan, A. I. R. 1971 S. C. 1444 at pp. 1446-47.

Section 34, I. P. C., does not create any distinct offence but it lays down the principle of constructive liability. It refers to cases in which several persons both intend to do and do an act. Section 149, I. P. C., is of wider scope than Sec. 34, I. P. C. and in a case where Sec. 149 applies a constructive liability arises in respect of those persons who do not actually commit the offence, if the offence is committed in prosecution of their common object. Section 34 stipulates that the act must have been done in furtherance of common intention. In order to incur joint liability for an offence there must be a pre-arranged and .pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation, and though the plan may be formed suddenly.[1] In order that Sec. 34, I. P. C., may apply, it is not necessary that the prosecution must prove, that the act was done by a particular or a specified person. The language of the section does not bear out this contention. In fact, the section is intended to cover a case where a number of persons act together and, on the facts of the case, it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime.[2] Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Sec. 34. By an application of this section the accused is not charged for anything done by one of his companions but for the act done by himself along with others.[3] While the leading feature of Sec. 34 is the element of participation in action, whereas membership of the assembly at the time of the committing the offence is the important element in Sec. 149. The two sections have a certain resemblance and may to certain extent overlap, but it cannot be said that both have the same meaning.[4] There is much difference in the scope and applicability of Secs. 34 and 149, though they have some resemblance and are to some extent overlapping. Section 34 does not by itself create any offence whereas it has been held hat Sec. 149 does.

The two sections have resemblance but not same meaning.

In a charge under Sec. 34, there is active participation in the commission of the criminal act; under Sec. 149, liability arises by reason of the membership of the unlawful assembly with a common object, and there may be no active participation at all in the perpetration or commission of the crime.[5] Section 34 does take into account the fact or the participation of every individual offender in the offence therein described as a "criminal act" as well as his mental state therein connoted by the word "intention". Section 149 completely ignores both these factors.[6] Section 34 does not create an offence and its provisions merely lay

Distinction between the two sections.

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1. Arjuna v. State, (1961) 3 Orissa J. D. 875.
2. Oswal Danji Tejsi v. State, A. I. R. 1961 Guj. 16 at p 18 : (1961) 1 Cr. L. J. 251.
3. Bachan Singh Basant Singh v. State, A. I. R. 1955 Pepsu 162 at p. 163 : 1956 Cr. L.J. 1617 (D. B.).
4. Chikkarange Gowda v. State of Mysore, A. I. R. 1956 S. C. 731 at pp. 735-36 : 1957 Ker. L. T. 25 : 1956 Cr. L. J. 1365 ; *see* also Gulab v. State, A. I. R. 1951 All. 660 : 52 Cr. L. J. 924 : 1951 A. L. J. 406 (F. B).
5. Willie (William) Slaney v. State of Madhya Pradesh, A. I. R. 1956 S. C. 116 at p. 134 : (1955) 2 S. C. R. 1140 : 1956 S. C. J. 182 : 1956 S. C. A. 183 : 1956 A. W. R. (Supp.) 38 : (1956) 1 M. L. J. (S. C.) 100 : 1956 Cr. L. J. 291 ; *see* also Barendra Kumar Ghose v King-Emperor, A. I. R. 1925 P. C. 1 : 52 I. A. 40 : 29 C. W. N. 181 : 27 B. L. R. 148 : 26 Cr. L. J. 431 (P. C.) and Karnail Singh v. State of Punjab, A. I. R. 1954 S. C. 204 : 1954 S.C.R. 904: 1954 Cr. L.J. 580 (S.C.).
6. Om Prakash v. State A. I. R. 1956 All. 241 at p. 244 : 1956 Cr. L. J. 452 : I. L. R. (1956) All. 447.

down a rule of law while Sec. 149 creates a definite head of criminality. Common intention is the decisive test under Sec. 34 but the common object of the members of the unlawful assembly is the basis of Sec. 149. Participation in the criminal act is the gist of the offence under Sec. 34 while membership of the unlawful assembly is the foundation of liability under Sec. 149.[1] In order to apply Sec. 34, the criminal act must have been done by all the accused in furtherance of their common intention, whereas for the application of Sec. 149 it is not necessary that all the accused must have committed the criminal act.[2]

Where a person is tried along with four other accused for committing an offence and some of them are acquitted by the Court, the question arises, whether in a subsequent trial against others, the Court is entitled to hold that earlier acquittal of the accused in prior criminal prosecution was illegal. In *Karam Singh* v. *State of Madhya Pradesh*,[3] Sarkar, J., speaking for the Supreme Court said : "Before the High Court the appellant contended that Ramhans having been acquitted the appellant could not be held constructively liable for the offences with the aid of Sec. 149 of the Code. The High Court rejected his contention relying upon the judgments of this Court in *Marachalil Pakku* v. *State of Madras*,[4] *Bimbadhar Pradhan* v. *State of Orissa*,[5] and *Sunder Singh* v. *State of Punjab*."[6] In the Supreme Court the only question argued was whether in view of the acquittal by the learned Sessions Judge of Ramhans, it was open to the High Court that the appellant was guilty of murder under Sec. 302 read with Sec. 34 of the Indian Penal Code by finding on the evidence that Ramhans who shared a common intention with the appellant shot the deceased dead and attempted to murder Ram Chandra. The Supreme Court after a review of the case-law stated: "In spite of the acquittal of a person in one case it is open to the Court in another case to proceed on the basis—of course if the evidence warrants it—that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the latter case that the person tried in it was guilty of an offence under Sec. 34 by virtue of having committed the offence along with the acquitted person. There is nothing in principle to prevent this being done."

Whether in a subsequent trial Court can declare earlier acquittal illegal.

Supreme Court's conclusions.

The Judicial Commitee of the Privy Council in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*,[7] observed: "The effect of a verdict of acquittal . . . is not completely stated by saying that the person acquitted cannot be tried for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

The constructive liability under Sec. 34 may not in all cases be different from that under Sec. 149, as when common intention and common object become equivalent and participation in the crime is coupled with participation in the assembly, in which situation the two elements of constructive liability under both the sections are present.[8] Under Sec. 34

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1. *In re* P. Ramulu, A. I. R. 1956 A. P. 247 at p. 248 : 1956 Andh. W. R. 664 : 1956 Cr. L. J. 1889.
2. Ram Chandra v. State, 1957 Cr. L. J. 270 at p. 272 : 1956 A. W. R. (H. C.) 696.
3. A. I. R. 1965 S C. 1037 at pp. 1038, 1039.
4. A. I. R. 1954 S. C. 648.
5. A. I. R. 1956 S. C. 469 : 1956 Cr. L. J. 831.
6. A. I. R. 1962 S. C 1211.
7. 1950 A. C. 458 at p. 459.
8. State of Bihar v. Rahim Nadaf, A. I. R. 1957 Pat. 52 at p. 56 : 1957 Cr. L. J. 216 : I. L. R. 35 Pat. 671.

it is the intention and under Sec. 149 the knowledge that it is necessary to prove.[1] Common intention and common object differ but they both deal "with combination of persons who become punishable as sharers in an offence".[2] To attract the operation of Sec. 34 and fix constructive guilt on each of several accused under that section, there must be participation in action, with a common intention, although the different accused might have taken different parts; and unlike under Sec. 149 before any of them can be convicted for an offence read with Sec. 34 the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such findings is illegal.[3] Section 34 deals with the liability of the persons who had common intention when an illegal act is committed in furtherance of that common intention. Knowledge that an offence is likely to be committed is not what is contemplated in Sec. 34. While this section deals with the liability of persons when an offence is committed in furtherance of a common intention to commit that act, Sec. 149 deals with the liability of persons in respect of an offence when they had the knowledge of there being a likelihood of being committed in prosecution of their common object. That section does not deal with common intention to commit the offence. In effect the common object with which it deals may be one which is lawful while the commcn intention contemplated by Sec. 34 is with reference to the committing of a criminal act. It may be observed that Sec. 34 does not deal with the liability of persons for an offence likely to be committed in the course of what was intended by them, but deals with only the liabilities of the persons who intended to commit a criminal act, when that act is committed. It may be further added that even in a case where an offence is committed by one person another person who was with him at the time the offence was committed cannot be punished, though he had a similar intention, that is because, the section deals with the liability of persons for a criminal act done in furtherance of a common intention.[4] Section 34 refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases Sec. 149 only may be applicable, but Sec. 34 is not. Section 149 will, of course, apply if that other act was done in the prosecution of the common object of all.[5]

Distinguishing features of the two persons.

It should be observed that the words used in Sec. 34 are "in furtherance of the common intention of all," whereas in Sec. 149 describing a similar community of intention and design of an unlawful assembly, the words used are "in prosecution of the common object of that assembly", which cannot mean the same thing as the words used

1. Chhota Singh v. State, I. L. R. (1957) Cut. 642.
2. B. N. Srikantiah v. State of Mysore, A. I. R. 1958 S. C. 672 at p. 675 : 1958 S. C. J. 918 : 1958 M. L. J. (Cr.) 721 : 1958 Cr. L. J. 1251.
3. Fazoo Khan v. Jatoo Khan A. I. R. 1931 Cal. 643 : 33 Cr. L. J. 92 : 35 C. W. N. 463, *per* Rankin, C. J., followed in Rajaram Raghu Patil v. State, A. I. R. 1958 Bom. 469 at p. 470 : I. L. R. (1957) Bom. 173 : 59 Bom. L. R. 43 : 1958 Cr. L. J. 1385.
4. *In re* Basappa. A. I. R. 1951 Mys. 1 at p. 4.
5. Faiyaz Khan v. Rex, A. I. R. 1949 All. 180 at p. 184 : 1948 A. W. R. (H.C.) 296 ; *see* also Anir Uddha Mana v. Emperor, A. I. R. 1925 Cal. 913 : 26 Cr. L. J. 827.

here.[1] What they do mean will, however, be clear by a comparison between the two sections : *first*, this section is wider as regards the complicity of criminals, since it affects them regardless of number, whereas Sec. 149 limits it to persons whose number is not less than five ; *secondly*, while the common object under this section is undefined, that under Sec. 149 is limited by Sec. 141 ; *thirdly*, a conviction under this section involves co-operative criminal act,[2] whereas under Sec. 149 all members of an unlawful assembly become constructively liable for an offence committed by one or more of them. In the one case, there must be proof of the criminal *act* while, in the other, liability would arise from a mere criminal intention or knowledge.

Once it is established that at the time of the commission of the murders, a particular accused was a member of that unlawful assembly, he would be guilty of murder by the operation of Sec. 149, I. P. C. and his conviction under Sec. 302 read with Sec. 149, I. P. C., must inevitably follow.

In the absence of the prejudice, there is no legal bar to the recording of a conviction under Sec. 302 read with Sec. 149, I.P.C., when the accused were charged under Sec. 302 read with Sec. 34, I. P. C.[3]

It is settled that Sec. 34 is only a rule of evidence and does not constitute a substantive offence. An Appellate Court or a revisional court is entitled to apply Sec. 34 while maintaining conviction.[4]

The distinction between "intention" and "object" is very thin, intention is the volition of the mind immediately preceding the overt act while object is the end to which effect is directed, the thing aimed at and that which one endeavours to attain or carry on.[5]

11. Sections 34, 120-A and 149.—Turning, now, to the distinction between this section, Sec. 149 and Sec. 120-A, which defines criminal conspiracy it would be observed that the last-named section is wider than this section or Sec. 149 in that a mere agreement between two or more persons, followed by an overt act by any of them in pursuance of the agreement, amounts to criminal conspiracy, though the act in itself may not amount to an offence, but under this section, that act must in itself be criminal. In practice the three sections may, at times, overlap one another, but the main distinction between them lies in the fact that while under this section criminality ensues from the doing of a criminal act in furtherance of the common intention criminal liability under Sec. 120-A only ensues from the moment two or more

Main distinction between the three sections.

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1. *Per* Jackson, J., in Sahed Ali, 11 B. L. R. 347 (F. B.), approved in Barendra Kumar Ghose, I. L. R. 52 Cal. 197 at p. 212 (P. C.), followed in Bhondu Das, I. L. R. 7 Pat. 753 ; Mahaddi, I. L R 5 Cal. 871 at p. 873; Sahibzada v. Crown, I. L. R. 1950 Pesh. 24 : 51 Cr. L. J. 1052 ; Faiyaz Khan v. Rex, A. I. R. 1949 All. 180 : 1948 A. W. R. (H. C.) 296 ; Dalip Singh v. State, 1953 S. C. 364 : 1953 M. W. N. 642 ; Kassim Pillai v. State, A. I. R. 1952 T. C. 565 : 1951 Ker. L. T. 735.
2. Fazoo Khan v. Jatoo Khan, A. I. R 1931 Cal. 643 : 35 C.W.N. 463 *In re* Basappa, A. I. R. 1951 Mys. 1 : 51 Cr. L. J. 1603 ; Atma Singh Hazara Singh v. State, A. I. R. 1954 Punj. 126 : 56 P. L R 43.
3. *In re* Poreddi Venkata Reddy, A. I. R. 1961 A. P. 23 at p. 28 : (1961) 1 Cr. L. J. 42.
4. Umrao Singh v. State of M. P., A. I. R. 1961 M. P. 45 at p. 46 : 1961 M. P. L. J. (Notes) 309.
5. Himirka Lokanath v. State, (1964) 1 Cr. L. J. 114 at p. 117.

persons agree, which confines *mens rea* within narrower limits, though, if there is an agreement, the act need not be criminal, while under this section there need be no proof of agreement, since a mere common intention would suffice but in that case the act itself must be criminal and proved to have been done in furtherance of the common intention. Section 149 assumes the presence of at least five participants in the crime, which, again, may or may not be the case covered by this section or Sec. 120-A. But the elements constituting the *mens rea* are there wider in that, as required by this section, there need be no common intention, nor common agreement as required by Sec. 120-A, but merely common object, or failing this, even knowledge on the part of any member that the object of that assembly was to commit any of acts enumerated in Sec. 141, though he may himself have had neither the intention to commit that act nor have agreed to do so. Summing up the three sections, it would be seen that the evidence of criminality under the three sections varies according to the degree of the criminal intent or criminal act, though under Sec. 149 there is a further condition that the offenders must at least be five in number. Where the intention is criminal, the act need not be proved to be criminal; but where the intention is not necessarily criminal, the act itself must be criminal to furnish evidence of criminal intention. In short, there must be criminality either disclosed in the act or in the intention.

Evidence on criminality under the three sections varies according to degree of criminal intent, etc.

Take an example : *A* plans a dacoity and invites *B*, *C* and *D* to join him. They agree to commit dacoity at *P*'s house. Here *A* has abetted the offence of dacoity by *B*, *C* and *D* and all the four become members of a criminal conspiracy and would be liable to punishment under Sec. 120-B. They are, of course, not yet liable under Sec. 34, 114 or 149. Now *A* says to *B*, *C* and *D* "I am an old man and will only keep a watch outside *P*'s house" which he does ; *B*, *C* and *D* enter *P*'s house and rob *P*. Here *A* becomes liable under Sec. 114 for the dacoity to the same extent as if he had actually joined in robbing *P*. Now, if while proceeding to *P*'s house, *A*, *B*, *C* and *D* meet *E* and ask him to join them in the dacoity and he refuses, *A*, *B*, *C* and *D* all become liable as abettors under Sec. 115. Now suppose *E* agrees and joins the four, the five become an unlawful assembly under Sec. 141 ; and suppose *E* gets hurt, while crossing a ditch and remains behind, while the remaining four proceed to rob *P*, *E* is, nevertheless, liable with the four by reason of Sec. 149, but Sec. 34 has not yet come into play. But suppose when *E* joined he warned his companions that while he was for dacoity he was not for shedding blood. But *A* and *B* were enemies of *P* and had previously decided to kill him. Here the common intention of *A* and *B* was to kill *P*, though the common object of all the five was to dacoit *P*. Section 34 begins to function. Now suppose after the dacoity is over, *B* gives *P* a fatal stroke, *B*'s stroke would be treated as *A*'s stroke as well, by reason of Sec. 34, though *C*, *D* and *E* would not be liable for the murder of *P*. Now suppose in committing dacoity one of them *C*, is seized by *P*, to rescue whom *B*, *C* and *D* strike *P* with *lathis* of which *P* dies—here *B* had intended to kill *P* in any case, and he, with *A* must share the consequence of *B*'s act, while the common *object* of the assembly being to dacoit *P* in prosecution of which *B*, *C* and *D* kill *P*, therefore, by reason of Sec. 149 all five become *prima facie* liable for the murder of *P*.

Example.

Now since all the five have the same intention and the same object, namely, of committing dacoity, it follows that the *mens rea* of this section and that of Sec. 149 overlap and if all the five were armed with lethal weapons,

the second condition in Sec. 149, is also present, and, so far as *A* is concerned, his previous abetment and his presence at the crime makes him liable for dacoity under Sec. 114, murder under Sec. 396 and conspiracy under Sec. 120-A and all alike would be equally guilty of that offence by the application of other principle, e. g. that stated in Sec. 149. It will, thus, be seen that since all these sections are intended to penalise participation in the crime with diverse intentions and objects and at its various stages, they cannot be regarded as mutually exclusive, and at some stage and in some cases all of them may become equally applicable.

12. Principle.—The section merely prescribes a measure of criminal liability in one aspect of complicity in a crime, that is, that in which several persons participate in design and in action while order sections, already referred to, deal with other aspects of complicity. They all deal with what is known in English law as accessory before the fact.

13. Procedure and practice.—The omission to mention Sec. 34 in the charge, be it of a substantive offence or be it of a substantive offence read with Sec. 149, I. P. C., is no bar to the recording of the conviction for that offence read with Sec. 34, I. P. C., if the facts alleged and proved justify the application of Sec. 34, I. P. C., against the accused.[1] In a recent Supreme Court case,[2] where the accused were charged with murder under Sec. 302, read with Sec. 149, I. P. C., it was held that recourse could not be had to Sec. 34 as the accused were not charged with that even in the alternative, and the common intention required by Sec. 34 and the common object required by Sec. 149 are far from being the same thing.[3] But in a more recent Supreme Court case,[4] it has been held that the observations in *Dalip Singh's* case[5] could not be read as an authority for the broad proposition that in law there could be no recourse to Sec. 34 when the charge was only under Sec. 149. It is true that there is substantial difference between the two sections but as observed by Lord Sumner in *Barendra Kumar Ghose* v. *Emperor*,[6] they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Sec. 149 overlaps the ground covered by Sec. 34. If the common object which is the subject-matter of the charge under Sec. 149 does not necessarily involve a common intention, then the substitution of Sec. 34 for Sec. 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the

Common intention under Sec. 34 and common object under Sec. 149 are not the same thing.

Substitution of Sec. 34 for 149 if permissible.

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1. Sheo Ram v. Emperor A. I. R. 1948 All. 162 at p. 163 : 1948 A. W. R. (H. C.) 1 ; *see* also Kunwar Pal Singh v. Emperor, A. I. R. 1948 All 170 : 49 Cr. L. J. 140 : 1947 A. L. J. 627 : 1947 A. W. R. (H.C.) 401 ; Waryam Singh, A. I. R. 1941 Lah. 214: I. L. R (1941) Lah. 423: 43 P. L. R. 159 : 43 Cr. L. J. 660 : 195 I. C. 58 ; Nga Tha Htin v. Emperor, 158 I. C. 603 : A. I. R. 1935 Rang. 304 : 36 Cr. L. J. 1393 ; Bhondu Das, I.L.R. 7 Pat. 758 ; Hari Lal, I. L. R. 14 Pat. 224 ; Lachman Singh v. State, A. I. R. 1952 S. C. 167 : 1952 S. C. R. 839 ; 1952 M. W. N. 389 ; 1952 Cr. L. J. 863.
2. Dalip Singh v. State, A. I. R. 1953 S. C. 364 at p. 366 : 1953 M. W. N. 642 : 1953 S. C. J. 532.
3. *See* also Bishwa Nath v. Emperor, A. I. R. 1946 All. 153 : 47 Cr. L. J. 532 : 1945 A. L. J. 531.
4. Karnail Singh v. State of Punjab, A. I. R. 1954 S. C. 204 at p. 207 : 1954 S. C. R. 904.
5. A. I. R. 1953 S. C. 364 : 1953 M. W. N. 642 : 195 S. C. J. 532.
6. A. I. R. 1925 P. C. 1.

charge under Sec. 149 would be the same if the charge were under Sec. 34, then the failure to charge the accused under Sec. 34 could not result in any prejudice and in such cases the substitution of Sec. 34 for Sec. 149 must be held to be a formal matter.[1]

Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Sec. 34. By an application of this section the accused is not charged as being responsible for anything done by one of his companions but for the act done by himself along with others. Where the offence has been proved to have been committed by the accused himself, he can be convicted for his act and offence. Where, therefore, two persons were charged under Sec. 302 read with Sec. 34 and one of them was acquitted and the other convicted, it was held that the conviction was legal and that even if there was an omission or defect in the charge (and the accused never raised prejudice), the provisions of Secs. 535 (1) and 537, Code of Criminal Procedure, would cure the defect as no failure of justice had been occasioned.[2]

Similar intention to be distinguished from common intention.

Similar intention is to be distinguished from the common intention. This is a distinction of fundamental importance. When there is neither any proof of conspiracy or premeditation to kill nor is there any other evidence of common intention and where the accused have also not been given any notice either by framing a charge under Sec. 34, I. P. C., or by putting the necessary question in their examination under Sec. 342, Cr. P. C., that this was the case of the prosecution which they had to meet. There could be no punishment given to the accused on the ground of any vicarious liability but each of the appellant could be convicted and punished for what was actually done by him.[3]

Failure to mention Sec. 34 in the charge—Effect.

Failure to mention Sec. 34 in the charge is not a defect for the section does not create a substantive offence which should be mentioned in the charge.[4] The common object of the unlawful assembly was merely to administer a chastisement to the deceased and the learned Judges of the High Court did not hold that though the common object was to chastise the deceased, the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The conviction under Sec. 302 recd with Sec. 149, I. P. C., was not justified in law. When the charge framed against them gave them no notice of any joint liability on the basis of a separate common intention to kill the deceased. On the finding of the High Court, none of the members of the unlawful assembly had the intention of killing the deceased Sec. 34 cannot be applicable.[5]

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1. *See* also Kashiram Nanda v State. A. I. R. 1954 M. B. 143 : 1954 M. B. L. J. 161 ; Madhuwa Pyarelal Kunbi v. State of Vindhya Pradesh, A. I. R. 1954 V. P. 36 : 55 C. L. J. 1303.
2. Bachan Singh v. State, A. I. R. 1955 Pepsu 162 at p. 168 : 1955 Cr L. J. 1617 (D. B.). ; *see* also Nanak Chand v. State, A. I. R. 1955 S C. 274.
3. Dewji Moti Bhil v. State, A. I. R. 1955 M. B. 26 at p. 27 : 1955 M. B. L. R (Cr.) 130.
4. Shivappa v. Hyderabad State, 1955 Cr. L. J. 958 at p. 965: I. L. R. (1954) Hyd. 147.
5. Chikarange Gowda v. State of Mysore, A. I. R. 1936 S. C. 731 at pp. 735, 736 : 1957 Ker. L. T. 25.

The appellant was convicted of the offences of murder and robbery by the Sessions Judge by the application of Sec. 34, I. P. C. The charge framed, however, was one of murder and robbery and there was no mention of these offences having been committed where furtherance of a common intention the High Court found that the appellant along with two others committed these offences and they shared in the goods robbed. The Supreme Court was satisfied that it establishes the offences of murder and robbery against the appellant and not merely the minor offence of robbery or theft.[1]

The charge is a rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside prejudice will have to be made out.[2] As Chandra Sekhar Ayer, J., observed in his judgment, in such a case evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is relevant.

Whereas Sec. 34, I. P. C., does take into account the fact of the participation of every individual offender in the offence which is therein described as a "criminal act" as well as his mental state which is therein connoted by the word "intention", Sec. 149, I.P.C., completely ignores both these factors. Section 34, I.P.C., is merely declaratory of a rule of criminal liability and does not create a distinct offence but Sec. 149 is not merely a declaratory provision and does create a distinct offence.[3]

Ingredients of Secs. 34 and 149 differ in material respects.

The ingredients of Sec. 34 and that of Sec. 149 differ in some material particulars though they also overlap under certain circumstances. Section 34 does not create an offence and the provisions thereof merely lay down a rule of law while Sec. 149 creates a definite head of criminality. While the common intention is the decisive test under Sec. 34 the common object of the members is the basis of Sec. 149. While membership of an unlawful assembly is the foundation of liability under Sec. 149 participation in the criminal act is the gist of the offence under Sec. 34. Where there is overlapping of the facts bringing a case both under Sec. 34 and under Sec. 149 if an accused is charged for an offence involving a common object to commit murder, he cannot possibly be prejudiced by the omission of Sec. 34 in the charge. Further, even in a case where the accused are charged *simpliciter* only for committing murder, there is nothing in law which prohibits a court from convicting them under Sec. 302 read with Sec. 34 if the evidence justified it and if the accused are not prejudiced by the absence of an express charge under Sec. 34. This principle is embodied

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1. Wasim Khan v. State of Uttar Pradesh, A. I. R. 1956 S. C. 400 at p. 404 : 1956 S. C. R 191.
2. Willie (William) Slaney v. State of Madhya Pradesh, A. I. R. 1956 S. C. 116 at p. 137 : (1955) 2 S. C. R. 1140.
3. Om Prakash v. State, A. I. R. 1956 All. 241 at p. 244 : 1956 Cr. L. J. 452.

in Sec. 225 of the Code of Criminal Procedure. In considering the legality of the conviction in such circumstances, the test whether the facts which it was necessary to prove and on which evidence was given of the charge upon which the accused was actually tried are the same as the facts upon which he was convicted.[1]

Bombay case.

Where the alternative charge against the appellant and the co-accused was that in furtherance of their common intention to commit an offence under Sec. 201, they had committed the said offence and the co-accused were acquitted, it was held that "the appellant can still be convicted of the offence by the operation of Sec. 34 if it is proved that the crime was committed in furtherance of the common intention of himself and others."[2] The appellant had to answer a charge under Sec. 302 read with Sec. 34 and alternatively, a charge under Sec. 201 read with Sec. 34. It is submitted that common intention postulates that it is shared by at least two persons, and once the co-accused have been acquitted, the element of common intention drops out. The conviction in the Bombay case could be justified on the ground that there was sufficient evidence to prove the appellants guilt under Sec. 201 and that no prejudice had been caused to the appellant by the inclusion of Sec. 34 in the charge. The judgment contains a bare reference to the latest decision of the Supreme Court without citing it.

It is always desirable that this should be indicated in the charge.

Rajastban case.

But where by oversight or otherwise specific mention of Sec. 34 is not made in the charge, that defect by itself would not be fatal, if otherwise the Court can come to the conclusion that the accused had notice that they would be liable under Sec. 34 also, for after all Sec. 34 is merely an explanatory provision in the Code, and does not create any specific offence itself.

Where each one of the accused was told that he and the other were both responsible for the murder and therefore he was guilty under Sec. 302, Indian Penal Code, it was held that it was sufficient indication to the accused that each of them would be held liable for the joint act of both of them.[3]

Supreme Court's case.

In *Suraj Pal* v. *State of U. P.*,[4] their Lordships of the Supreme Court observed that "the framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the foundation for a conviction and sentence therefor". As Wanchoo, C. J. (as he then was) rightly pointed out in Rajasthan case, that the words "criminal liability" in the quoted passage are limited by the words "constituting an offence". And it is clear that as Sec. 34 creates of itself no offence, it cannot be the basis of a charge.

When on the facts of a given case there could be no difference between the object or the intention with which the offence in question was committed, both Secs. 149 and 34 could be invoked in aid as they overlap to some extent but the Court cannot enter a conviction for an offence read with either section

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1. *In re* Ramulu, A. I. R. 1956 Andh 247 at pp. 248, 249, 250 : 1956 Andh. W. R. 664 : 1956 Cr. L. J. 1389.
2. Mathur Dhana v. State, A. I. R. 1956 Bom. 393 at p. 396 : 1956 Cr. L. J. 715.
3. State v. Babulal and Bhcrumal, A. I. R. 1956 Raj. 67 at p. 75 : I. L. R. (1956) 6 Raj. 359.
4. A. I. R. 1955 S. C. 419 at p. 422 : 1955 S. C. R. 1332.

unless it finds the elements justifying its application to have been made out on the evidence.[1] A mere mention of relevant sections in the charges to which accused persons are called upon to plead or when entering convictions against them will not satisfy the conscience of an Appellate Court that the Lower Court has applied its mind to the question whether the elements attracting the application of the rules relating to constructive liabilty for crime are present in the case nor would such mere mention of the sections clothe accused persons with proper notice of the crimes for which they are sought to be made constructively liable. The learned Chief Justice delivering the judgment of the Bench added that these remarks apply with equal force to a charge relating to the abetment of an offence.

A charge of kidnapping and extortion in pursuance of a criminal conspiracy between the two appellants having been established against one of them, the Supreme Court held that such daring offences would necessarily have called for acting, planning and co-operation of both the appellants and (circumstantial) evidence establishing the charge of conspiracy could equally be relied upon for establishing the charge with the aid of Sec. 34. The concurrent findings of the two Courts below on the question of common intention was not only entitled to great weight but was also held to be legally correct.[2]

Where there is nothing in the statement of the accused before the Sessions Court (which must be taken as a whole) to show that the accused had any common intention with other people to commit the murder, he was not responsible for the acts of others which were not committed in furtherance of the common intention.[3] In this case the only act of the accused was to hold the legs of the deceased at the time of the murder and this was not a voluntary act but committed under duress and so it was not an offence by virtue of Sec. 34.

Where offences under Secs. 304 and 324 are proved against one only of several accused, he can be convicted of them even though Sec. 34 is not applicable.[4]

There is no gainsaying that unless there was sufficient evidence to establish common intention Sec. 34, Penal Code, could not be pressed into use and all the accused could not be convicted under Sec. 302, Penal Code.[5] This proposition of law seems to be rather widely stated.

Where an accused is charge with others for a substantive offence under Sec. 201[6] or under Sec. 302[7] read with Sec. 34 and the others are acquitted

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1. Krishna Pillai Vasu Pillai v. State, A. I. R. 1956 T.C. 230 at p. 232 : I.L.R. (1956) T. C. 1 : 1956 Ker. L. T. 30 : 1956 Cr. L. J. 1358 (D. B.).
2. Ram Chandra v. State of U. P., A. I. R. 1957 S. C. 381 at p. 389 : 1957 Cr. L. J. 559.
3. Bachchan Lal v. State, A. I. R. 1957 All. 184 at p. 187 : 1957 A. L. J. 20 : 1956 A. W. R. (H. C.) 86 : 1957 Cr. L, J. 344 (D. B.).
4. Ram Chandra v. State, 1959 A. W. R. (H. C.). 696 this case went on appeal to the Supreme Court which confirmed the convictions of the appellants under Secs. 364 and 386, read with Secs. 120B and 34; Ram Chandra v. State of U. P., A. I. R. 1957 S.C. 381 at p. 389: 1957 Cr. L J. 559.
5. Shariff Ahmad v. State, A. I. R. 1957 All. 50 at p. 53 : I. L. R. (1956) 2 All. 188
6. *In re* Sreenivasulu, (1957) 2 Andh. W. R. 63 : 1957 M. L. J. (Cr.) 361.
7. Basanta Goshain v. State, A. I. R. 1957 Assam 45.

the accused can nevertheless be convicted of the substantive offence provided the evidence on record was sufficient to establish the guilt and it is of a consequence that there was not an alternative charge for the substantive offence. It is not necessary to frame a charge under Sec. 34 for convicting a person under Sec. 498 read with Sec. 34 provided the facts and circumstances establish common intention.[1]

In cases where the common object required by Sec. 149 becomes equivalent to common intention required by Sec. 34 and participation in the unlawful assembly is coupled with participation in the crime, no separate charge need be framed for each of them as required by Sec. 233, Code of Criminal Procedure and the conviction of the accused may be altered from one under Sec. 302 read with Sec. 149 to that under Sec. 302 read with Sec. 34 without there being a separate charge for the latter as required by Secs. 236 and 237, Code of Criminal Procedure.[2]

Conviction of an accused person under Sec. 420 itself though charged under Sec. 420 read with Sec. 34, would be valid if the actual findings support it and no prejudice is shown to have occurred.[3]

The object of a charge is to warn the accused person of the case he is to answer. It cannot be treated as if it was a part of a ceremonial. The omission to mention Sec. 34 in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. Although there is a difference in "common object" and "common intention", they both deal "with combinations of persons who become punishable as sharers in an offence" and a charge under Sec. 149, I. P. C. is no impediment to a conviction by the application of Sec. 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all.[4]

Where in a case of grievous hurt, those of the accused alleged to be actual assailants were acquitted and the remaining accused was convicted under Sec. 326 read with Sec. 34, the conviction could not be upheld because there was no person who actually caused the grievous hurt.[5]

Some of the accused were not public servants. Accused who was a public servant convicted under Sec. 5 (2) of the Prevention of Corruption Act instead of under the said section read with Sec. 34 of the Indian Penal Code. *Held* that there was no failure of justice by reason of the High Court convicting him for substantive offence under Sec. 5 (2) of the Prevention of Corruption Act.[6]

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1. Alamgir v. State, A. I. R. 1957 Pat. 285 at p. 288 : 1956 B. L. J. R. 184 : 1957 Cr. L. J. 653.
2. State of Bihar v. Rahim Nadaf, A. I. R. 1957 Pat. 52 at p. 56 : I. L. R. 35 Pat. 671 : 1957 Cr. L. J 216, relying on Lachman Singh v. State, A. I. R. 1952 S. C. 167 : 1952 Cr. L J. 863 and Karnail Singh v. State of Punjab, A. I. R. 1954 S. C. 204 : 1954 S. C. R. 904.
3. Mobarik Ali Ahmed v. State of Bombay, A. I. R. 1957 S. C. 857 at p. 866 : (1958) 1 M. L. J. (Cr.) 42 : 1957 Cr. L. J. 1346, following Willie (William) Slaney v. State of Madhya Bharat, A I. R. 1956 S. C. 116 : (1955) 2 S. C. R. 1140
4. B N. Srikantiah v. State of Mysore, A. I. R. 1958 S. C. 672 at p. 675 : 1958 S. C. J. 918 : 1958 M. L. J. (Cr.) 721 : 1958 Cr. L. J. 1251.
5. Rajaram Raghu Patil v. State, A I. R. 1958 Bom. 469 at p. 470 : I. L. R. (1957) Bom. 173 : 59 Bom. L. R. 43 : 1958 Cr. L. J. 1385.
6. Major E. G. Barsay v. State of Bombay, A. I. R. 1961 S. C. 1762 : (1961) 2 Cr. L. J. 828.

A serious rioting with deadly weapons took place in the course of which two persons were butchered. Deceased sustained a gun-shot and injuries on the vital organs. The accused were charged under Sec. 302 read with Sec. 34, I. P. C., for having conjointly and in furtherance of their common intention caused the death of the deceased. *Held* that the conviction should be under Sec. 302 read with Sec. 34 even if the prosecution evidence had not established as to who had fired the fatal shot at the deceased. Conviction under Sec. 326 read with Sec. 34 was improper.[1]

14. Charge.—This section as well as Secs. 120-B and 149 all deal with constructive liability which must be specifically charged.[2] But, as such, one might be convicted, though the rest are acquitted.[3]

The charge under this section should run thus :

"I *(name and office of Magistrate, etc.), hereby charge you (name of accused),* as follows :

"That you——on or about the——day of——at——had formed a common intention with *B, C* and *D* to commit an offence, namely——in furtherance of which you did the following criminal act, to wit——(*here state the act*) resulting in the death of——, an offence punishable under Sec. 302 ; and I, therefore, hereby charge you of the said offence under Sec. 302 read with Sec. 34 of the Indian Penal Code."

Even though there might be no charge under Sec. 34, I. P. C., it is possible to convict the accused with the aid of Sec. 34. This does not mean that Magistrates and Judges should not indicate in the charge that Sec. 34 would be used against the accused. It is always desirable that this should be indicated in the charge.

But where by oversight or otherwise specific mention of Sec. 34 is not made in the charge, that defect by itself would not be fatal, if otherwise the Court can come to the conclusion that the accused had notice that they would be liable under Sec. 34 also, for after all Sec. 34 is merely an explanatory provision in the Code, and does not create any specific offence itself.[4]

The omission to mention Sec. 34, Indian Penal Code, in the order of conviction has nothing more than an academic significance as is observed in *Udai Singh* v. *State*,[5] when one of the petitioners made a girl naked and all of them carried her in the naked condition, all of them are guilty of the offence of outraging her modesty and they can be rightly convicted under Sec. 354, Indian Penal Code.[6]

15. Meaning of words.—"*A criminal act is done by several persons*" : This does not mean that the several persons do the same act, which is physically impossible. It can only mean that several persons do separate acts which might be similar or diverse.[7] "*In furtherance of the common intention*

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1. *In re* Poreddi Venkata Reddy, A. I. R. 1961 A. P. 23 at p. 28 : (1961) 1 Cr. L. J. 42.
2. *See* Kottoora Thevan, *In re*. A. I. R. 1924 Mad. 584 ; Profulla Kumar, I. L. R. 50 Cal. 41 ; Dastarali, I. L. R. 58 Cal. 822.
3. Dastarali. I. L. R. 58 Cal. 822.
4. Dhansai Sahu v. State, 35 Cut. L. T. 18 at pp. 32, 33 : A. I. R. 1969 Orissa 105 ; State v. Babulal, A. I. R. 1956 Raj. 67.
5. A I. R. 1966 Orissa 210,
6. Trinath Konhara v. State. (1968) 34 Cut. L T. 741 at p. 744.
7. A.I.R. 1924 Cal. 257 (F B.) : O. A. 52 Cal. 197 (P.C.) : 29 C.W.N. 181. King-Emperor v. Barendra Kumar Ghose,

of all" : This means that all the persons charged must have consented to the commission of the crime committed. The word "furtherance" indicates "some kind of aid or assistance producing an effect in the future. . . Any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony."[1] The intention must be actual intention,[2] and the common intention of all must be the commission of a criminal act which is done. That is to say, the act done must be the act contemplated by all ; otherwise all the co-conspirators are not guilty of the offence committed.[3] In order that Sec. 34 may be applicable there must be a common intention to commit some crime, that is, something punishable under the Penal Code or any other law. If that is so, every one would be liable for the result of their joint act in committing the crime, if the result was such as was likely to follow from their joint act in committing the crime intended and was not foreign to their common intention. It is not necessary, in order that Sec. 34 should apply, that the common intention should have been to cause the particular result which came about in committing the crime.[4] These words are much stricter than the words "in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object" of Sec. 149. The common intention required by Sec. 34 and the common object required by Sec. 149 are far from being the same thing.[5] The term "intention" implies a resolution of the mind while the term "object" means the purpose for which that resolution was made. Offenders may differ in their intention and object. The two sections, therefore, prescribe different conditions for their joint liability. Under Sec. 149 the offence committed need not have been the offence intended. It will suffice if it was considered likely. A reckless man may chance a likelihood without intending it. "*By several persons*" : Why not "by one or several persons" which would include "by several persons" as well ?[6] These words have remained as they were originally enacted, but their alteration would improve the sense intended. As it is, the sentence will not bear a too literal construction for, so construed, it would read thus : "When a criminal act is committed by several persons in furtherance of the common intention of the several persons, each of such several persons is liable," etc., which is not what the section means. There is, of course, no limit to the number of persons acting in pursuance of a common intention.[7] "*Each of such persons is liable for that act*" : "That act" here means not the individual act or acts of the several persons, but the final act being the cumulative result of all the acts.[8]

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1. Russell on *Crime*, 11th Ed., p. 555.
2. Satrughan, 50 I. C. (C) 337.
3. Nga Tun Baw, 7 Cr. L. J. 205 ; Jamardui, 16 C. W. N. 909 ; Dhian Singh, 9 A L. J. 180 ; Hari Bijal, 17 Bom. L. R. 905 ; *see* also Nga E, I. L. R. 8 Rang. 603 (F. B.) ; Sundar Singh, I L. R. 4 Luck. 660 : Ibra Akanda v. Emperor, A I. R. 1944 Cal. 339 : 45 Cr L. J. 771 ; Emperor v. Mujjaffar Sheikh. A. I. R. 1941 Cal. 106 : I. L. R. (1940) 2 Cal. 358.
4. State v. Saidu Khan, A. I. R. 1951 All. 21 at p. 43, overruling Dhian Singh v. Emperor, 9 A. L. J. 180 and other Allahabad decisions.
5. Dalip Singh v. State of Punjab. A. I. R. 1953 S. C. 364 at p. 366 : 1953 S. L. J. 532.
6. Section 2, *ante* ; Barendra Kumar Ghose v. Emperor, A. I. R. 1925 P. C 1 : 52 Cal. 197 at p 206 (P. C.). : 29 C. W. N. overruling Nirmal Kanta . Roy, I. L R. 41 Cal. 1072 in which Stephen, J., held that the act must be done by several persons only and conjointly ; Gulab v. State, A. I. R. 1951 All. 660 : 52 Cr. L. J. 924 : 1951 A. L. J. 406 (F.B.).
7. Nibaran, 11 C. W. N. 1085.
8. Emperor v. Barendra Kumar Ghose A I.R. 1924 Cal 257 at p. 308 (F. B.): O. A. 52 Cal.197 (P.C.); Barendra Kumar Ghose v. Emperor, A. I. R. 1925 P. C. 1 ; 52 Cal.197.

Section 34 was subject of judicial scrutiny in innumerable cases. The expression "in furtherance of the common intention of all" was not in the original section, but was inserted in the section by Sec. 1 of Act XXVII of 1870. The Judicial Committee in *Barendra Kumar Ghose* v. *Emperor*,[1] defined the expression "criminal act" in the said section thus :

Definitions by Privy Council.

> "A criminal act means that united (unity of) criminal behaviour which results in something for which an individual would be punishable if it were all done by himself alone, that is, in a criminal offence."

The Judicial Committee in *Mahbub Shah* v. *King-Emperor*,[2] laid down the following conditions for its application :

> "To invoke the aid of Sec. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all ; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual ; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

It is, therefore, clear that the criminal act mentioned in Sec. 34 of the Indian Penal Code is the result of the concerted action of more than one person, if the said result was reached in furtherance of the common intention, each person is liable for the result as if he had done it himself. The question is what is the meaning of the expression "in furtherance of the common intention". The dictionary meaning of the word "furtherance" is "advancement or promotion". If four persons have a common intention to kill *A*, they will have to do many acts in promotion or prosecution of that design in order to fulfil it. Some illustrations will clarify the point. Four persons intend to kill *A*, who is expected to be found in a house. All of them participate in different ways. One of them attempts to enter the house, but is stopped by the sentry and he shoots the sentry. Though the common intention was to kill *A*, the shooting of the sentry is in furtherance of the said common intention. So Sec. 34 applies. Take another illustration. If one of the said accused enters the room where the intended victim usually sleeps, but somebody other than the intended victim is sleeping in the room and on a mistaken impression he shoots him. The shooting of the wrong man is in furtherance of the common intention and so Sec. 34 applies. Take a third variation of the illustration. The intended victim has a twin brother who exactly resembles him and the accused who is entrusted with the part of shooting

Examples

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1. A. I. R. 1925 P. C. 1 : I. L. R. 52 Cal. 197; 52 I. A. 40.
2. A. I. R. 1925 P. C. 118 at p. 120 : 72 I. A. 148 at p. 153.

the intended victim, on a mistaken impression, shoots the twin brother. The shooting of the twin brother is also in furtherance of the common intention. Here also Sec. 34 applies. If that much is conceded there is no justification why the killings of another under a mistaken impression of identity is not in furtherance of the common intention to kill the intended victim.[1]

16. Criminal act.—A criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone.[2] The "criminal act" mentioned in the section is the physical act that has been done and must be distinguished from the effect or result or the consequences of it.[3] The word "act" includes a "series of acts" and that Sec. 34 contemplates, among other things, a series of acts done by several persons, some perhaps by one of these persons and some by another, but all in pursuance of a common intention.[4] There is, however, some dispute as to whether the act includes both a single act as well as a series of acts or the latter alone. In *Bisappa's* case,[5] it has been held by the Mysore High Court that this section contemplates a series of acts as well as a single act, though done by several persons. In a later Allahabad case,[6] it has been laid down that a "criminal act" must include at least two acts, it must be a series of acts. As Cuming, J., put it in *Emperor* v. *Barendra Kumar Ghose*[7]: "It is impossible to conceive two individuals doing identically the same act. Such a thing is impossible. Therefore to have any meaning, the expression 'criminal act done by several persons' must contemplate an act which can be divided into parts each part being executed by a different person, the whole making up the criminal act which was the common intention of all. To put it in another way the one criminal act may be regarded as made up of a number of acts done by the individual conspirators, the result of their individual acts being the criminal act which was the common intention of them all."[8] The act may be different acts as when several men set out to burgle a house, and one of them keeps watch outside and the others enter the house, and one of the latter uses a fire arm and shoots one of the inmates, or there may be similar acts as where several men combine to assault another. In either case, in order that Sec. 34 may apply it is incumbent on the prosecution to show, in the first place, the existence of a common purpose or design or enterprise. If this cannot be shown, each of the accused persons is liable only for what he himself actually did. If, on the other hand, the prosecution succeed in showing the existence of a common purpose of design, then each of the accused persons is liable for any act done in pursuance of that common purpose or design. When the acts done are similar, as where a number of blows are struck with *lathis*, then each of

What criminal "act" includes.

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1. Shankarlal Kacharabhai v. State of Gujarat, A. I. R. 1965 S C. 1260 at p. 1262 : (1965) 1 S. C. W. R. 750.
2. Barendra Kumar Ghose v. King Emperor, A. I. R. 1925 P. C. 1 at p. 9 ; King-Emperor, v. Barendra Kumar Ghose, A. I. R. 1924 Cal. 257 (F. B.) : O. A. 52 Cal. 197 (P. C.) : 29 C. W. N. 181 ; *see* also Indar Singh, I. L. R. 14 Lah. 814.
3. Bashir v. State, A. I. R. 1953 All. 668 at p. 670 ; Nazir v. Emperor, A. I. R. 1948 All. 229 and State v. Saidu Khan, A. I. R. 1951 All. 21 (F. B.) ref,
4. Emperor v. Motilal Mallick, A. I. R. 1935 Cal. 526 at p. 532 : 36 Cr. L. J. 1230 : 157 I. C. 829 : 39 C. W. N. 199 ; Barendra Kumar Ghose v. Emperor, *supra*.
5. A. I. R. 1951 Mys. 1 at p. 3 : 51 Cr. L. J. 1603.
6. Bashir v. State, A. I. R. 1953 All. 668 at p. 671.
7. A. I R. 1924 Cal. 257 at p. 312 (F. B.).
8. *See* also Maung Thwa, I. L. R. 3 Rang. 74 ; Mian Khan, 29 Cr. L. J. 474 (Lah.); Krishnaswami, 1936 M. W. N. 644.

them is liable for every one of the blows struck, and if in the event of every blow having been struck by one man, that man would have been guilty of murder, each of them is guilty of murder, it being immaterial whose blow it was which was the direct and immediate cause of death.[1]

17. Done by several persons.—Another requirement of Sec. 34 is that the "criminal act" must be done by "several persons". If it is done by one person, even if it consists of a series of acts, Sec. 34 will not apply. All the persons who are sought to be made liable by virtue of Sec. 34 must have done some act which is included in the "criminal act". One who has not taken any part in doing the criminal act cannot be made liable under the section.[2] A criminal act includes a series of acts and further "act" includes omission to act.[3] Where a number of men make an attack with *lathis* on certain men and one of those men is killed all the men making the attack are guilty even if only one or two of them struck the deceased.[4]

To what cases the section applies

The section applies only to cases where several persons both intend to do and do an act. It does not apply to cases where several persons intend to do an act and one or more of them does or do an entirely different act : in such cases if the number of persons be five or more and the other act was done in prosecution of the common object of all, Sec. 149 may apply.[5] In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation Sec. 34 provides that each one of them would be liable for that crime in the same manner as if *all* the acts resulting in that crime had been committed by him alone.[6] In the case of *Jagir Singh* v. *State of Punjab*,[7] the Supreme Court observed that if the Court recorded a clear finding that the two appellants participated in the offence with four other unknown culprits and if their common intention is provided, the two appellants could be rightly convicted of the offence under Sec. 302 read with Sec. 34 of the Indian Penal Code. It was significant to note that in that case six named persons were charged of the offence but there was a mistake in the identity of three of the accused and with regard to another accused the benefit of doubt was given.[8] In *Krishna Govind Patil* v. *State of Maharashtra*,[9] the High Court had acquitted three of the four accused charged for an offence under Sec. 302 read with Sec. 34 giving them the benefit of doubt in view of the fact that their identity was held not to have been established, but convicted the fourth under Sec. 302 read with Sec. 34 on the ground that he had committed the offence along with one or the other of the acquitted accused. Their Lordships of the Supreme Court took the view that the conviction of the fourth accused was clearly wrong. It was held that when the accused

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1. State v. Hira Dubey, A. I R. 1952 Pat. 135 at p 136 : I L. R. 30 Pat. 1264.
2. Bashir v. State A. I. R. 1953 All 668 at p. 671.
3. Barendra Kumar Ghose v. Emperor, A. I. R. 1925 P. C. 1 at p. 6 : I. L. R. 52 Cal. 197 ; *see* also Moti Lal Mallick, A. I R. 1935 Cal. 526.
4. Goverdhan v. Emperor, A. I. R. 1935 All. 930 at p. 931 : 1935 A. L. J. 1114 : 1935 A. W. R. 1064, relying on Irshadullah Khan v. Emperor, A. I. R. 1933 All. 528 : 1933 A. L. J. 1292 : 34 Cr. L. J. 1234.
5. Faiyaz Khan v. Rex, A. I. R. 1949 All. 180 at p 184 ; Hur Singh v. State, 1954 Cr. L J. 752.
6. Nanak Chand v. State of Punjab, A. I. R. 1955 S. C. 274 at p. 277 : (1955) 1 S. C. R. 1201 : I. L. R. (1955) Punj 154 : 1955 S. C. A. 272 : 1955 S. C. J. 241 : 1935 All. W. R. (Sup.) 59 : 1955 Andh. W. R. (S. C.) 141 : (1955) 1 M. L. J. (S. C.) 141 : 1955 Mad. W. N. 326 : 1955 Cr. L. J. 721.
7. A. I. R. 1968 S. C. 43.
8. Radhey v. State, 1969 A. W. R. (H. C.) 670 at p. 672.
9. A. I. R. 1963 S. C. 1413.

were acquitted either on the ground that evidence was not acceptable or by giving benefit of doubt to them the effect in law would be that they did not take part in the offence. Hence the effect of acquittal of the three accused was that they did not conjointly act with the fourth accused in committing the murder. If that was so, the fourth accused could not be convicted under Sec. 302 read with Sec. 34, Indian Penal Code, for having committed the offence jointly with the acquitted persons.[1]

There is no bar against the conviction of an accused under Sec. 302, Indian Penal Code, *simpliciter* merely because he has been charged only under Secs. 302/34, Indian Penal Code, if no prejudice has been caused to the accused. But if there is no evidence that it was the appellant who struck the fatal blow he cannot be convicted of an offence under Sec. 302, Indian Penal Code, after the acquittal of his co-accused.[2]

18. Common intention—What is.—The Supreme Court in the case of *Shankarlal Kachrabhai* v. *State of Gujarat*,[3] said that a mistake by one of the accused as to killing *X* in place of *Y* would not displace the common intention if the evidence showed the concerted action in furtherance of pre-arranged plan. The dominant feature of Sec. 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Sec. 34 of the Indian Penal Code. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt.[4]

Essential ingredients.

It is well-settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot, during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under Sec. 302, read with Sec. 34 of the Indian Penal Code, it should come to a definite conclusion that the said person had prior concert with one or more others persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of Sec. 34 on different situations :

Examples.

(1) *A*, *B*, *C* and *D* are charged under Sec. 302, read with Sec 34 of the Indian Penal Code, for committing the murder of *E*. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) *A*, *B*, *C* and *D* and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.

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1. Thakur Prasad v. State, 1968 A. L. J. 50 at p. 54.
2. *Ibid.*
3. A. I. R. 1965 S. C. 1260 : (1965) 1 S. C. R. 287.
4. Hethubha v. State of Gujarat, 1970 S. C. 1266 at p. 1269 : (1970) 2 S. C. J. 635.

(3) *A*, *B*, *C* and *D* are charged under the said sections. But the evidence is directed to prove that *A*, *B*, *C* and *D*, along with three others have jointly committed the offence.

Ar regards the third illustration, a court is certainly entitled to come to the conclusion that one of the named accused is guilty of murder under Sec. 302 read with Sec. 34 of the Indian Penal Code, though the other three named accused are acquitted, if it accepts the evidence that the said accused acted in concert along with persons, named or unnamed, other than those acquitted, in the commission of the offence. In the second illustration, the Court can come to the same conclusion and convict one of the named accused if it is satisfied that no prejudice has been caused to the accused by the defect in the charge. But in the first illustration the Court certainly can convict two or more of the named accused if it accepts the evidence that they acted conjointly in committing the offence.[1]

Common intention within the meaning of Sec. 34, I. P. C., presupposes a prior concert. It requires a pre-arranged plan, a meeting of minds.[2]

Section 34, I. P. C., enacts that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons shall be liable for that act in the same manner as if it were done by him alone. In Sec. 33, the word "act" denotes as well a series of acts as a single act. The criminal act refers to the totality of the series of acts reflecting the unity of the criminal behaviour which resulted in the offence for which each individual is to be punished. If the act of each individual was done in furtherance of the common intention to commit murder, then each one of the offenders is constructively liable for the offence of murder even though his own act might not have resulted in causing death. If the individual act is performed in furtherance of the common intention, the vicarious liability accrues. Section 34 deals with separate acts similar or diverse by several persons. The offence is attributable to each offender, provided it was done in furtherance of the common intention. Common intention is not same or similar intention. It pre-supposes a prior concert and a pre-arranged plan. It follows that there must be a prior meeting of the mind. Several persons can simultaneously attack a man. Each can have the same intention, that is intention to kill. Each can individually cause a separate fatal blow. Yet, there may not exist a common intention if there was no prior meeting of the mind. In such a case, each would be individually liable for the injuries he causes. None can be vicariously convicted for the act caused by the other. If the prosecution fails to prove that the blow of a particular offender caused murder, he cannot be convicted of that offence. The partition between the limits of common intention and same or similar intention is, however, thin though the distinction is real and substantial and, if overlooked, it may result in miscarriage of justice.

This is, however, not to say that the pre-arranged plan need necessarily be an elaborate one. Nor is it necessary that long interval of time must elapse between the meeting of the mind and the preparation of the act. The common intention may develop and be formed suddenly. To illustrate, when a person asks others to help him to kill the deceased and thus other persons, either by their acts or words, assault him or join with him in the assault, common intention is established. The common intention in such a

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1. Krishna Govind Patil v. State of Maharashtra, A. I R. 1963 S. C. 1413 at pp. 1415-16: (1963) 1 Ker. L.R. 505 : 1963 M. P. L. J. 729 : 65 B. L. R. 789.
2. M. K. Parameswara Kurup v. N. Krishna Pillai, A. I. R. 1966 Ker. 264 at p. 265.

case is formed on the spur of the moment. Existence of prior concert is to be determined with reference to the facts and circumstances of each case. The conduct preceding the commission of offence, the nature of injuries, the manner of causing them, the seat of the injury, the conspiracy before the offence is committed and the subsequent conduct, such as, running away together, are some of the important matters to be taken into consideration for deducing the existence of common intention. In other words, each case should depend upon its own facts and circumstances to judge whether there was common intention or same or similar intention.[1]

Their Lordships of the Supreme Court in *Pandurang* v. *State of Hyderabad*[2] observed :

> "Now in the case of Sec. 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all * * * *"[3]

Common intention implies a pre-arranged plan.

Common intention implies a pre-arranged plan.[4] The plan need not be elaborate, nor is a long interval of time required. It can arise and be formed suddenly, and all that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, of incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other resasonable hypothesis.[5] Though common intention implies pre-arranged plan or concert between persons, there is nothing in the section which requires that pre-arranged plan must come into existence before the acts are done and that it cannot come into existence whilst the acts are being committed and that it cannot be inferred from such acts. Whether there is common intention or not may also be proved by asking the Court to draw an inference from the various acts committed by the accused persons. Whether such an inference should be drawn or not in a particular case would depend upon the facts of each case. No hard and fast rule can be laid down on the subject. If there is any evidence that there was a pre-arranged plan or concert then the case is simple ; but if this is not the case and if the prosecution wants the Court to draw an inference from the acts which took place simultaneously with the commission of the crime, then the problem is a difficult one. But difficulty of a problem cannot jettison a true principle of law. The difficulty arises because the guilt of the accused is to be inferred from circumstantial evidence and the difficulty is no more or no less than the one which arises in all cases which are dependent upon circumstantial evidence. Therefore, in all such cases, the true rule of law which is to be applied is the rule which requires that guilt is not to be inferred unless that is the only inference which follows from the circumstances of the case and no other innocuous inference can be drawn.

Test.

In order that intention may be common, the test which is applied is whether intention of one was known to the other and shared by that other.[5]

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1. Chandra Majhi v. State, (1965) XXXII Cut. L. T. 121 at pp. 130-31.
2. A. I. R. 1955 S. C. 216.
3. Bhopal Singh v. State of Rajasthan, A. I. R. 1968 Raj. 305 at p. 309.
4. Bhagban Barik v. State, 1961 A. W. R. (Sup.) 85 : 27 Cut. L. T. 116 : 1961 All. Cr. R. 398 ; Bhopal Singh v. State of Rajasthan, A.I.R. 1968 Raj 305 at p. 310.
5. Bhopal Singh v. State of Rajasthan, A. I. R. 1968 Raj. 305 at p. 310.
6. Oswal Danji Tejsi v. State, A. I. R. 1961 Guj. : 16 at pp. 18, 19 : (1961) 1 Cr. L. J. 251.

To reach a finding about common intention, it is not necessary to establish a prior concert. Common intention may be formed just before or even during the course of the assault. In fact, the question of common intention is a question of inference, to be drawn from the facts and circumstances of the case. In this connection, two important considerations should always be borne in mind :

(1) Whether the assault is sudden or appears to be deliberate.

(2) Whether it is a case of a few casual injuries or a case of a number of injuries inflicted by a number of persons.

In a case where the assault is not sudden, common intention should be generally presumed unless there is something to show that there was no opportunity for the accused to have a concert.[1]

Secondly, when several persons inflict numberless injuries, the common intention should be safely presumed.[2]

In *Banwaree Banʿphor* v. *State of Bihar*,[3] Anant Singh, J., observed : "Three of the appellants were assaulting Kanhai simultaneously, they must be found to have shared the common intention of assaulting him with the consequential result".

Where in an altercation between two parties one member of a party gives a blow in the first instance and there is evidence showing clearly that his fellow member was standing closely with a stick and there is nothing from which it can be reasonably inferred that the fellow member had no intention of assaulting the other party, the fellow member could be said to have joined with his colleague in attempting to give a blow, though the prosecution had not said so.[4]

Common intention.

When five of the six accused have been eliminated then it cannot possibly be said in law that the sixth shared the common intention with those five other persons. It would have been another matter if sixth had been charged for having shared the common intention with those five persons and other persons unknown.[5]

When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same ; it would mean that they did not take part in the offence. The effect of the acquittal of accused 1, 3 and 4 is that they did not conjointly act with accused 2 in committing the murder. If they did not act conjointly with accused 2, accused 2 could not have acted conjointly with them.[6]

The crucial test as to the applicability of constructive liability under this section is to be found in the phrase "in furtherance of the common intention of all". Once the criminal act becomes independent of the common intention though done in pursuance to an intention same or similar to that common intention or giving rise to consequences same or similar in nature as contemplated by the common intention, the rule of constructive liability in this

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1. *Vide* Ganpat v. State, 1951 Raj. L. W. 313.
2. Mohanlal v. State, A. I. R. 1951 Raj. 24 at pp. 28, 29.
3. A. I. R. 1965 Pat. 45 at p. 47.
4. Sajjandas v. State, A. I. R. 1964 Orissa 251 at p. 253 : (1964) 2 Cr. L. J. 567.
5. Sohar Singh v. State of Bihar, A. I. R. 1966 Pat. 448 at p. 453.
6. Krishna Govind Patil v. State of Maharashtra, A. I. R. 1963 S. C. 1413 at p. 1417.

section ceases to operate and others, who are a party to the original common intention, will not be held liable constructively for that criminal act.[1]

"Any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony."[2] The criminal act for which all the conspirators are sought to be made liable must be connected with the common intention; it must have been done while, or for the purpose of, executing or carrying out the common intention. If it is extraneous to the common intention or is done in opposition to it, or is not required to be done at all for carrying out the common intention, it cannot be said to be in furtherance of it.[3] Only such acts are not to be deemed to be acts done in furtherance of the common intention as could not have taken place ordinarily in carrying out the common intention. Such acts would be mostly unpremeditated ones by some of the persons joining in the criminal act. For such an unpremeditated act of one person the others cannot be made liable. But there is no justification for others to be not liable for such acts of the other confederates as were likely to be committed in carrying out the common intention and which would have been normally foreseen and even contemplated by those persons.[4]

Criminal act must be connected with the common intention.

Kenny in his outlines of *Criminal Law*, 15th Ed., writes on page 162 that "the act done must relate to the common design and not totally or substantially vary from it". But a slight variation will not prevent the act from being in furtherance of the common intention. Whether an act is in furtherance of the common intention or not depends upon the common intention and the nature of the act. It is a question of fact and not of law.[5]

In *Behari* v. *State*,[6] Agarwala, J., observed: "When three persons attack another with *lathis*, not upon a sudden quarrel but in concert and after previous consultation, they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention." Referring to this it was observed in *Bashir's* case,[7] as follows: "If our learned brother really meant that whatever is the act done by the conspirators, it must be presumed to have been done in furtherance of their common intention, we respectfully dissent." If *A* and *B* jointly agree to strike *X* with *lathis* then the striking with *lathis* only can be in furtherance of their common intention and if *A* shoots *X* and kills him his act being in opposition to the common intention, cannot be said to be in furtherance of it and *B* will not be responsible for it. But of course there must be evidence to show that the common intention was to strike with *lathis* only. If at the time of their joint decision to strike *X*, *A* openly carried a pistol and *B* a *lathi*, the use of both the weapons must be deemed to have been contemplated, and *A*'s shooting with the pistol would be an act in furtherance of the common intention. But if *A* had concealed the pistol and *B* did not know that he was armed with it, *A*, shooting *X* with the pistol would not be said to be in furtherance of the common intention. Again, *A* and *B* agree to assault *C* with fists, but *A*, of his own impulse, kills *C* with a

Examples.

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1. State of Bihar v. Lala Mahto, A. I. R. 1955 Pat. 161 at p. 169: 1955 Cr. L. J. 597 (D. B.): I. L. R. 33 Pat. 397.
2. Russell on *Crime*, 11th Ed., p. 555.
3. Bashir v. State, A. I. R. 1953 All. 668.
4. Nazir, A. I. R. 1948 All. 229.
5. Bashir v. State, A. I. R. 1953 All. 668 at pp. 673 674.
6. A. I. R. 1953 All. 203 at p. 207.
7. A. I. R. 1953 All. 668.

weapon suddenly caught up. The killing is not an act in furtherance of the common design and *B* would not be responsible for it.[1] Where the High Court arrived at a finding that the only common intention that the villagers had was to enforce their right of way, it was held that such a common intention cannot be considered as a common intention to commit criminal act within the meaning of Sec. 34, I. P. C.[2] If the means are not specifically agreed upon or understood, each conspirator would become responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.[3] The use of the words "in furtherance" suggests that Sec. 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention, or it may become necessary to do it after achieving the common intention, or it may be done while achieving the common intention. Going to the spot in a motor car is an act in furtherance of the common intention to commit a crime there; but if while going there the driver runs over and kills a pedestrian, the collision is merely incidental and the running over of the pedestrian is not in furtherance of the common intention. If, however, a conspirator who wishes to commit a crime involving violence against *X* is impeded by *Y* and throws *Y* aside in order to get at *X*, the attack upon *Y* is made in furtherance of the common intention.[4] Section 34 of the Indian Penal Code, would be applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual.[5]

The law is stated by the Supreme Court of India by their Lordships of the Supreme Court in Criminal Appeal No. 24 of 1968, dated 24th March, 1970, as follows :

> "So far as Sec. 34, Indian Penal Codc, is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application."

The common intention can be inferred from the following facts and circumstances. All the four accused do belong to the same community. At least some of the relations of some of the accused were aggrieved at the pending civil and criminal proceedings or the past proceedings. There was undoubtedly a faction between the deceased and accused parties. The fact that all the four accused were found seated in the *mandhai* just prior to the occurrrence would be a circumstance showing a pre-concerted plan, where the facts have not been challenged in cross-examinatton.

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1. R. v. Caton, 12 Cox. C. C. 624 ; *see* also State v. Saidu Khan, A. I. R. 1951 All. 21 (F. B.) : 1950 A. L. J. 884.
2. Kanbi Nanji Virji v. State of Gujarat, A. I. R. 1970 S. C. 219 at p. 222 : 1970 S. C, D. 244.
3. Pettibone v. United States, (1899) 37 Law Ed., 419, quoted with approval in Basbir v. State, A. I. R. 1953 All. 668.
4. Bashir v. State, A. I. R. 1953 All 668 at p. 674, relying on Russel on *Crime*, 11th Ed , p 55.
5. Irshadullah Khan v. Emperor, A. I. R, 1933 All. 528 at p. 533 : 34 Cr. L. J. 1234 : I. L. R. 55 All. 607 : 1933 A. L. J 1292.

Their emergence and appearance at the scene of the occurrence from behind the *thatti* near the well in deceased partys, land would also spell out common intention. All the four accused were armed with lethal weapons and all the four participated in the murderous attack of the deceased who died instantaneously. All the accused inflicted cumulatively no less than 13 injuries which have resulted in multiple fractures and at least one of them was a necessary fatal injury and another was sufficient in the ordinary course of nature to cause death. All the four accused left the scene of occurrence at one time.

All these facts and circumstances would constitute indubitable proof of the common intention which actuated the four accused to commit the murder.[1]

There is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and though, it is difficult in most cases to prove the intention of an individual. it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, for instance that all of them had left the scene of the incident together and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. The Court had in *Krishna Govind Patil's* case,[2] held that the pre-arranged plan may develop on the spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so before a court can convict a person under Sec. 302 or Sec. 304, read with Sec. 34 of the Indian Penal Code it should come to a definite conclusion that the said person had a prior concert with one or more persons named or un-named for committing the offence.

The totality of the circumstances indicate without doubt the inference that there was a pre-concerted plan and a common intention to remove the thatch and to attack any person if he resisted. The accused in the furtherance of that common intention began to remove the *chappar* and when the deceased obstructed, they beat him and others who came to resist their attack and aggression.

The appellants are clearly guilty of offences under Sec. 304, Part I read with Sec. 34 and also Sec. 307 read with with Sec. 34 and accordingly are to be convicted.[3]

19. Distinction between common intention and common object.— In the case of Sec. 34 it is well established that a common intention

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1. State Public Prosecutor v. Karuppanna Thevar, (1972) 1 M. L. J. 26 at p. 39.
2. (1964) 1 S. C. R. 678 : A. I. R. 1963 S. C. 1413.
3. Ram Tahal v. State of U. P., A. I. R. 1972 S. C. 254 at pp. 257, 260.

presupposes prior concert. It requires a pre-arranged plan. Accordingly, there must have been a prior meeting of minds. Common intention differs from common object in that the latter does not require prior concert and a common meeting of minds before the attack, and can develop as an unlawful object after the people get there.[1] Although there is a difference in common object and common intention, they both deal with combination of persons which become punishable as sharers in one offence and the charge under Sec. 149, I. P. C., is no impediment to a conviction by the application of Sec. 34, if the evidence discloses the commission of the offence in furtherance of intention of all.[2]

20. In furtherance of the common intention of all.—It is well established that a common intention presupposes *prior concert*. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all.[3] Accordingly, there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others : and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder, however clearly an intention to kill could be proved in his case.[4] Same or similar intention should not be confused with common intention ; as their Lordships said in *Mahbub Shah*'s case,[5] "the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice." The plan need not be elaborate, nor is a long interval of time required. It conld arise and be formed suddenly, as for example when one man calls on by-standers to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan, however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in *Mahbub Shah's* case,[6] to have the same intention independently of each other, e. g. the intention to rescue another and, if necessary, to kill those who oppose. It is true pr or concert arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together [as the eye-witnesses testified that the accused did when they (the eye-witnesses) ran to the spot on hearing the commotion, in *Mamand* v.

Common intention presupposes prior concert.

Common intention not to be confused with similar intention.

How prior concert can be determined.

1. Public Prosecutor, Andhra Pradesh v. Bollapali Veeraiah, 1962 M. L. J. (Cr.) 862 : (1962) 1 Andh. W. R. 84 ; Manilal Sahu v. State, A. I. R. 1969 Orissa 176 at pp. 179-80.
2. Sivapada Scuapati v. State, A. I. R. 1969 Cal. 28 at p. 31.
3. Mahbub Shah v. Emperor, A. I. R. 1945 P. C. 118 at pp. 120 and 121.
4. Barendra Kumar Ghose v. Emperor, A. I. R. 1925 P. C. 1 at pp. 5, 6 ; Mahbub Shah v. Emperor, *supra*.
5. A. I. R. 1945 P. C. 118.
6. A. I. R. 1945 P. C. 118 : 72 I. A. 148 : I. L. R. (1945) Lah. 367 : 1945 A. L. J. 344 : 47 B. L. R. 941 : 49 C. W. N. 673 : 46 Cr. L. J. 659.

Emperor.[1] In the last cited Privy Council case the evidence of the eye-witnesses coupled with evidence of enmity between the appellant and the deceased established the common intention of the appellants to murder the deceased. Each case must rest on its own facts, and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another.[2] The distinction between common intention and same or similar intention becomes important especially in cases of sudden occurrences.[3]

Similar intention should be distinguished from common intention. The Privy Council in *Mahbub Shah* v. *Emperor*,[4] cautioned that common intention should not be confused with same or similar intention and that the distinction though very thin is real and if overlooked would result in miscarriage of justice.

Where there is neither any proof of conspiracy or premeditation to kill nor is there any other evidence of common intention and where the accused have also not been given any notice either by framing a charge under Sec. 34, I. P. C. or by putting the necessary question in their examination under Sec. 342, Cr. P. C., that this was the case of the prosecution which they had to meet. There could be no punishment given to the accused on the ground of any vicarious liability, but each of the appellants could be convicted and punished for what was actually done by him.[5]

Common intention implied a pre-arranged plan and for the application of Sec. 34 it was necessary to prove that the criminal act was done in concert pursuant to a pre-arranged plan.[6]

Common intention to be presumed on facts of a case.

In view of the facts of the case, particularly the inhuman manner in which the accused acted, it can be safely presumed that their common intention was to kill. Assuming that their primary object was to commit robbery the common intention to carry out the unlawful design at all costs, even at the cost of overcoming resistance by taking life would be sufficient for the application of Sec. 34, Indian Penal Code.[7] A mere direction from one person to another and the carrying out of the direction by the other may be only instigation at the latter's act and may not be a case of a joint act falling under Sec. 34, Indian Penal Code. But where two persons, with their followers, all of them armed, move about together for a set purpose and one gives instructions to the other and keeps himself on the spot in readiness to see that the instructions are carried out, it is hardly possible to say that the act is not one which was done in furtherance of the common intention of both. The accused's saying, "People are collecting, let us fire," brings out the common intention clearly. But if the evidence makes out no more than mere instigation, it is even so, instigation by a person who is present at the same of offence when the act is committed. In such a case the instigator is "deemed" to commit murder by virtue of Sec. 114, I. P. C. Actual presence plus prior abetment can mean nothing else but participation.

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1. A I. R. 1946 P. C 45 : 1946 A. L. J. 103 : 48 B. L. R. 295 : 50 C. W. N. 353 : 47 Cr. L. J. 344 : 59 M. L. W. 138 : 1946 M. W. N. 103 : (1946) 1 M. L. J. 211 : 223 I. C. 34 : 1946 O. W. N. 1218 : 48 P. L. R. 311.
2. Pandurang v. State of Hyderabad, A. I. 1955 S. C. 216 at pp. 222, 223 : 1955 S. C. R. 1083 : 1955 S. C. J. 106 : 1955 A. W. R. (Sup.) 34 ; 1955 M. W. N. 161 : 1955 Cr. L. J. 572.
3. Kinaram Das v. State, A. I. R. 1955 Assam 2 at p. 5 (D. B.) : I. L. R. (1954) 6 Assam 368 : (1955) Cr. L. J. 57.
4. A. I. R. 1945 P. C. 118 at p. 121 : 72 I. A. 148 : I. L. R. (1945) Lah. 367 : 1945 A. L. J. 344 : 47 Bom. L. R. 941 : 49 C. W. N. 678 : 1945 M. W. N. 373 : (1945) 2 M. L. J. 144 : 58 M. L. W. 368 : 1945 N. L. J. 344 : 26 P. L. T. 227 : 219 I. C. 467 : 46 Cr. L. J. 689.
5. Dewji Moti Bhil v. State, A. I. R. 1955 M. B. 26 at p. 27 : 1955 M. B. L. R. (Cr.) 130.
6. Kinaram Das v. State, A. I. R. 1955 Assam 2 at p. 5 (D. B.) : I. L. R. (1954) 6 Assam 368 : 1955 Cr. L. J. 57.
7. Chuhar Singh v. State, A. I. R. 1955 Pepsu 81 at p. 87 : I. L. R. 1954 Patiala 352.

That is the irrebuttable presumption raised by Sec. 114, I. P. C., and brings the case under Sec. 34.[1]

What is common intention and how it is to be proved.

This section lays down a rule of presumption in matters relating to criminal responsibility. The existence of a common intention is the sole test of joint responsibility.[2] But what is common intention and how is to be proved? It should be understood clearly that all that is required is the formation of a common intention, no particular kind of common intention is required. The common intention may be to do a certain act regardless of the end and the means, it may be to achieve a certain end regardless of the means or it may be do an act with certain means regardless of the end.[3] A slight variation will not prevent the act from being in furtherance of the common intention.[4]

When the question of murder committed by two or more persons has got to be decided, the question of intention becomes important and that intention has to be proved or inferred as any other fact from the evidence of the case.

Where no intention to commit murder has been provided, the only offence under which the accused could be convicted is one under Sec. 265, Hyderabad Penal Code, corresponding to Sec. 325, Indian Penal Code.[5] It seems clear that common intention implies concert and planned action. In *Mahbub Shah* v. *Emperor*,[6] their Lordships of the Privy Council held that common intention within the meaning of Sec. 34 implies a pre-arranged plan. To convict the accused of an offence applying Sec. 34, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. This case has naturally been followed in various cases by different High Courts.[7] But as was pointed out in *Gajraj Singh* v. *Emperor*[8]: "There must be a pre-arranged plan, but that plan may be made shortly or immediately before the commission of the crime. A long-standing conspiracy is not required for the application of the section." "Common intention" was held to imply a "pre-arranged plan". This does not mean either that there should be confabulation, discussion and agreement for a considerable time before the

1. Mathurala Adi Reddi v. State of Hyderabad, A. I. R. 1956 S. C. 177 at p. 180 : 1956 Cr L. J. 341 (S. C.).
2. Sulaiman v. The King, A. I. R. 1941 Rang. 301 at p. 302 ; *see* also Barendra Kumar Ghose v. Emperor, A. I. R. 1925 P. C. 1 : 52 Cal. 197 (P.C.) : 29 C W. N. 181 ; Harihar Singh, 90 I. C. (Pat.) 154 ; Jhakri, 17 I. C. (Cal.) 1001 ; Dahin Singh, 14 I. C. (All.) 649 dissented from in Hamman, I. L. R. 35 All. 560 ; Pholo, (1933) S. 407 ; Sadgu Singh, I. L. R. (1933) Lah. 865 ; Sharif, I. L. R. (1933) Lah. 315 ; Debi Chand, I. L. R. 59 Cal. 1192 ; Irshadullah Khan v. Emperor, A. I R. 1933 All. 528 : 1933 A. L. J. 1292 ; Dastarali, I. L. R. 59 Cal. 822.
3. Bashir v. State, A. I. R. 1953 All. 668 at p. 671.
4. *Ibid.* at p. 673.
5. Hulliah v. State, A. I. R. 1954 Hyd. 54 at p. 55 : I. L. R. 1953 Hyd. 613 (F. B.) ; *see* also Madhuwa v. State of V. P., A. I. R. 1954 V. P. 36.
6. I. L. R. (1945) Lah. 367 (P. C.) : I. L. R. (1945) Kar. (P. C.) 210 : 1945 M. W. N. 373 : 219 I. C. 467 : 46 Cr. L. J. 689 : 1946 A. W. R. (P. C.) 46 : 1945 A. L. J. 344 : 172 I. A. 148.
7. Gajraj Singh v. Emperor, A. I. R. 1946 Oudh 250 at p. 252 : 225 I. C. 308 : 47 Cr. L. J. 714 ; *see* also Kamaldin v. Emperor. A. I. R. 1947 Sind 41 : 47 Cr. L. J. 1006 : 227 I. C. 149 ; Gorey, 1948 O. W. N. 286 : 1948 A. W. R. 281 ; Muklesur Rehman v. King, A. I. R. 1950 Assam 98 : 51 Cr. L. J. 945 ; Biswanath v. Emperor, A. I. R. 1946 All. 153 ; Sakhat Singh, 1952 R. L. W. 17 ; *see* also Hira Dubey. A. I. R. 1952 Pat. 135 : 30 Pat. 1264 ; Fakir Chand, 51 Cr. L. J. 1265 ; Basappa, A. I. R. 1951 Mys. 1 : 51 Cr. L. J. 1695. For cases taking the same view before the pronouncement by their Lordships of the Privy Council, *see* Jaimangal v. Emperor, A. I. R. 1936 All. 437 : 37 Cr. L. J. 457 ; Nga E, I.L.R. 8 Rang. 603 (F. B.).
8. A. I. R. 1946 Oudh 250 at p. 253 : 47 Cr. L. J. 714 : 225 I. C. 308.

doing of the criminal act.[1] The decision of the Judicial Committee in *Mahbub Shah's* case is warrant only for the proposition that it is not enough to attract the provisions of Sec. 34, Penal Code, that there was the same intention on the part of several people to commit a particular criminal act, or a similar intention but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.[2]

Common intention and *mens rea.*

As common intention can be formed only a moment before the doing of the criminal act, the suddenness of a quarrel or fight does not by itself negative the existence of common intention.[3] Common intention should not be confused with the intention that is an ingredient of many of the offences. In some cases the intention which is an ingredient of an offence may be identical with the common intention of the conspirators but it would still be separate from, or in addition to, the common intention and not made in it.[4]

Care must be taken not to confuse same or similar intention with common intention ; the partition which divides "their bounds" is often very thin ; nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice.[5]

What is necessary to constitute common intention.

The fact that two or more persons possess the same intention and take similar action does not make them jointly liable for the combined effect of their action under this section, though they might be liable under the next section. To constitute common intention it is necessary that the intention of each one of the accused should be known to the rest of them and be shared by them.[6] Take an example : the accused, a notorious debauchee well known for his misdeeds in the neighbourhood, entered the house of a married girl at dead of night and began to ravish her by force. She screamed and shouted "Thief, Thief" whereupon several villagers armed with sticks ran up to her rescue. Finding the miscreat *flagrante delicto* one body of persons lightened their sticks upon him and he bolted, but found another party in the verandah who did likewise. He escaped to the courtyard where he found another lot whose blows killed him outright. The parties were animated by the same intention to disable the culprit and to seize his body, but they did not act in furtherance of a "common intention". Hence they were all acquitted of culpable homicide and of an offence under Sec. 148.[7] But persons who have a common intention must have the same intention. "Same intention" must, to make it "common intention," be indicated in same way by words or act between the persons who share it. Such indication may be inferred from circumstances.[8] Common intention can certainly be formed by conduct ; neither a written nor an oral agreement is required.

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1. Bashir v. State, A. I. R. 1953 All. 668 at p. 671 ; *see* also State v. Saidu Khan, A. I R. 1951 All. 21(F. B).
2. Nachimuthu Goundan, *In re*, A I. R. 1947 Mad. Mad. 259 at p. 261 : I. L. R. (1946 Mad. 425 : 48 Cr. L. J. 123 : 228 I C. 195 : 59 L. W 455 : 1947 M. W. N 550 (2) : (1946) 2 M. L J. 137 ; Muniyandi, (1952) 2 M. L. J. 745 : 1952 M. W. N. 1962 ; Bashir v. State, A I. R. 1953 All. 668 ; Kasim Pillai v. State, A. I. R. 1952 T. C. 565 ; *see* also Banka Bhoi, 17 Cut. L. T. 181 ; Mchtab Singh, 17 J. K. L. R. 9.
3. Bashir v. State, A. I. R. 1953 All. 668 at p. 671.
4. *Ibid.* ; State v. Saidu Khan, A. I. R. 1951 All. 21 (F. B.) : 1950 A. L. J. 884.
5. Mahbub Shah v. Emperor, A. I. R. 1945 P. C. 118 at p. 121 : I. L. R. (1945) Lah. 367 (P. C.) : 72 I. A 148 : I. L. R. (1945) Kar. (P C.) 210 : 47 Cr. L. J. 689 : 219 I. C. 467 : 1945 A. L. J. 344 ; Padamraja, 52 Cr. L. J. 595 ; Gajraj Singh v. Emperor, A. I R 1946 Oudh 250 : 225 I. C. 308 : 47 Cr. L. J. 714 ; Narayan v. State, A. I. R. 1953 Hyd. 161.
6. Tillu Ahir v. Rex, A. I. R. 1949 All. 89 at p. 90 : I.L.R. (1949) All. 127 : 1948 A. L. J. 505 : 1948 A. W. R. (H. C.) 201.
7. Jhakri Chamar, 17 I. C. (Cal.) 1001.
8. Gajraj Singh v. Emperor. A. I. R. 1946 Oudh 250 at p. 253 : 225 I. C. 308 : 47 Cr. L. J 714.

Cases where two or more persons attack another simultaneously may broadly be divided into two categories. One is where the assailants do not have an opportunity at all of having a pre-arranged plan. In such a case there may be a similar intention in the minds of the assailants, but there will not be common intention and Sec. 34 will not apply. In the second category there is an opportunity for the assailants to have pre-concert. In such cases Sec. 34 would generally apply and common intention would be presumed, provided the conduct of the assailants is such as to give rise to an inference of pre-concert.[1]

Common intention when may be presumed.

21. Presence at time of commission of offence.—The essence of Sec. 34 is that the person must be physically present at the actual commission of the crime. This must be coupled with actual participation. It is essential that the accused join in the actual doing of the act and not merely in planning its perpetration. Actual participation may be of a passive character such as standing by a door with the intention of assisting in furtherance of the common intention of all the accused and with a readiness to play his part when the time comes for him to act. If the accused was not present, he cannot be convicted with the aid of Sec. 34.[2] Presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act.[3] The actual participation may be of a passive character as where an accused stood near a cart to warn his companions about the approach of danger.[4]

Presence of accused if necessary for conviction under this section.

The essence of liability under Sec. 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under Sec. 34 is not, on the words of the statute, one of the conditions of its applicability. As explained by Lord Sumner in *Barendra Kumar Ghose v. The King-Emperor*,[5] the leading feature of Sec. 34 of the Indian Penal Code is "participation" in action. To establish joint responsibility for an offence, it must of course be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention—a meeting of minds—to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of Sec. 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consist of diverse acts which may be done at different times and places.[6]

Essence of liability under this section.

Physical presence if essental to establish joint criminal liability.

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1 (1955) S C. R. 1177.
2 Fazal, 1953 R. L. W. 354.
3. Shree Kantiah Ramayya *v.* State of Bombay. A.I.R. 1955 S.C. 287 at pp. 293. 294: 1955 S.C.R. 117 : 1955 S.C.A 283 : 1955 S. C. J. 233 : 57 Bom. L. R. 632 : 1955 M. W. N. 317 : 1955 A. W. R (Sup.) 65 : 1955 Cr. L. J. 857 ; Om Prakash *v* State, A.I.R. 1956 All 241 : 1956 Cr. L. J. 452.
4 Ranchhod *v* State. A I.R. 1956 M.B. 262 at p 268 : I L R (1956) M. B. 104 : 1956 Madh. B L. J 571 : 1956 Cr L.J. 1401.
5. A. I. R 1925 P.C. 1 at p 7 : 52 I. A. 40.
6. Jaikrishnadas Manohardas Desai *v* State of Bombay, A. I. R 1960 S. C. 889 at p 892 : (1960) 3 S. C. R. 319.

In *Shree Kantiah's* case,[1] misappropriation was committed by removing goods from a Government depot and on the occasion of the removal of the goods, the first accused was not present. It was therefore doubtful whether he had participated in the commission of the offence, and the Supreme Court in those circumstances held that participation by the first acccused was not established. The observations in *Shree Kantiah's* case in so far as they deal with Sec. 34 of the Indian Penal Code must be read in the light of the facts established and are not intended to lay down a principle of universal application.

Section 34, I. P. C., lays down a principle of joint liability for acts done by several persons in pursuance of a criminal design or enterprise. Under this section, one of several persons who engages himself in a criminal enterprise or design may be liable for an act done by another which he never himself intended and perhaps never contemplated. It cannot be in doubt that the mere presence of the accused without anything more can bring him within the purview of Sec. 34, I. P. C. In order to establish the guilt, it has to be proved that the accused did something in furtherance of common intention.[2] The mere presence of a person at the time of the commission of an offence by his confederates is not in itself sufficient to bring his case within the purview of Sec. 34, I. P. C., unless the community of design is proved against him. It is no doubt true that in view of the provision of Sec. 32, I. P. C., an omission is included in an act, but it is incumbent that such an omission must be an illegal omission and the onus lies on the prosecution to show that the omission which is being treated as an act, was either an offence or was prohibited by law or was one which furnished grounds for a civil action as required by Sec. 43, I. P. C., which defines what "illegal" means. An inaction which is not shown to be illegal would never amount to an act under the Indian Penal Code. It is an illegal inaction alone that can make a person equally liable with the actor himself.[3]

Mere presence at the time of commission of offence is not itself sufficient to attract this section.

Next, how is a common intention to be proved ? The simplest method of proving it is, of course, by direct evidence of conspiracy. But such evidence is not always procurable, nor, if procured, is it invariably reliable, for the only evidence thus obtained would be the evidence of approvers or accomplices which the Courts consider it unsafe to rely upon unless it is corroborated in material praticulars.[4] Failing this evidence or its material corroboration, resort must be had to other circumstances evidencing community of interest.[5] This is some time sought to be proved from the presence of the accused at the time of the commission of the crime. But this alone is never sufficient.[6] For persons present do not necessarily possess the same intention which is the

Mode of proving common intention.

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1. (1955) 1 S. C. R. 1177 : A. I R. 1955 S. C. 287.
2. Ramsetty Butchaiah *v.* State, 1969 Cr.L.J 642 at p. 549.
3. Kochu Cherukka Panicker *v.* State of Kerala. (1964) 1 Cr. L. J. 375 at p. 377.
4. Section 114 (*b*), Indian Evidence Act (I of 1872), but see *ibid.*, Sec. 133, which would appear to be in conflict with the earlier clause. But it is not. The one lays down a rule of practice, the other the rule of law.
5. *See* Mahbub Shah *v.* Emperor, A. I. R. 1945 P. C. 118 : I. L. R. (1945) Lah. 367 (P. C.) : 72 I. A. 148 : I. L. R. (1945) Kar. (P. C.) 210 : 46 Cr. L. J. 689 ; Nachimuthu Goundan, I: L. R. (1946) Mad. 425 : 48 Cr. L.J. 123 : 223 I.C. 195 : 194 M. W. N. 550 (2) : (1946) 2 M. L. J. 137 ; Banka Bhoi, 17 Cut. L. T. 181 ; Bashir *v.* State, A. I. R. 1953 All. 668 ; Nazir, 49 Cr. L. J. 271.
6. Jardine, J., in Magan Lal, I.L.R. 14 Bom. 115 ; Gorachand Gope, B.L.R. (Sup. Vol.) 443 (F. B.) ; Gurusami Tevari, 1936 M. W. N. 177 ; *see* also Gangapathi *v* Emperor, A. I. R. 1923 Mad. 369 (2) : 29 Cr. L. J. 531 ; Basharat *v.* Emperor, A. I. R. 1934 Lah. 813; Mahadeo Nath *v.* Emperor, A. I. R. 1941 Pat. 550 : 42 Cr. L. J. 603.

fact to be decided. Nor can it be held that a person, who, being present, does not prevent the commission of a crime or fails to apprehend the criminal must be himself one.[1] But if several policemen go out together for the purpose of apprehending a man, and taking him to the *thana* on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, then the Court might properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design.[2] All the persons within the house must have known what was going on, *M* was crying out loud enough to be heard by the neighbours as well as those inside the house. If murder was about to be done or was being done the others hearing *M*'s cries and knowing what was happening or about to happen had the statutory duty cast upon them by Sec. 44, Criminal Procedure Code, forthwith to inform the the Magistrate or police officer. If that could not be done in time to prevent the completion of the offence any of them could by opening the door and calling in the neighbours have saved the life of *M*. Not one of the four accused did any such thing and all of them must be held either to have taken an active part or by wilful acquiescence to have furthered the intention of all that the crime should be carried to its completion and that no outsider should have a chance to interfere.[3] As already observed, the question, therefore, whether a person was inspired by common intention to take part or to be present at the commission of a crime cannot be answered by reference to any general principle. This must be gathered from the facts of each case and the surronding circumstances.[4]

No general principle for wrong inference.

22 Inference of common intention —The existence of common intention has always to be inferred from facts. Where it was established that all the three applicants came together. Two of them, *R* and *T* had guns with them. The prosecution had established to the satisfaction of the Additional Sessions Judge and the High Court that as *A* was giving information to the police about the movements of the appellants and had also taken the major part in getting one *M* arrested in a dacoity case *R* nursed a grievance against *A* It was held that the inference, therefore, must be that he had come with the intention of taking revenge on *A* by killing him and the other two appellants who accompanied him shared that intention. As the High Court had pointed out, which was made clearer by the statement of *M* to the effect that *R* said at the time of the incident that "his (servant)" *N* was taken away forcibly and then *J* asked the deceased sarcastically, "Where is your military today?" In the circumstances, therefore, there could be no doubt that common intention to commit murder was established not only with respect to *J* but also with respect to *N* who was all along with them.[5] In a case where an unarmed person is attacked by four persons where three or four are armed with spears and one with a

Existence of common intention has always to be inferred from facts.

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1. Jardine, J., in Magan Lal, I.L.R. 14 Bom. 115 ; Ramnath *v.* State of M. P., A. I. R. 1953 S. C 420.
2. Gorachand Gope, B. L. R. (Sup. Vol.) 443 (F B.).
3. Mahadeo Nath Khetri *v.* Emperor, A I. R. 1941 Pat. 550 at p. 553
4. Irshadullah Khan *v.* Emperor, A.I.R. 1933 All. 528 at p 533 : 55 All. 617, followed in Haider A.I R. 1935 All. 504 ; Nga E I. L. R. 9 Rang. 612 ; Heramba *v.* Kali Prasanna, 1 C. W. N. 465 ; Faizulla, 61 I. C. 522 ; Mianjan, 73 I. C. 81 ; Adam Ali, 31 C W.N. 314, a case where Sec. 34 applied to Sec. 304, Part II ; Tara Singh, I.L.R (1932) Lah. 189, following Barendra Kumar Ghose *v.* Emperor, 52 Cal. 197 (P. C.). *contra* Aniruddha, A. I. R. 1925 Cal. 915 : 86 I. C. (C.) 475.
5. Baleshwar Rai *v.* State of Bihar, (1944) 1 Cr. L. J. 564 at p. 565 (S. C.).

lathi injuries are caused, it can be safely presumed that all of them intended to cause at least grievous hurt. So if grievous hurt is actually caused, all the assailants can be punished for having caused grievous hurt in furtherance of the common intention of all.[1]

The inference of common intention within the meaning of the term in Sec. 34 of the Indian Penal Code "should never be reached unless it is a necessary inference deducible from the circumstances of the case".[2]

As was held by the Supreme Court in *Pandurang, Tukia and Bhillia* v. *State of Hyderabad*,[3] a common intention under Sec. 34, I. P. C., presupposes prior concert and requires a pre-arranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of common intention of them all. It was emphasised that similar intention must not be confused with common intention; though the partition which divides their bounds is often very thin, nevertheless the distinction is real and substantial. It is a natural corollary to these propositions that the interference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.[4] In another judgment of the Supreme Court of the same year in *Rishideo Pande* v. *State of Uttar Pradesh*,[5] it was observed that the common intention while presupposing a prior concert and a pre-arranged plan, may be inferred from the surrounding circumstances and the conduct of the parties.

The inference of common intention within the meaning of term in Sec. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.[6] It is well established that common intention presupposes prior concert. Is requires a pre-arranged plan and a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, and yet none would have the common intention required by this section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others. No elaborate plan or long interval of time is required. It could arise and be formed suddenly. There is then the necessary meeting of minds. There is a pre-arranged plan, however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough to have the same intention independently of each other. Prior concert and arrangement are often to be determined from subsequent conduct but as the Privy Council said in *Mahbub Shah* v. *Emperor*,[7] "the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case". This reproduces the ordinary rule about circumstantial evidence. At bottom it is a question of fact in each case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference, "or the incrminating facts must

Inference of common intention from circumstances of the case.

1. Dal Singhar *v.* State, 1969 A. W. R. 24 at pp. 27-28.
2. State *v.* Bhimsbankar Siddannappa, A. I. R. 1968 Bom. 254 at p. 256; Mahbub *v.* Emperor, 47 Bom. L. R. 941 : A.I.R. 1945 P. C. 118.
3. (1955) 1 S. C. R. 1083.
4. Amar Singh *v.* State, (1967) 69 Punj. L. R. 139 at p. 143.
5. A. I. R. 1955 S. C. 331 at p. 332.
6. Mahbub Shah *v.* Emperor, A. I. R. 1945 P.C. 118 at p. 121 : 72 I. A. 148 : I. L. R. (1945) 2 Kar. P. C. 210 : 1945 A. L. J. 344 : 47 Bom. L. R. 941 · 49 C. W. N. 678 : I. L. R. (1945) Lah. 367 : (1945) 2 M. L. J. 144 : 58 L. W. 368 : 1945 M. W. N. 375 : 1945 M W. N. (Cr) 69: 1945 N. L. J. 475 : 26 P.L.T. 229 · 219 I.C. 467 : 46 Cr.L.J. 689 (P.C.).
7. *Ibid.*

be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis."[1]

Where the circumstances give rise to a number of alternative inferences the safer course is to hold that the act of the individual was his personal act and not done in furtherance of a common intention.[2]

Common intention to be inferred from whole conduct of all persons.

The distinction between the same or similar intention and the common intention is real though at times thin and it assumes importance particularly in cases where the occurrence is sudden. Common intention should be inferred from the whole conduct of all persons concerned and not only from an individual act actually done. It cannot be said as a matter of law that in all cases, even though the occurrence is sudden any particular act of a member would by itself or exclusively form the basis of the conclusion about the common intention of all.[3] After a person was mercilessly beaten and was thrown in a drain when the same people came back again and seeing the man still with life went on beating him with sticks till he died, there is no difficulty in coming to the conclusion that they had the common intention of killing him.[4] It is difficult, if not impossible to procure diect evidence to prove the intention of an individual ; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.[5]

A pre-arranged plan is not an indispensable requirement of the application of Sec. 34. A common intention may develop suddenly depending upon the facts of each case. In *B. N Srikantiah* v. *State of Mysore*,[6] the Supreme Court observed that common intention is a question of fact and is to be gathered from the acts of the parties.

In *Sukha* v. *State of Rajasthan*,[7] the Supreme Court drew a distinction between "common intention" and "common object". "Common intention" required by Sec. 34 and "common object" set out in Sec. 149, according to their Lordships, though they sometime overlap, are used in different senses and should be kept distinct. In a case under Sec. 149 there need not be a prior concert and meeting of minds ; it is enough that each has the same object in view and their number is five or more and they act as an assembly to achieve that object. In *Karnail Singh* v. *State of Punjab*,[8] it was observed that it is true that there is substantial difference between Secs. 34 and 149 but they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Sec. 149 overlaps the ground covered by Sec. 34. If the common object which is the subject-matter of the charge under Sec. 149 does not necessarily involve a common intention, then the substitution of Sec. 34 for Sec. 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under Sec. 149 would be the same if the charge were under Sec. 34 the failure to charge the accused under Sec. 34 could not result in any prejudice and

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1. Pandurang *v.* State of Hyderabad, A. I. R. 1955 S.C. 216 at p. 222: (1955) 1 S. C. R. 1033 : 1955 S.C.A. 228 : 1955 S.C.J. 106: 1955 Cr. L. J. 216.
2. State of Bihar *v.* Lala Mahto, A. I. R. 1955 Pat. 161 at pp. 168, 169 : 1955 Cr. L. J. 597 (D. B.) : I. L. R. 33 Pat. 397.
3. Kinaram Das *v.* State, A. I. R. 1955 Assam 2 at p. 5 7 : I. L. R. (1954) 6 Assam 368 : 1955 Cr. L. J. 57 (D. B.).
4. *In re* P. Ramulu, A. I. R 1956 Andh. 247 at p. 250 : 1956 Andh. W. R. 664 : 1956 Cr. L. J 1389.
5. Mahbub Shah *v.* Emperor, A. I. R. 1945 P. C. 118 at p. 120 : 72 I. A. 148 : I L R. (1945) Lah. 367 : 1945 A. L. J. 344 : 47 Bom. L R. 941 : 49 C W. N. 485 : 1945 N L. J. 475 : 1945 M.W.N. 373 : 58 M.L. W. 368 : (1945) 2 M.L. J. 144 : 26 P L.T 229 : 219 I. C. 467 : 46 Cr. L. J. 689, followed in Ramchand Tolaram Khatri *v.* State, A. I. R. 1956 Bom 87 : I L. R. (1956) Bom. 343 : 58 Bom. L. R 90 : 1956 Cr.L. J. 585 (D. B.).
6. (1959) S. C. R. 496 : A.I R. 1958 S.C. 672.
7. (1956) S C. R. 288 : A.I.R 1956 S.C. 513.
8. (1954) S. C R. 904 : A.I R. 1954 S C. 204.

in such cases the substitution of Sec. 34 for Sec. 149 must be held to be a formal matter. There is no such broad proposition of law that there can be no recourse to Sec. 34 when the charge is only under Sec. 149.

It is not necessary to refer to other desisions. In *Sukha's* case,[1] their Lordships of the Supreme Court observed that when a crowd assembles and there is an uproar and people are killed and injured, it is only natural for others to rush to the scene with whatever arms they can snatch. Some may have an unlawful motive but others may not, and in such circumstances, it is possible to say that they were all motivated by a common intention with prior concert. What a Court of fact should do in such a case is to find from the evidence which of them individually had an unlawful object in view, or having originally a lawful object in view developed it later on into an unlawful one.[2]

Pre-concert in the sense of distinct previous plan need not be proved.

A pre-concert in the sense of a distinct previous plan need not be proved. The common intention to bring about a particular result may well be developed on the spot as between a number of persons, with reference to the facts of the case and the circumstances of the situation. It is a question of fact in each case whether in a proved situation all the individual concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and therein intended by all of them.[3] Common intention requires a pre-arranged plan and when the pre-concert has not been proved, the Courts will not infer common intention from the mere fact that several accused dealt blows on a certain person with *lathis*.[4]

Theft case.

If a stolen article, almost at the very moment it is stolen, is handed over by the thief to a companion who was with him at the time of commission of the offence, the proper inference to be drawn from this circumstance is that the second person was in concert with him and not merely that he received the stolen property. To bring home a charge under Sec. 379 read with Sec. 34 it is sufficient if it is established by evidence or circumstances that the accused shared the common intention of committing theft with the actual thief.[5]

There can be absolutely no doubt that all the four accused had a prior meeting of minds and they had already planned the crime committed by them. It is established beyond any doubt that all of them were armed with sharp and blunt weapons. They were lying in ambush together at one place. They all attacked the deceased together with the weapons and they did not leave him till they were satisfied that they had broken both of his legs. All this evidence shows that they had a common intention to cause him grievous hurt.[6]

Examples.

Where both the accused were at the bungalow of one of them before the occurrence took place and they came to the spot on hearing the protest raised by the deceased and immediately give him a beating with *lathis*, these facts clearly pointed to the common intention of the accused. It was immaterial as to who caused the grievous, and who caused the simple, injury to the deceased and either of them

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1. (1959) S. C. R. 288 : A.I.R. 1956 S.C. 513.
2. Dharma *v.* State. 1970 Cr. L. J. 126 at pp. 127-28.
3. Kripal *v.* State of U. P., A. I. R. 1954 S.C. 706 at p. 710
4. Anna *v.* State of Hyderabad, A. I. R. 1956 Hyd. 99 at pp. 104, 105 : I. L. R. (1956) Hyd. 205: 1956 Cr. L. J. 887 (D.B.) following the principle laid down by the Supreme Court in Kripal *v.* State of U. P., *supra.*
5. Ganga *v* State, A I. R. 1957 All. 678 at p. 680: 1957 Cr. L. J. 1060.
6. Gonda Singh *v.* State, 1957 Cr. L. J. 240 at p. 243 : 1956 Raj. L. W. 178.

could be convicted under Sec. 325 read with Sec. 34 of causing grievous hurt to the deceased.[1] There is no evidence whatsoever of any premeditation or of a pre-arranged plan by the assailants of murdering the *S*. No act or conduct on the part of the accused has been proved from which an inference of a pre-arranged plan to murder *S* could be raised.[2]

Where the officer-in-charge of the prosecution in the Trial Court wrongly concedes that common intention could not be inferred under the circumstances of the particular case, that cannot stand in the way of the Appellate Court setting aside the order of acquittal based on that concession.[3]

The inference to be drawn from a set of given facts is one upon which the leading precedents shed a flood of light. Thus, in one case,[4] a number of men armed with clubs went out to enforce a right or supposed right by the use of those clubs. Ainslie, J.,[5] inferred their intention to be homicidal because of their number, the strength of the opposing force, and the unlikelihood of self-control in a moment of passion. But it seems that the learned Judge failed to see that it is one thing to suppose what persons sallying out for the vindication of their rights by show of force should think, and it is quite another thing to hold that what some or a few of them might or should have thought all must have intended.

In short, as remarked before, to think what is likely is not the same thing as to intend it. And this appears to have been the view of the majority of the Full Bench overruled Ainslie, J.[6] So where a policeman arrested a thief whereupon the latter shouted for help hearing which his relations and castemen ran up with sticks to rescue him, and in rescuing him two of them grievously hurt the constable, the Magistrate convicted all the four of grievous hurt, but on appeal Mahmud, J., held that some discrimination should be made between the case of the two assailants and the remaining accused, for while the common intention of the four accused was merely to rescue their comrade, the intention to inflict grievous hurt could not be imputed to those who took no part in it.[7]

Murder cases.

In *Subbanna's* case,[8] four persons were charged with the offence of murder. Evidence showed that the accused Nos. 1 and 2 were armed with knives. Accused Nos. 3 and 4 held the deceased while accused Nos. 1 and 2 cut him and this attack continued even after witnesses attempted to intervene. It was held that all the accused acted with the common intention of killing the deceased, and the fact that the accused Nos. 3 and 4 were not armed made no manner of difference. Accused 1 and 2 were taken in the cart by the deceased, leaving accused 3 to 5 in the village, the latter three persons subsequently went towards the cart and overtook the cart, that one of these three persons at the time when they reached the cart said that they will have to give a sound thrashing to the constable and even finish him and it is after this was said all the accused belaboured the deceased and even after the deceased fell down all the five of them beat him and left him only after he was dead.

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1. Kundan *v.* State, 1959 Raj L. W. 35.
2. Ram Nath Madhoprasad *v* State of Madhya Pradesh, A. I. R. 1953 S. C. 420 at p 424.
3. Public Prosecutor *v.* Chitikena Subbanna, A. I. R. 1947 Mad. 239 at p 241 : I. L R (1947) Mad. 224 : 48 Cr L. J. 112 : 1946 M. W. N 345 : 228 I. C. 178 : 59 L. W. 334 : (1946) 1 M. L. J. 444.
4. Sahed Ali, 11 B L R. 347 (F. B.).
5. *Per* Ainslie, J., dissentient in Sahed Ali. 11 B.L.R. 347 (F.B.); Jailal. 64 I.C. 878.
6. *Per* Couch, C J., in Sahed Ali, 11 B.L.R. 347 (F. B.) approved in Barendra Kumar Ghose *v.* Emperor, I. L R. 52 Cal. 197 at p. 212 (P.C.) ; to the same effect Shwe, 10 L. B. R 117 : 57 I. C. 918 ; Nazir *v.* Emperor. A. I. R. 1948 All. 229 : 49 Cr. L. J. 271 : 1947 A. L. J. 417 ; Sulaiman, 1911 Rang. 301 : 49 Cr. L. J. 271 : 197 I. C. 131.
7. Dharam Rai, (1887) A. W. N. 236.
8. A. I. R. 1947 Mad. 239 : I. L. R. (1947) Mad. 224 : 48 Cr. L. J. 112 : (1946) 1 M. L. J. 444 : 59 L. W. 334 : 228 I. C 178 : 1946 M. W. N. 345.

The words "finish him" are clearly indicative of the fact that he wanted the deceased to be killed and it was only after he had given this direction that all the accused did the acts which resulted in the death of the deceased. These circumstances are enough to the indicate that all the accused acted in pursuance of a common intention to kill and that all these acts were done as the result of a common intent to kill; and when that was so, this is a case to which the provisions of Sec. 34 could be availed of by the prosecution.[1] Where one accused caught hold of the victim from behind and grappled with him and the other four accused came armed with *lathis* and began to beat him mercilessly and continued beating even after the victim fell down, it was held that the inference was irresistible that all the five accused had the same intention and that the intention was shared by all in the sense that it had been communicated by them to each other before they rushed to attack the victim[2] simultaneously.

What constitutes intention and common intention.

A mere presentment of a possible danger does not, therefore, constitute an intention to court it. It must be foreseen, foreknown and premeditated. If, therefore, the assembly understood and realised that a certain offence would be committed or was likely to be necessary for the common object it would bring the case under Sec. 149 though not under this section.[3] Knowledge of a likely result has been held not to amount to an intention to bring about those results. Knowledge of the likely result and the actual result may justify the determination of the intention of the actual doer, but are not the right factors to determine the common intention of others.[4] It is not sufficient for joint responsibility for an offence under Sec. 34, Penal Code, that the offence actually committed was likely to occur as a result of the several persons acting together; but that the existence of a common intention being the sole test of responsibility, it must be proved what the common intention was and it must also be proved that the common act for which the accused were to be made responsible was acted in furtherance of that common intention.[5] Knowledge of the likely result and the actual result may justify the determination of the intention of the actual doer, but are not the right factors to determine the common intention of others who had made a common cause with the actual doer and whose liability for the actual acts of the doer will be dependent on the question whether the actual acts done were done in furtherance of the common intention of all or not.[6] Again it is not necessary for the liability of all the accused that they must have the common intention about the exact result which was to follow from the act or about the offence which would be made out on account of the actual physical act and its result. There is no justification for others to be not liable for such acts of the other confederates as were likely to be committed in the carrying out of the common intention and which would have been normally foreseen and even contemplated by those persons. Only such acts are not to be deemed to be the acts done in furtherance of the common intention as could not have taken place ordinarily in carrying out of the common intention. Such acts would be mostly unpremeditated ones by some of the persons joining in the criminal act. For such an unpremeditated act of one

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1. *In re* Nachimuthu Goundan, A. I. R. 1947 Mad. 259 at pp. 260-61 : 1946 M. W. N 550.
2. Gajraj Singh *v.* Emperor, A. I. R. 1946 Oudh 250 : 47 Cr. L. J. 714 : 225 I.C. 308: 1946 A. W R. (C. C.) 162 : 1946 O.W.N. 249.
3. Sabed Ali, 11 B L. R. 347 (F B.).
4. Nazir *v.* Emperor, A I. R. 1948 All. 229 at p 233 : 1947 A. L. J. 417.
5. Nga Maung Gyi *v.* Emperor, A.I.R. 1923 Rang. 268 : 1 Rang. 390 : 25 Cr. L. J. 241 ; Sulaiman *v.* King, A. I. R. 1941 Rang. 301 at p. 302 : 197 I. C. 131 : 43 Cr L. J 123.
6. Nazir *v.* Emperor. A. I. R. 1948 All. 229 at p. 233 : 49 Cr. L. J. 271 : 1947 A. L. J. 417.

person, the others cannot be made liable.[1] The common intention in furtherance of which the criminal act is done ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act, as the criminal act itself is committed in furtherance of that common intention.[2]

23. Proof of common intention.—Though prior concert and arrangement are to be determined from subsequent conduct, "the inference of common intention within the meaning of the term in Sec. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case".[3] This is no more than the ordinary rule about circumstantial evidence. At bottom, it is a question of fact in every case and, however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or as courts prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis".[4] It is well-established rule of law as laid down in the case of *Mahbub Shah* v. *Emperor*,[5] that the inference of common intention within the meaning of Sec. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. The same principle will apply even when a conclusion has to be drawn as to what is the exact common intention entertained between the different individuals if they are found to have one or when a conclusion has to be drawn as to whether a particular criminal act done by one is in furtherance of the common intention of all.[6]

Principle enunciated in Privy Council's case.

When common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so in the case when one of the accused has got the benefit of the doubt and has been acquitted.[7]

Where the three accused attacked complainant in the first incident, and In this incident certain injuries were suffered by the complainant, although no injury was caused by a spear. The complainant ran away followed by the accused. Whether he or his companions were or were not attacked by a large number of persons at the second incident, the findings make it clear that they were attacked by the 3 accused. It seems, therefore, that the accused were actuated by a common intention to assault the complainant and his men and this inference is justified from the circumstances. They did assault the complainant in the first incident. They pursued the complainant and they persisted in assaulting him and those who had come to his help. The clear implication of this is that the assault in the second incident was the result of previous concert.

The High Court found that the common object charged was identical with the common intention and it seems that the evidence to prove the common intention was the same which would have proved the common

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1. Nazir *v.* Emperor, A I.R. 1948 All. 229 at p. 234 : 49 Cr. L. J. 271 1947 A.L.J. 417.
2. *Ibid*. at p. 232 ; Ghoba, (1948) P.L.R. 303.
3. Mahbub Shah *v.* Emreror, 72 I. A. 148 : I. L. R. (1945) Lah. 867 : 1945 A. L. J. 344 : 47 B. L. R. 941 : 49 C. W. N. 678 : 1945 M. W. N. 373 : 58 M. L. W. 368 : (1945) 2 M. L J. 144 : 1945 N. L. J. 475 : 26 P. L. T. 229 : 219 I. C. 467 : 46 Cr. L. J. 689.
4. Pandurang *v.* State of Hyderabad, A. I. R. 1955 S. C. 216 at p. 222 : (1955) 1 S.C.R. 1083 : 1955 S. C. J. 106 : 1955 S. C. A. 228 : 1955 M. W. N. 161 : 1955 Cr. L. J. 572.
5. A. I. R. 1955 P. C. 118 : 72 I. A. 148 : 46 Cr. L. J 689 (P C.)
6. State of Bihar *v.* Lala Mahto, A I R. 1955 Pat. 161 at pp. 168-69 : I. L. R. 33 Pat. 397.
7. Baul *v.* State of U. P., A I.R, 1968 S, C, 728 at p. 730.

object, if it had been established that there had been an unlawful assembly, the accused were convicted under Secs. 323 and 326 read with Sec. 34, Indian Penal Code.[1]

Difficulty to procure evidence of common intention.

It is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.[2] Direct evidence of common intention is a rarity and that common intention has to be found mostly on circumstantial evidence.[3] This common intention may develop on the spot and suddenly.[4] The activities of persons working in concert by virtue of a common intention and a criminal conspiracy cannot be established by direct evidence as they are carried on in privacy. Evidence of the conspiracy can be gathered only from the members of the family or from persons intimately connected with them or from their associates.[5] In a case where a group of persons detain a person carrying some articles and engage themselves in some negotiation with him and another group suddenly appears at the scene and remove the articles while the first group remain silent spectators, the natural inference is that the group which detained the person and the group which removed the articles are members of a gang acting in furtherance of a common intention.[6] The common intention implies acting in concert, the existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts.[7] The common intention in furtherance of which the criminal act is done ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act, as the criminal act itself is committed in furtherance of that common intention.[8] The common intention has to be inferred from a network of facts cast around the accused and the jury had to act on just and reasonable conviction founded upon just and reasonable grounds.[9]

Common intention to be establishd by facts and circumstances.

It was held the possibility of a common intention may be inferred from the conduct of the assailants or their participation in the commission of the crime and from circumstances such as the character of the attack or the nature of the injuries inflicted or from the nature of the weapons employed.[10]

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1. Khacheru Singh *v.* State of U. P., A. I. R. 1958 S. C. 546 at pp. 547, 548 : 1956 Cr. L. J. 950 ; *see* also Karnail Singh *v.* State of Punjab, A. I. R 1954 S. C 204 : 1954 S C. R 904. and the observations of Fazl Ali, J., in Lachman Singh *v.* State, A. I. R. 1952 S C. 167 at p. 170 : 1952 S. C. R. 939
2. Mahbub Shah *v* Emperor, A. I. R. 1945 P C. 118 at p 120 : 72 I A 148 : I. L. R. (1945) Lah. 367 : 1945 A L J 344 : 47 B L R. 941 : 49 C W N 678 : 1945 M W. N 373 : 58 M. L. W. 368 : (1945) 2 M L. J. 144 : 1945 N L J 475 : 26 P. L. T. 229 : 46 Cr. L. J. 689 : 219 I. C. 467 ; Ramchand Tolaram Khatri *v.* State, I L. R (1956) Bom. 343 : 58 Bom. L. R. 90 : 1956 Cr. L. J. 585 (D. B.) ; Chotteylal *v.* State, A I. R. 1968 All. 358 at p. 361.
3. Shariff Ahmad *v* State A. I. R 1957 All. 50 at p. 53 : I. L R (1956) 2 All. 188 : 1956 Cr. L. J. 28 ; Shivarada *v* State, A. I. R. 1969 Cal 28 at p 3 .
4. Kripal *v.* State of Uttar Pradesh, A. I. R. 1954 S. C. 706 at p. 710.
5. Govinda Reddy, *In re*, A. I. R. 1958 Mys. 150 at p. 166 : I. L. R. (1957) Mys. 177 : 1958 M L. J. (Crl.) 341.
6. Gopala Panikkar Thankappan *v.* State of Kerala, A. I. R. 1969 Ker. 29 at p. 31 : 1968 Ker. L. T. 500.
7. Sitaram Dhaku Chawan *v.* State, A. I. R. 1958 Bom. 439 at p. 440 : I L. R. (1957) Bom. 114 : 59 Bom. L.R. 39 : 1958 Cr. L. J. 1380.
8. Nazir *v.* Emperor, A. I. R. 1948 All. 229 at p. 232 : 1947 A. L. J. 417 : 1947 A. W. R, (H. C.) 343 : 49 Cr. L. J. 271 ; Gheba *v.* Emperor, 1948 P L. R. 303 ; Rishideo Pande *v.* State of U. P., A. I. R. 1955 S. C. 33 : 1955 Cr. L. J. 873.
9. King-Emperor *v.* Barendra Kumar Ghose, A. I. R. 1924 Cal. 257 at p. 310 ; O. A. 52 Cal. 197 (P. C.) ; *see* also Har Sahai *v.* Rex, A. I. R. 1949 All. 582 ; *In re* Nachimuthu Goundan, A. I. R. 1947 Mad. 259 ; Nga E *v.* Emperor, A. I. R. 1931 Rang. 1 ; Bashir *v.* State, A. I. R. 1953 All. 668.
10. Kassim Pillai Assnaru Kutty *v.* State, A.I. R. 1952 T.C. 565 at p. 568 : 1951 Ker.L.T. 735 ; Ram Nivas, I. L. R. 35 All. 506.

In all cases, whether the crime is committed by a single person or by several persons acting together, courts have to determine what was the intention of the accused person, and must in almost all cases determine this by presumption from the acts done by him and must take into consideration all the circumstances of the case. And if in so determining the common intention of a number of persons the facts are such as to lead to a conclusion that some of those persons had such an intention as would make the offence murder, but that in the case of others the intention did not go so far, then those latter persons liable to conviction for such offence as would be constituted by the acts of the combination if done with the intention held by themselves individually.[1] The presumption of common intention must be subject to the same restrictions as other presumptions, it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the inference of common intention "should never be reached unless it is a necessary inference deducible from the circumstances of the case".[2] The common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the criminal act done is not to be assumed to be in furtherance of the common intention it follows that the common intention is not to be inferred exclusively from the criminal act done. The criminal act done will certainly be one of the factors to be taken into consideration but should not be taken to be the sole factor. Besides proving that a certain criminal act was done, the prosecution has to prove the existence of common intention and that the criminal act was done in furtherance of it, these two are independent facts and one is not to be assumed or inferred exclusively from the other.[3] The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention.[4]

Common intention—Presumption subject to restriction.

It is a simple case, if the motive or intention of the accused is to commit a particular crime, and that motive or intention can be proved by direct evidence. But the difficulty arises when the intention has to be deduced from the acts of the accused. Take, for example, the following cases: *A* had entered a house for the purpose of committing adultery. On an alarm being raised, some neighbours, including one *P*, turned him out and gave him a beating. He was afterwards prosecuted and sentenced to a month's imprisonment. On his release he, along with his two brothers, *B* and *C*, waylaid *P* and on meeting him immediately beat him mercilessly with *lathis*. On his falling down, they continued to beat him and only ran away when the villagers appeared upon the scene to remonstrate with them. *P* died the same night. His skull was found to have been fractured in four places. These injuries left no doubt in the mind of the Court as to what the assailants' intention was, and they were all convicted of murder.[5] Now take another case. Some four years before the assault upon him, one *P* had broken the leg of one *A* for which he had been imprisoned. It led to two factions. On a certain day *P* passed by *A*'s village, whereupon *A*, with his four brothers and cousins, set upon *P* and brutally assaulted him inflicting countless injuries with clubs. Both his legs were fractured in one or two places, but there was no injury to the head and though the trunk was bruised no

Example.

1. Nga E *v.* Emperor. A. I. R. 1931 Rang. 1 at p. 4 : 103 I. C. 355.
2. Bashir *v.* State, A. I. R. 1953 All. 668 at p. 672.
3. *Ibid.* at pp. 672-73.
4. *Ibid.* at p. 674.
5. Ram Newaz, I. L.R. 35 All. 606.

bones were broken, but *P* died of haemorrhage. The Court held *A* and his party guilty of culpable homicide and not of murder.[1] Now take a third case. The four accused, who were related and were co-sharers, entered *P*'s field, three armed with sticks and one *B* with a loaded gun, and wanted to turn him out by overawing him with their numbers. As *P* refused, *A* and his three companions started beating him, but *P*, with the assistance of another, defended himself and finding themselves worsted *B* fired and killed *P*. The question was what offence the four accused had committed? The question had to be referred to a Full Bench of five Judges of whom four held that the firing, being sudden and unpremeditated, must be treated as the act of *B*, from which Ainslie, J., differed asking the majority why did *B* carry a loaded gun if not to use if necessary? But the majority held that since the gun was fired to ward off a counter-attack it could not be said that the assailants had started to dispossess *P* after killing him, if necessary.[2] Other cases similarly decided follow the same principle. So where two persons, having conspired to procure a girl, persuaded her mother to give her up which she refused to do, whereupon one of them fired a gun loaded with pebbles which set up gangrene of which she died, it was held that he alone was guilty of murder and his confederate was acquitted of its abetment.[3]

Inference of common intention to kill.

In the case of *Kassim Pillai Assnoru Kutty* v. *State*,[4] as the accused approached the deceased Hydrose Kunju accused 5 exclaimed, "Here is the man who murdered our uncle; kill him". So saying he himself struck the first blow. When accused 2 and the deceased were engaged, accused 3, 4, 7 and 8 stabbed the deceased on his back. Then accused 2 and 3 caught him and threw him down flat on his back. Accused 3, 4 and 7 again gave several stabs on his chest and face. It was held the possibility of a common intention may be inferred from the conduct of the assailants or their participation in the commission of the crime and from circumstance such as the character of the attack or the nature of the injuries inflicted or from the nature of the weapons employed. The question whether there was such an intention or not will in most cases depend on inferences to be drawn from proved facts and not on any direct evidence about a pre-arranged plan which may seldom be available. The question whether there was common intention or not will have to depend in many cases on inferences to be drawn from the proved fact and not on any direct evidence about a preconceived scheme or plan which may not be available at all. Previous animosity together with the character of the weapon and the nature of the attack make the above the only reasonable conclusion possible.

There was an exchange of abuse between the deceased and the appellant and the relation between the parties became strained. The three appellants went to the *choupal* of the deceased armed with *lathis* and started belabouring the deceased and he died. There was only one injury on the head and there were two other injuries on the shoulders and they must have been caused by the two other persons. It was not clear from the evidence on record as to who caused the fatal injury on the head. Where actual injury caused was sufficient in the ordinary course of nature to cause death and it could not be said that the injury was accidentally or negligently

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1. Inder Singh, I. L. R. 10 Lah. 477.
2. Sabed Ali, 11 B. L. R. 347 (F. B.), approved in Barenrda Kumar Ghose v. Emperor, I. L. R. 52 Cal. 197 at pp. 211 and 212 (P. C.).
3. Shuka, 43 I. C. 827 (Cal.).
4. A. I. R. 1952 T. C. 565 at pp. 567, 568, 569 : 1951 Ker. L. T. 735.

caused, a strong presumption arises that the intention was to cause the injury which has been caused and as such the case would fall under Cl. (3) of Sec. 300. It would be particularly so if the attack was premeditated. It must be held that the person who actually caused the injury on the head was guilty of murder as defined in Cl. (3) of Sec. 300. When three persons attack another with *lathis*, not upon a sudden quarrel but in concert and after previous consultation, they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention.

There was nothing to show that the intention of the person who actually caused the fatal blow on the head was different from the intention of the others. Hence all the three will be liable for murder as defined in Cl. (3) of Sec. 300.[1] If two or three of several men proceed to assault another man with their fists and if suddenly one of the bystanders joins them and pulls out a knife and stabs him fatally, it might well be said that stabbing was not part of the criminal act in which all of them had joined but was the individual act of the man who used the knife. But where two men each armed with *lathis* set out in pursuit of another and overtake and assault him, each of them striking several blows, both would be equally guilty of the offence committed.[2]

Example—Privy Council's case.

In a Privy Council case,[3] out of the three accused who were connected with one another and were living together, two dealt with the deceased while the third, who had strong grounds for entertaining feelings of enmity against the deceased, grappled with a witness so that he might not rescue the deceased. It was held that the facts justified the inference that the third shared the intention of the other two accused to commit the murder.

English cases.

In an English case, where a party of poachers beat a keeper and left him senseless after which one of them returned and stole his money, it was held that he alone was guilty of theft.[4] But where eight poachers, all armed with guns, being surprised by some keepers who went towards them for the purpose of apprehending them, formed into lines and pointing their guns at the keepers said that they would shoot them, and one of them fired a shot wounding a keeper, it was held that all were guilty of attempted murder, because they had all formed into lines, pointed their guns and threatened to shoot and one of them had nearly carried out the threat.[5] The same view was taken in another case in which six sailors for reasons unknown, chased a German sailor belonging to another ship, and as the latter took refuge from their attack against a railing, he was stabbed by one of them with a knife as a result of which he died in a few minutes. The evidence as to the hand by which the blow was given was very conflicting. But before the unfortunate man had been stabbed, he had been assaulted brutally and in a dastardly manner by all the six men, and Byles, J., told the jury that in order to convict all the six men of murder, there must be evidence of common design, or evidence that, being present at the stabbing, they assented and manifested their assent by

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1. Behari *v.* State, A. I. R. 1953 All. 203 at pp. 204, 205, 207, 208 : 1952 A. L. J. 546.
2. State *v.* Hira Dubey, A. I. R. 1952 Pat. 135 at p. 137 : I. L. R. 30 Pat. 1264.
3. Mamand *v.* Emperor, A. I. R. 1946 P. C. 45 at p. 46 : 48 Bom. L. R. 295 : 47 Cr. L. J. 344.
4. Hawkins, 3 C. & P. 892.
5. Edmeads, 3 C. & P. 390 ; Warner, 5 C. & P. 525.

assisting in the offence, that is, in the use of the knife. For the men may have intended to thrash the sailor, but it did not follow that they intended to stab him as well.[1] In another case two soldiers went after closing hours to a publican's and demanded beer which he refused, whereupon they returned uttering threats. They again came back some time afterwards, and one of them rushed in, the other remaining without, and while the landlord was trying to reject the intruder he received a violent blow from a sharp instrument from the other soldier which occasioned his death. There was evidence that the two had returned with the deliberate intention of using violence in case their demand was not complied with, and they were consequently both held to be guilty of murder.[2]

24. Common intention, when not established—Effect of.—If there is common intention established in the case the prosecution would not be required to prove which of the injuries is caused by which assailant. But when common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so when one of the accused has got the benefit of the doubt and has been acquitted.[3]

What is necessary for the prosecution to prove in a case is whether the alleged assault resulting in the death of the deceased was in furtherance of the common intention of all the accused and, if this is so, then each one of them would be liable for this criminal act in the same manner as if it were done by him alone.[4]

25. Applicability to offences under Sec. 304, Part II.—There is some difference of opinion as to the application of Sec. 34 to offences under Sec. 304, Part II, Penal Code. According to some authorities Sec. 34 can in no case apply to offences falling under Sec. 304, Part II, for the element of intention is missing in case of such an the offence.[5] The weight of authority, however, is for the view that it is possible to convict an accused person under Sec. 304, Part II, read with Sec. 34, Penal Code, provided the Court is of the view that each person taking part in the commission of the offence acted in furtherance of the common intention of all.[6] The common intention contemplated by Sec. 34 is anterior in time to the commission of the crime and does not refer to the time when the act is committed. If on the facts of a particular case it is proved that the common intention of two or more persons was to cause death of a person, and in furtherance of the common intention an act was done by one which caused the death of a person, there

Difference of opinion.

Allahabad Full Bench view.

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1. Price, 8 Cox 96; to the same effect Profulla Kumar *v.* Emperor, I. L. R. 50 Cal. 41; Barendra Kumar Ghose *v.* Emperor, I.L.R. 52 Cal. 97 (P. C.); Munda Murari, 61 Cal. 170; Naga Aung Thein, I. L. R. 3 Rang. 210 (F. B.).
2. Willoughby, 1 East P. C. 288; *see* also Lal, 99 I. C. 90; Ngo Po Kyone, I. L. R. 11 Rang. 354.
3. Babulal *v.* State of U. P., 1968 A. W. R. (H. C.) 484 at p. 484: A. I. R. 1968 S. C. 728.
4. Dharma *v.* State, 1970 Cr. L. J. 126 at p. 127.
5. Sahibzada *v.* Crown, 51 Cr. L. J. 1052 at p. 1056: A. I. R. 1950 Pesh. 24; Ram Khelawan, 1951 A. L. J. 464: 1951 A. W. R. (H. C.) 477; Ram Nath *v.* Emperor, A. I. R. 1943 All. 271: 44 Cr. L. J. 624. 1943 A. L. J. 207: 207 I. C. 158; Sher Ali *v.* Emperor, A.I.R. 1942 Pesh. 51: 43 Cr.L.J. 766: 201 I.C. 705; Sunder Singh *v.* Emperor, A. I. R. 1939 Oudh 207: 14 Luck. 660: 40 Cr.L.J. 722: 182 I.C. 345: 1939 O. W. N. 576.
6. State *v.* Saidu Khan, A. I. R. 1951 All. 21 at p. 44: 1950 A. L. J. 884: 52 Cr. L. J. 131 (F. B.); State *v.* Doria, 1950 A. L. J. 912; Ibra Kanda, A. I. R. 1944 Cal. 339: 215 I. C. 67: 45 Cr. L. J. 77: 48 C. W. N. 366; Ram Prasad, A. I. R. 1947 All. 434: 48 Cr. L. J. 866: 1947 A. L. J. 277; Muklesur Rehman, A. I. R. 1950 Assam 98: 51 Cr. L. J. 945; Puttaswami, 54 Mys. H. C. R. 102.

can be no difficulty in invoking the aid of Sec. 34 whether the conviction is recorded under Sec. 304, Part I or Sec. 304, Part II of the Penal Code.[1] The words "in furtherance of the common intention of all" in Sec. 34 do not mean that all the participants in the joint act must either intend to commit the same offence or intend to produce the same result by their joint act. It will be enough if all of them in ended to perform the act. Hence there can be no difficulty in applying Sec. 34 to cases falling under Sec. 304, Part II.[2] In view of the Full Bench decision of the Allahabad High Court,[3] accepting the latter view, the Allahabad cases accepting the former view stand overruled. Where the accused were not charged under the second part of Sec. 304 read with Sec. 34, I. P. C. It was not the prosecution case that the two accused before the Court attacked the deceased in pursuance of their common intention to murder him. They could not have had any intention to kill the deceased. The common intention which they would have had was only to catch the thief and probably to thrash him. In the very nature of things they could not have entertained any intention to murder the thief. The charge framed against accused reads :

> "That you on or about the 4th day of January, 1958, at about 3 to 4 a. m. in R. S. No. 26/3 of village Hosur had committed culpable homicide not amounting to murder by causing the death of Dhareppa Chinnappa Dhar of Shegunashi by beating him with sticks and causing him injuries 'with the knowledge that they may cause death but without any intention of causing his death' and thereby committed an offence punishable under Sec. 304, Part II, read with Sec. 35 of the Indian Penal Code and within the cognizance of the Court of Session, Bijapur."

It was held that it was clear that even according to the prosecution, the accused had no common intention to kill the deceased. The accused at best could have been armed with only sticks. Of course, one or the other or possibly both, must have been armed with sticks because most of the injuries found on the person of the deceased were likely to have been caused by beating with sticks. The evidence only indicated that both the accused had joined in the beating. It by no means showed that both the accused beat the dceceased with sticks. Nor was there any evidence to show as to how many blows each one of the accused gave to the deceased. In order to establish a common intention the prosecution has to adduce either evidence *aliunde* disclosing a prior concert or the intention in question must be gatherable from the acts committed by the accused. In the instant case, there was no evidence to show that there was any prior concert. Equally there was no evidence to show in what manner the two accused participated in the attack. Barring the fact that both of them beat the deceased there was absolutely no other evidence. Hence the application of Sec. 34, I. P. C., was to be ruled out.

The facts proved in the case, Sec. 35, I. P. C., could also be not applied. That provision is applicable to a case where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention. In order to apply Sec. 35, I. P. C., to the present case, it is necessary for the prosecution to prove that the two accused having similar criminal intention or knowledge jointly committed the murder of the deceased. The facts of the case did not give rise to such an inference.[4]

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1. Muklesur Rehman, A. I. R. 1950 Assam 98 : 51 Cr. L. J. 945.
2. Ibra Kanda, A. I. R. 1944 Cal. 339 : 215 I. C. 67 : 45 Cr. L. J. 77 : 48 C.W.N. 366.
3. Saidu Khan, A. I.R. 1951 All. 21 at p. 44: 1951 A.L.J. 884 : 52 Cr. L. J. 131 (F.B.).
4. *In re* Mallappa Shivappa Kankanwadi. (1961) 2 Cr. L. J. 515 at p. 517.

If a man comes armed with a *pharsa* in the company of two others who are armed with *lathi's* and all the three cause injuries to their victim, it cannot be said that the only legitimate inference is that the person, who came with the *pharsa*, came with that dangerous weapon only by way of show or to use it only in case there was any resistance and not otherwise. As it is, the *pharsa* was actually used as a result of which the injury was caused. The person who used the *pharsa* may not have had the intention to cause the death of the victim and also the other two who accompanied him. They may just have thought that they might teach victim a lesson, but an injury was caused by the *pharsa* in furtherance of their common intention and this causing of injury was not such as may not have been anticipated even by the person who did not have *pharsa* with them. Even the person, who caused the injury with the *pharsa* may not have intended to cause death of the victim, but he has to be held guilty of the offence under Sec. 302, I. P. C., on account of the causing of injury by virtue of the fact that that injury resulted in the death of the victim and it was sufficient in the ordinary course of nature to cause death. If the person, who used the *pharsa*, himself did not intend to cause the death, but still he is held guilty of the offence under Sec. 300, I.P.C., punishable under Sec. 302, I. P. C., the other two who share a common intention with him to cause that injury and which was in fact caused in furtherance of that intention, also have to be held guilty of that offence punishable under Sec. 302, I. P. C., with the aid of Sec. 34, I. P. C.[1]

26. Joint liability.—Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it.[2] When a number of persons are engaged in the commission of something criminal, all acting in furtherance of common intention, each is of course punishable for what he has done as if he had done it by himself.

But his liability does not end therefore he is liable not only for the acts he himself does but also for those which he thereby facilitates provided of course they are done in pursuance of the common intention.[3] It is not necessary for the liability of all the accused that they must have the common intention about the exact result which was to follow from the act or about the offence which would be made out on account of the actual physical act and its result. There is no justification for others to be not liable for such acts of the other confederates as were likely to be committed in the carrying out of the common intention and which would have been normally foreseen and even contemplated by those persons.[4] The law considers all the confederates as one unit, and the criminal act as done by that unit, and makes the unit punishable regardless of the question which member of it did which act. If the conditions of Sec. 34 are fulfilled, it is impossible to convict the conspirators of different offences. The section dispenses with the necessity of ascertaining what are the respective acts done by the various conspirators. All that remains to do is to find out the offence

Section dispenses with necessity of ascertaining offenders respective acts of various offenders.

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1. Rati Pal *v.* State, 1968 A. L. J. 423 at pp. 428-29.
2. Barendra Kumar Ghose *v.* Emperor, A.I.R. 1925 P. C. 1 : I. L. R. 52 Cal 197 (P. C.): 52 I. A. 40.
3. Mangta *v* Emperor, 38 Cr. L. J. 628 at p. 630 : 168 I. C. 748.
4. Nazir *v.* Emperor, A. I. R. 1948 All. 229 at p. 234 : 49 Cr. L. J. 271 : 1947 A. L. J. 417.

constituted by the whole criminal act done by all the conspirators. If the nature of the offence depends upon a particular intention or knowledge, the intention or the knowledge of the actual doer of the criminal act has to be taken into account. That intention or knowledge will decide the nature of the offence committed by him and all the others will be convicted of the offence, because they cannot be convicted of a different offence. The intention of the actual doer must be distinguished from the common intention. It is an ingredient of the offence said to be constituted by the criminal act and is a personal matter. But it must not be foreign to or inconsistent with the common intention, otherwise the criminal act done will not be in furtherance of the common intention. It has also to be remembered that under Sec. 34, the liability of the conspirators is for the criminal act actually done and not for the common intention, e. g. the act jointly intended by them. Even if *A* and *B* formed a common intention to cause simple or grievous hurt and the simple or grievous hurt causeed by them resulted in death, they will be liable for causing the death. That the hurt resulted in death does not mean that the hurt was not caused in furtherance of the common intention ; and when the nature of offence is to be ascertained, the act done and the effect produced must both be taken into account. Of course, if the fatal injury is caused accidentally or in excess of the common intention, Sec. 34 may not apply as it may not be held to be in furtherance of the common intention.[1]

Example.

While treating criminal act jointly committed as having term done by individual participant as if acting alone, the liability of each one of them should be determined either on the basis of specific common intention or his own individual intention if in excess of common intention. In other words, the nature of the offence committed by various participants should not be determined on the individual intention of one of doers which is in excess of common intention even though their constructive authorship of the act is held established in terms of Sec. 34, I. P. C.

Now, taking up the question of the responsibility of the joint doers for the criminal act as such apart from the intention common or individual, it may be safely stated that in determining the liability of joint criminal act as distinct from an offence involving a consideration of the mental state it need not be contested that the act committed must be precisely the act commonly intended. Of course, in the generality of cases an answer to the question whether a particular act was committed in furtherance of the common intention must be supplied by ascertaining as to what was the common intention of the joint offenders. Cases are, however, conceivable when some of the joint offenders may commit acts, though not intended in pursuance of the common design, but with a view to execute the common intention, e. g. to avoid or remove any obstruction or resistance to be put in the proper execution of the common intention. In such cases in order to invoke liability under Sec. 34, I. P. C., for such incidental acts the test is whether the acts are a natural outcome of the common intention or are independent of it while there is no justification for others to be not liable for such acts of the other confederates as were likely to be committed in the carrying out of the common intention and which should have been normally foreseen or contemplated by these persons, they should not be held responsible for fresh or independent wrongs springing wholly from the mind of one of the doers. Clearly then, whether or not a

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1. Bashir *v.* State, A. I. R. 1953 All. 668 ; *see* also Madhuwa *v.* State, A. I. R. 1954 V. P. 36.

criminal act is done by several persons in furtherance of the common intention of all within Sec. 34 is a question of fact to be determined on a consideration of the facts of each case. In this connection, regard must be had not only to a particular individual act but to all the acts which together constitute joint act.[1]

27. Cases of joint responsibility.—In *Sher Khan Bher Zaman* v. *Emperor*,[2] the accused, three in number, with a view to avenge an insult for which the brother of the deceased was responsible, opened fire on the party of the deceased. It was found that the shots of the accused did not hit anybody but both of his co-accused had succeeded in hitting and killing the deceased. It was held that the former also was guilty of murder.

Where a number of men go towards a particular field with a common intention of attacking a party engaged therein irrigating a field from a particular well in order to prevent them from so doing, and attack them with the result that two of the attacked party die of gun-shot, while others receive minor injuries with *lathis*, all the accused are equally guilty of murder although only one of them was armed with the gun.[3]

If, for instance, two or more persons enter a house with the common intention of committing theft and only one of them is lucky in finding the jewels and removes them in furtherance of the common intention, every one of them is liable to be convicted of the offence of theft as if he alone removed the jewels. Does it mean that if one of them finds a man waking up and hits him so hard that he dies as a result of that injury, every one of his companions is liable for the offence.

It is however clear that, if the persons went out to commit theft and it is in evidence that one of them openly carried a loaded gun, all of them must be deemed to have intended that murder should be committed in th- course of their committing theft. Every one of them is liable for murder.[4] Where a party of men set out to commit burglary but, without any idea or probability of the likelihood of any resistance to them, they carried with them spears generally seen with agriculturists, and during the course of burglary one of the resisters sustained a fatal injury it was held tha murder was not and could not have been the common intention of tht accused party, and the killing, not being in furtherance of any such intene tion, Sec. 34 did not apply and each of the accused was responsible only- for his individual act.[5] Again, if a person is attacked by several persons numbering less than five and grievous hurt is caused and is not known who caused the grievous hurt, all of them can be convicted of causi g grievous hurt with the aid of Sec. 34, provided the criminal act was done in furtherance of the common intention of all.[6] Where *ganja* is sold in con travention of the terms of the licence when both master and licence-holder and his servant are present, the servant receiving the price, the application of Sec. 34 would be attracted and the servant would also be liable for the

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1. Jeevan *v.* State, 1964 Raj. L. W. 109 at pp 116, 117.
2. A. I. R. 1940 Lah. 485 at pp. 485, 486: 42 Cr L J. 82 : 42 Punj. L. R. 616
3. Irshadullah Khan *v.* Emperor, A I R. 1933 All. 528 at p. 533 : I. L. R. 55 All 607, followed in Goverdhan *v.* Emperor. A I R. 1935 All 930 : 37 Cr L J. 85 : 1935 A.L.J. 1114 ; *see* also Pakhar Singh *v.* Emperor, A. I. R. 1929 Lah. 292 ; 31 Cr. L. J. 41 ; Nga Pu Ke *v.* Emperor, A. I. R. 1933 Rang. 340 : 35 Cr. L. J. 267 ; Pira, 27 Cr. L. J. 818 (Lah.).
4. *In re* Basappa, A. I. R. 1951 Mys. 1 at p. 3 : 5 D. L. R. (Mys.) 94.
5. Lal Singh *v* State, A. I. R. 1950 Pepsu 50 at p. 52 : 2 Pepsu L. R. 346.
6. State *v.* Saidu Khan, 1951 All. 21 at p. 44 : 1950 A. L. J. 884 : 52 Cr L. J. 131 (F. B.).

offence of selling *ganja* without a licence.[1] When two persons start together for committing robbery and one of them is armed with a revolver and the other with a knife courts may presume that the intention of these two persons is to use the weapons if the necessity should arise and it could be postulated that the act of shooting with the revolver was committed in furtherance of the common intention of both the persons.[2] Where more than one highway robber is armed with a revolver, he cannot be permitted to escape liability for murder on the ground that the prosecution has failed to show conclusively who had fired the fatal shot. Nor can an armed bandit be allowed to plead, when a person at whom he levels a revolver offers resistance, that he did not intend to shoot to kill or that the revolver accidentally went off in the course of a scuffle. A common intention to use a loaded revolver for the purposes of killing, if necessary, has to be presumed against bandits and highway robbers, who are armed with these weapons, and if a man is killed, the robbers so armed and acting in concert are all clearly guilty of murder under Sec. 302 read with Sec. 34, though each may not have actually fired a fatal shoot.[3] This will be so even if any of them are absent at the time of shooting, provided they are absent at the moment in connection with that very robbery.[4] In the above-cited case the common intention of the accused was to commit robbery and in furtherance of that intention different acts were committed by different persons. While two of the culprits kept guard on the house of the victim of their robbery, two went to his field to bring him to his house. In the meanwhile two major sons of the owner of the house turned up and one of the culprits on guard shot and killed one of the sons. It was held that even those who had gone to bring the owner and were not present were guilty of murder. But it has been held by the Rangoon High Court that it would be going very far to hold that because a man takes part in a robbery in which some of the robbers are armed with deadly weapons it can be presumed that he thereby becomes a party to an intention to kill any person who may happen to resist them in carrying out the robbery. Of course, when a man accompanies robbers who are armed with such weapons he must know it to be likely that a murder will be committed if the attempt to rob is resisted, but further than that, it is not safe to go. Knowledge is not the same thing as intention. Where it is not established that there was a common intention among the robbers to commit murder, if necessary, then Sec. 34 does not apply and such intention cannot be presumed.[5] The principle governing the application of Sec. 34, I. P.C., is well settled that in order that an accomplice can be made constructively liable for an offence committed jointly by more than one person. It must be established that the criminal act was done in furtherance of the common intention of all of them. It is true that similar intention or same intention, conceived separately and, independently, is not the same as common intention, which postulates pre-planning or prior concert or meeting of minds to conceive and do an act. But it is neither necessary, nor possible, in every case to get direct evidence of a prior concert. A common intention may well develop even at the spot and it has to be gathered from the surrounding circumstances and the conduct of the parties. The question, therefore, whether the accused are guilty also of the offence of murder by

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1. Keshwar Lal *v.* Girish Chander, 29 Cal. 496.
2. *In re* Munyandi, A. I. R. 1954 Mad 196 at p. 197 : (1952) 2 M. L. J. 752.
3. Ramaswami, *In re*, A. I R. 1952 Mad. 411 at p. 413 : (1951) 2 M. L. J. 630 : 1951 M W. N. 857.
4. Indar Singh Gurmukh Singh *v.* Emperor, A. I. R. 1933 Lah. 819 at pp. 820, 821 : I. L. R. 14 Lah. 814 : 45 Cr. L. J. 72.
5. Sanlaydo *v.* Emperor, A I R 1933 Rang. 204 : 147 I. C. 49 : 35 Cr. L. J. 262.

virtue of application of Sec. 34, I. P. C., is a question which must be determined with reference to the facts and the circumstances which have been proved in the case.

Thus where from the facts found in the case, it was manifest that the accused were among the group of three or four persons who had entered into the compartment of the deceased and at least one of them had carried the dagger which must have been employed in commission of the murder. It was held that the primary intention of the whole group may have been only to commit robbery, but it was implicit upon the foregoing circumstances of the case that the party must have also conceived to commit murder of the deceased in case of need. They must have conceived that they would also commit murder of the object if he offered any resistance, as the deceased appears to have done.

Holding third class tickets, as they did, the accused could never have been *bona fide* passengers in a first class compartment where robbery accompanied with murder had been committed. If they were so, they would not have disappeared and moved about with some booty, talked in a suspicious manner and tried to conceal their persons in the passenger's shed. The murder was undoubtedly committed in the same transaction in which the offence of robbery was committed, and it was, therefore, manifest that the entire group of three or four persons was actuated with the common intention of committing robbery at all costs, and it was really in pursuance of such common intention which was undoubtedly shared by the accused, that murderous assault had been inflicted upon the deceased by one or more of the associates of the appellants, evidently to facilitate their primary design, which was to commit robbery, and which, in fact, was committed at least in respect of the box of the deceased, which the accused themselves had carried away immediately after the murder. Upon the facts found it is impossible to dissociate the crime of murder from the crime of robbery committed in course of the same transaction in which the accused had undoubtedly participated.[1]

In *Mukhanda Murai Pal* v. *Emperor*,[2] two men were armed with guns and had plenty of ammunition and they entered the shop for the purpose of committing robbery. When they were disturbed in their act by a large number of villagers they decided to retreat and in so retreating they fired a large number of shots. It is clear that their primary intention was to effect their escape from their pursuers and it was their determination to prevent the pursuers from arresting them. It may be conceded that it was not their primary intention to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers. But from the circumstances, it may be concluded that their intention was to effect their escape even though for that purpose it was necessary to shoot any of the pursuers mortally. Take another case. An act is alleged to have been committed by a number of specified persons, five or more in number, in furtherance of the common intention of all of them. They are prosecuted for rioting and for commission of the alleged act in view of the provisions of Sec. 149, Penal Code. The Court acquits all except the appellant giving them the benefit of doubt. At the same time its definite finding is that the appellant was associated with some at least of those acquitted persons in the commission of the alleged act. Can it convict the appellant of the commission of the alleged act applying

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1. State of Bihar *v.* Harikant, (1964) 1 Cr. L. J. 473 at p. 482.
2. A.I.R. 1934 Cal. 10 at p. 12: I.L.R. 61 Cal. 190 ; Barendra Kumar Ghose *v.* King-Emperor, A. I. R. 1925 P. C. 1, referred to.

the provisions of Sec. 34, Penal Code? The question was answered in the affirmative by a Full Bench of the Allahabad High Court in the case of *Gulab*.[1]

In *Harchand's* case,[2] in which on a difference of opinion between Dayal, J. and Agarwala, J., Wanchoo, J., agreed with Agarwala, J., the latter summarised the law on the point as follows:

> "(1) Where the finding is that there were several persons, some of them identified and some of them unidentified, who inflicted the injuries, and the Court convicts some of the identified persons and not all, then the convicted accused may be held guilty for the action of the unidentified persons.
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> "(2) Where there are no unidentified accused, and out of the accused persons some are acquitted on the finding that it is doubtful whether any one of them were present at all, then the remaining accused, who are convicted, cannot be convicted of any supposed action of the persons acquitted. The reason is that you cannot convict a person on the ground of constructive liability for the action of a person or persons, whether identified or unidentified, whose complicity is doubtful or has not been established.
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> "(3) Where there are no unidentified persons participating in an incident, but out of the accused some are acquitted on the finding that it is not certain whether all the acquitted persons were present, but it is held that some of them were certainly present, though it cannot be ascertained as to who those persons were, even in such a case the convicted accused cannot be held guilty of what was done by the unidentified persons among those who have been acquitted."

Agreeing with the view taken in *Ram Rup's* case[3] it has been held that the part, if any, said to have been played by those acquitted cannot be taken into account in determining the guilt of the remaining persons who have been convicted.[4]

28. No joint responsibility.—From the foregoing discussion it will be obvious that the essence of joint responsibility lies in the common intention to commit the act complained of. If the act complained of be murder, then all the accused held accountable for it on the strength of this rule must be shown to have joined in a plot to kill. It will not suffice that they had started to commit an assault. It is, of course, by no means necessary that all the accused should have conspired to kill at the same time, for they may become of one mind at the last moment,[5] but this must be proved by legal

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1. A. I. R. 1951 All. 660: 52 Cr. L. J. 924: 1951 A. L. J. 106: 6 D. L. R. (All.) 204: 5 A. I Cr. D. 448: 1951 A W. R. (H.C.) 444(F. B.).
2. A. I. R. 1950 All. 355 at pp. 361-62: 1950 A. L. J. 220. Sadho *v.* Emperor, A. I. R. 1934 All 881 distinguished.
3. A. I. R. 1945 All. 31: 46 Cr. L. J. 198: 1944 A. L. J. 447.
4. Harchand *v.* Rex, A. I. R. 1950 All. 355 at p. 364: 1950 A. L. J. 220.
5. *See* Emperor *v.* Ebrahim, A. I. R. 1931 Rang. 321; *see* also State *v.* Hira Dubey, A. I. R. 1952 Pat. 135: I L. R 30 Pat. 264; State *v.* Dina Nath Das, A. I. R. 1951 Assam 65: 52 Cr. L. J. 504; *In re* Bassappa, A. I. R. 1951 Mys. 1: 41 Cr. L. J. 1603.

evidence. Where all the appellants were seen at that spot of killing a the time of firing this fact by itself could not be held enough to prove a common intention of the appellants to murder the deceased. It can well be that these four persons were standing together and one of them suddenly seeing the deceased fired at him. This possibility has not been eliminated by any evidence on the record. In such a situation when it would not be known who fired the fatal shot, none of such persons could be convicted of murder under Sec. 302, I. P. C.

Where the evidence as to conspiracy under Sec. 120-B, I. P. C., was rejected, the same evidence could not be used for finding a common intention proved under Sec. 34, I. P. C.[1] In *Mujjaffar Sheikh's* case,[2] Sen, J., observed: "It is quite wrong to say that if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. . . In order to make a person constructively liable with the aid of Sec. 34, Penal Code, for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under Sec. 34, Penal Code, for murder, it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions in the joint criminal act or enterprise. Unless this intention is proved, he cannot be made liable under the aforesaid section even though the murder be committed in order to accomplish some other object or purpose shared in common."

The phrase all are presumed to intend the natural consequences of their acts—If has place in criminal jurisprudence.

A stock phrase used indiscriminately by the Magistracy of this country—that all are presumed to intend the natural consequences of their acts—has, as has been already pointrd out, no place in the criminal jurisprudence of this country. It is not a formula which can take the place of evidence; though conduct is evidence from which a legitimate inference may be validly drawn in the circumstances of each case.[3] But to base one's constructive liability upon a presumed intention is arguing in a vicious circle from which the records of reported cases are unfortunately not entirely free. Where for instance, three persons, *A*, *B* and *C* agreed to attack and assault *D* with a view to punishing him for the damage caused by cattle to their crop, the fact that one of them struck a deadly blow killing *D*, would not justify the punishment of all three for murder, though they might justifiably be convicted for causing grievous hurt with a deadly weapon.[4]

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1. Ram Nath Madhoprasad *v.* State of Madhya Pradesh, A. I. R. 1953 S. C. 420 at p. 424.
2. A.I.R. 1941 Cal. 106 at p. 109.
3. Satrughan, 50 I. C. (Pat.) 327 ; *see* Aydross *v.* Emperor, (1922) M. W. N. 800 : A. I. R. 1923 Mad. 187 ; Nga Ba, 24 I. C. 572 ; Mala Singh *v* Crown, A. I. R. 1924 Lah. 61 ; Dhian Sing, 14 I. C. 649 Kanshi, 94 I. C. (Lah.) 134 ; Pira, 95 I.C (Lah.) 504 ; Chandan, 94 I C. (All.) 363.
4. Couridas. I. L. R. 36 Cal. 659 at p. 664 ; Morgan, 9 Cr. L. J. 393 ; Mahabir, 19 I. C. (Oudh) 497 ; Ngr Ba, 15 Cr.L.J. 484 ; Raja, 50 I. C. (Lah.) 977 ; Abdul Karim, 58 I. C. (All.) 158; Fatekhan *v.* Emperor 1930 Lah. 950.

Usually three classes of cases of fatal assault.

There are usually three classes of cases of fatal assault where the question of the joint responsibility of several assailants arises, viz. (*i*) where several persons join in the assault and inflict numerous injuries and the cumulative effect of all or some of the injuries is to cause death; (*ii*) where several persons commit an assault and inflict minor injuries but one of them deals a fatal blow, and he can be identified; and (*iii*) where, in the case last supposed, the assailants cannot be identified.

Examples.

In the first case, if several persons jointly attack the deceased with *lathis* fracturing his skull and inflicting a number of other injuries they are all equally guilty even though it may not be possible to prove which of them actually inflicted the fatal blow.[1] In the second case, the person who is shown by the evidence to have dealt the fatal blow would alone be liable; while in the third case, none of the assailants would be liable for the fatal blow.[2] The dealing of one fatal stroke by one of several assailants cannot form the basis of valid inference that the common intention of all the assailants was to murder the person attacked. Take, for instance, an extreme case. *A* struck *B* with a hatchet. *B* fell down, whereupon *C* hit *B* with a stick and *B* subsequently died. Now, it is not a necessary inference, and cannot be assumed as a matter of course, that *C* had a common intention with *A* to kill *B* ;nor could *C* be from that fact alone convicted of the murder of *B* conjointly with *A*.[3] So again where the conspirators intended and started to kill *A* but a chance blow from one of them killed another person, *B*,—but *A* escaped, all of them could not be held, apart from Sec. 111, jointly liable for the murder of *B*.[4]

When a large body of men, each of whom has a grievance against an individual on account of his misconduct, join in the assault, it may be a question of some nicety to determine whether they can all be rightly regarded as guilty of the resultant act committed in pursuance of a common object or in pursuance of a common intention. Such a case arose in Calcutta which led to a difference of opinion between two learned Judges, whereupon the case was ultimately decided on a reference to a third Judge. In this case the deceased, a man of dissolute habits, had entered the privacy of a woman and was assaulted by a number of villagers while he was in the very act of violating her. The deceased escaped out of the room into the corridor where he found himself confronted by another body of men who assaulted him. He ran to the courtyard of the house, where still another body of men beat him to death. The accused were not shown to have taken any part in the assault upon the deceased after he had escaped from the room, and came to the corridor and finally to the courtyard. It was held that the accused could not be convicted under Secs. 304 and 148, and that their assault in the room was justified, they were entitled to acquittal.[5] The converse case is presented by the case of the Tinnevelly rioters who having felt aggrieved by the incarceration of a political agitator broke out into lawlessness smashing Government and Municipal property that came in their way. Here though the rioters formed separate groups, their joint trial was held on the ground of common intention as indicated by their conduct.[6] But

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1. Ghulam Hussain, A.I.R. 1924 All. 78 at p. 79; *see* also Mahabir,19 I.C. (O.) 497; Kanji Samal, I.L.R.33 Bom.114; Jamiruddi, 16 C. W. N. 909.
2. Gouridas, I.L.R. 36 Cal. 659 at p. 664; Nga Po, 20 I. C. (Bur.) 220; Nha Shwe On, 57 I. C. (Bur.) 918; Mahabir, 19 I. C. (O.) 497 (F.B); Yara, *v.* Emperor, A. I. R. 1929 Lah. 456.
3. Vahial, 15 I. C. (S.) 810 ; Dhian Singh, 14 I. C. (A.) 649; Savarajalu, 47 I.C. 445.
4. Po Ya, 10 L. B. R. 99 : 58 I. C. 525.
5. Jhakri, 17 I. C. (C.) 1001; *see* also Adam Ali, A. I. R. 1927 Cal. 324 : 100 I. C. (C.) 718. *cf.* Jafar, 14 A. L. J. 789.
6. Loganathaiyar, 4 I. C. (M.) 700; but did the common intention cover the ac done. Nga Thun Baw, 7 Cr. L. J. 205t at p. 206.

where, for instance, eight persons were concerned in a riot concerning a piece of land and the crop standing thereon, which resulted in murder, and it could not be definitely said that death was the result of the combined effect of injuries inflicted by one Jhubboo and some other unknown persons, Sec. 34 was held inapplicable and was held further that even if it were assumed that Jhubboo and some other unknown persons inflicted injuries which resulted in death, though Jhubboo might be liable for murder by the aid of this section yet his being thus found constructively guilty of murder would not necessarily mean that others could, with the aid of Sec. 149 of the Penal Code, by a double construction, be held guilty of the murder.[1]

Applicability of the section in acts committed during course of sudden quarrel.

Section 34 is not applicable to acts committed in the course of a sudden quarrel without any common intention amongst the accused and every person taking part in the fight would be responsible for his individual acts.[2] But where there is proof that some of the persons taking part in the fight, which has suddenly arisen, go and jointly commit an offence and there are indications that their joint object was to commit that offence, there is no bar for the courts to hold that they had formed a joint intention there and then to do that act of violence.[3] Section 34, Penal Code, does not apply where there was no pre-arranged plan and there was no evidence as to which of the accused who had beaten the complainant had given the grievous injury. In circumstances like these, none of the accused can be convicted of an offence under Sec. 325, Penal Code, each one of them can be convicted only for the offence of causing simple injuries under Sec. 323, Penal Code.[4]

In *Ram Charan Rai* v. *Emperor*,[5] the appellant is said to have struck the deceased a blow with a *lathi*. It is not possible to suppose that this boy joined in the attack on the deceased at the same time as the men who were armed with *pharsas* and *bhalas* fell upon him. This boy went over to the deceased as he was lying on the ground and hit him with a *lathi*. He is not guilty for two reasons. In the first place, the deceased died instantaneolsly, and it is possible that when appellant went over to where he was lying and hit him with a *lathi* he was already dead. Secondly, even if life was not yet extinct, the fatal assault was already over. This boy cannot be said to have participated in it, and such injury as he subsequently caused cannot in any way have accelerated or, indeed, contributed at all the the death of the deceased.[5]

If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unalwful assembly if he shares the common object of the assembly subsequent to his being made helpless in assaulting the victim. He can, however, in such a position disavow his share in the common object by expressions, leaving no doubt that he did not share the object any more. If he is also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unalwful assembly and that he had withdrawn himself from the unlawful assembly.[6]

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1. *Per* Field, J., in Jhubboo Mahton, I.L.R. 8 Cal. 739; Raezuddi, 15 I.C. (C.) 646.
2. *See* Gorey, A. I. R. 1949 All. 191: 1948 O. W. N. 286 : 1948 A. L. W. 281 ; Dipu, A. I. R. 1947 All. 408 : 1947 A.L.J. 208; Mian Singh, A. I. R. 1938 Lah. 747 : 40 Cr. L. J. 84 ; Lal Chand, A. I.R. 1931 Lah. 523 (1) : 32 Cr. L. J. 734; Dost Mohammad, A. I. R. 1942 Pesh. 29 (2) : 199 I. C. 878 : 43 Cr. L. J. 498; Masti Khan, A. I. R. 1935 Pesh. 41 : 155 I. C. 276 : 36 Cr. L. J. 800.
3. Dost Mohammad, A. I. R. 1942 Pesh. 29 at p. 32 : 199 I. C. 878.
4. Gorey *v.* Rex, A. I. R. 1949 All. 191 at pp. 193, 194 : 1948 O. W. N. 286.
5. A. I. R. 1946 Pat. 242 at p. 245 : I. L. R. 24 Pat. 166.
6. Rex *v.* Sadla, A. I. R. 1950 All. 418 at p. 420 : 1950 A. W. R. 376.

Cases relating to offences forming unlawful assembly.

In cases relating to offences of forming unlawful assembly, or committing rioting and dacoity, it does not necessarily follow that a member of the unlawful assembly who is guilty of rioting is also guilty of the offence of dacoity. That would be so only if the committing of robbery and dacoity are also the common object of the unlawful assembly and the dacoity is committed in the prosecution of that object. In the absence of reliable evidence of that fact, the fact that the unlawful formation of the assembly, rioting and dacoity formed one transaction and took place at one and the same time would not suffice to make the persons, who are not actual participants in the dacoity liable under Sec. 395 of the Code.[1] Different persons though aiming to achieve the same object may possess different intentions.

Different persons though aiming to achieve the same object may possess different intention.

In *Mutukdhari Singh* v. *Emperor*,[2] "the petitioners or some of them, had once had an interest in this land and that they went to it armed and proceeded to cut the *khesari*. When Makund remonstrated with them he was assaulted, of the petitioners, Awadh Behari, striking him with a blow with a *garasa* on the leg and the other petitioner, Ganga Singh, striking him a couple of blows with a *lathi* one on each of his arms. . . . It appears that Makund ran away and was pursued and eventually overtaken at some little distance from the field by Awadh Behari who struck him with a *garasa*, and by Ganga Singh who struck him with a *lathi*. . . An attempt has been made to support the conviction on the ground that, although Mutukdhari and Lal Behari took no part themselves in the assault they joined in the pursuit of Makund. It is not at all clear from the evidence that the two men really pursued Makund to any distance. It may be that they ran at him or after him, but presumably their intention in so doing was merely to scare him way from the land so that they and their labourers might continue to cut the *khesari* without further interruption. Admittedly they soon stopped and did not go up to Makund or strike him or molest him in any way. In these circumstances it is quite imposible to apply Sec. 34, Penal Code, and make either Mutukdhari or Lal Behari constructively liable for the assault committed by the other two men."[3]

In the case of an assault by a number of persons with *lathis*, even assuming that each one of the assailants had an intention to cause grievous hurt, that does not mean that all the assailants had a common intention to cause grievous hurt and, if there is no evidence as to which of the assailants caused the grievous hurt, it is not possible to convict all the assailants under Sec. 325 read with Sec. 34.[4] On the other hand, when there is proof of a common intention Sec. 34 becomes applicable and all of them may be held guilty even though there is no proof as to who caused the grievous hurt.[5]

In *Emperor* v. *Koramutla Narasigadu*,[6] the Madras High Court observed : "The deceased's sister, hearing her brother's cries, came to the scene and asked the accused why they were beating her brother. They then turned from him and attacked her, each delivering a blow on her head with considerable force with the sticks they held in their hand. One of these blows fractured her skull very extensively, causing a piece of bone to be pressed downwards on the brain. This led to death by compression of the brain. . . . .

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1. Parsa Majhi, I.L.R. 18 Cal. L. T. 188.
2. A. I. R. 1942 Pat. 376.
3. Mutukdhari Singh *c.* Emperor, A. I. R. 1942 Pat. 376 p. 377: 200 I.C. 296. But *see* also Hori Lal *v.* State of U. P., A. I. R. 1970 S. C. 1969 where this case has been overruled.
4. Tillu Ahir *v.* Rex, A. I. R. 1949 All. 89 at p. 90 : 1948 A. L. J. 505 : 1948 A. W. R. (H. C.) 201.
5. Puttu Lal *v.* Rex, A.I.R. 1949 All. 88 at p. 89 : 1948 A. L. J. 535 : 1948 A. W. R. (H. C.) 203.
6. A.I.R. 1937 Mad. 792 at pp. 793, 794: 4 M. L. W. 486.

"We do not however know, and find no suggestion has been made, which of the three accused delivered the fatal blow. In order that all the three persons could be found guilty of an offence committed only by one of them, it is necessary under Sec. 34 that they should have acted in furtherance of a common intention. . . . We therefore find it difficult to hold that the two persons who did not cause any fracture of the skull had the same intention as the person who used greater force and did fracture the skull. While therefore one person was guilty of murder and two of a lesser offence, we do not know which accused committed murder and which the lesser offence. We are therefore compelled . . . to hold that none of the accused could have been found guilty of murder."[1]

In *Bahal Singh* v. *Emperor*,[2] it has been held that "the act which caused the death of Dula Singh has not been established against him. According to the medical evidence there can be no doubt that only one stroke was delivered and that stroke has been found to have been delivered by Mula Singh. It therefore follows that the criminal act was not done by Bahal Singh and Mula Singh jointly in furtherance of their common intention. . . .

"According to this section, in order to make both Bahal Singh and Mula Singh equally liable for the murder of Dula Singh it ought to have been established that both of them struck the deceased.... We are clearly of opinion that Bahal Singh has not been rightly convicted of the offence of murder under Sec. 302 read with Sec. 34, I. P. C. He however was a member of the invading party. They had both armed themselves according to the evidence, with deadly weapons. It must have been known to Bahal Singh that in case of opposition the weapons would be used and at least it must have been known to him that in all probability grievous hurt would be caused. He must therefore be taken to have abetted an offence under Sec. 325.

In a Lahore case,[3] where it was not the common intention of the accused to commit murder and that if they had a common intention it was only to carry off a woman to their house, and in the quarrel that ensued one person was killed, it was held that each member of the party of the accused must be held liable for his own actions.

Where the two accused were loitering in suspicious circumstances and they were searched by the Police, and in the right-hand pocket of one of them was found a revolver wrapped in paper, in his left-hand pocket were six cartridges, but on the other accused no incriminating articles were found. The Magistrate convicted both of them stating that they had common object, viz. to possess the revolver for the purpose of committing crime. The High Court observed as follows: "But in what way Sec. 34 applies to show that Manmatha was in possession or control of the revolver, I do not understand. . . . This conviction rests in the end upon no foundation in the evidence or in the findings and I think it should be set aside under Sec. 107."[4]

29. Sentence in case of joint liability.—It is not possible to accede to the proposition that in case of constructive liability for the offence of murder the appropriate sentence in all cases must be the lesser penalty of imprisonment for life. The question of sentence must in each case depend upon the facts of that case.[5]

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1. Emperor *v.* Koramutla Narasigadu, A. I. R. 1937 Mad. 792 at pp. 793, 794 : 4 M. L. W. 486 A. I. R. 1919.
2. A. I. R. 1919 Lah. 375 at p. 379.
3. Nizam Din Roshan *v.* Emperor, A. I. R. 1948 Lah. 47 p. 48 : 230 I. C. 295
4. Manmatha Nath Biswas *v.* Emperor, A. I. R. 1933 Cal. 132 at pp. 133, 136: 60 Cal. 618: 34 Cr. L. J. 299 : 142 I. C. 280: 37 C. W. N. 201.
5. Raja Gopalan *v.* Emperor, A. I. R. 1944 F. C. 35 at p. 36: 213 I. C. 178 : 1944 F. L. J. 105 : I. L. R. (1944) Kar. (F. C.) 72 : 1944 P. W. N. 61 : 48 C. W. N. 98 : 1944 A. W. R. (F. C.) 20 : (1944) 1 M. L. J. 353 ; *see* also Rishideo Pande *v.* State of U. P., A. I. R. 1955 S. C. 331 : 1955 Cr. L. J. 873.

Where the five accused raided the house of one of the deceased and killed him and when the brother of the decaesed arrived on the scene, the accused belaboured him and he also died, the Sessions Judge awarded death sentence on only three of them on the ground that they were armed with axes and *lathi* and awarded the remaining two the sentence of life imprisonment, the High Court held, "no distinction in sentences could be made on that ground. All the five accused have been held to be liable under Sec. 34 of the Code. They were, therefore, equally liable."[1]

Can the accused-appellants be convicted under Secs. 302/34, Indian Penal Code, when they are actually charged under Sec. 302/149, Indian Penal Code. The answer to this question is provided by Mr. Justice Venkatarama Ayyar in *Karnail Singh* v. *State of Punjab*,[2] where it was held that:

> "If the common object which is the subject-matter of the charge under Sec. 149 does not necessarily involve a common intention, then the substitution of Sec. 34 for Sec. 149 might result in prejudice to the accused and ought not therefore to be permitted."[3]

30. Section inapplicable.—The section has, of course, no application to sections which are limited by their nautre to personal acts, e. g. Secs. 307, 308,[4] 458[5] and 497 and 498.[6]

31. Meeting of minds.—It is true that if there is no pre-concert or meeting of minds to form common intention the accused cannot be convicted for vicarious liability under Sec. 34 of the Indian Penal Code.

It is well settled that meeting of minds can be even at the last moment and even during the scuffle.[7]

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joints in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

SYNOPSIS

1. Analogous law.
2. Principle
3. Meaning of words.
4. Proof of particular intention when required.

1. Analogous law.—The last section dealt with an act following a joint intention, this deals with an act following not a joint but a like intention. The last section raises criminality because of participation in the intention; this because of participation in action. The last section is limited to offences which are independent of intention or knowledge, that is, those in which intention or knowledge is presumed, while this is limited to those in which intention or knowledge cannot be presumed but *must be expressly proved*. In the one case, the intention and knowledge need not be proved against each of the accused, who, however, may rebut the presumption by setting up an intention not

Difference between Secs. 34 and 35.

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1. Devisingh *v.* State, A. I. R. 1963 M. P. 29 at p. 30 : 1963 Jab. L. J. 117.
2. A. I. R. 1954 S. C. 204.
3. Radha Kishan Yad Ram *v.* State, A. I.R. 1969 Punj. 204 at p. 207.
4. Ali Mirza, I.L.R. 51 Cal. 265 ; Nabibux, I. L. R. 52 Bom. 168 ; Nga Pu, A. I. R. 1926 Rang. 207.
5. Ghulam, I. L. R. 4 Lah. 399.
6. Nga Pu, *supra* ; Ali Mirza, *supra*.
7. Chandra Majhi *v.* State, (1965) 32 Cut. L. T. 121 at pp. 130-31.

criminal. In a case under this section the accused has nothing to rebut till the prosecution have established criminal intention or knowledge on the part of *each* accused. In other words, the measure of criminal liability under the previous section is joint intention, the measure under this section is the extent of intention or knowledge of each accused. *A* and *B* beat *C* of which beating he dies. If it is proved that *A* and *B* had the common intention of killing *C*, *A* and *B* would both be liable, and it does not matter to what extent *A* and *B* contributed to his death. But, if such intention cannot be proved, it is on the prosecution to prove the intention and knowledge on the part of both. It may be that *A* had intended to kill *C*, while *B* had intended to merely cause hurt and no more; but in either case it lies on the prosecution to prove intention or knowledge.[1]

2. Principle.—The last section dealt with a case in which several persons were assumed to conspire with the common intention of committing a *crime*. This section goes further and provides that where the element of a particular knowledge or a particular intention enters in the composition of a crime, all the co-accused must be shown to possess that particular knowledge or intention in common, otherwise they cannot be held jointly liable for the crime committed by any of them.[2]

3. Meaning of words.—"*Act which is criminal only by reason of its being done with a criminal knowledge or intent*", e.g. collection of armed men which may or may not be a crime according to the knowledge or intention, as harbouring an offender,[3] and all offences where knowledge or intention is expressly referred to.

4. Proof of particular intention when required.—The Code deals with two classes of crimes, (*i*) those in which the proof of knowledge or intention is immaterial; and (*ii*) those for the completion of which guilty knowledge or intention must be proved. In the latter case, the act itself may be indifferent unless the intention be proved. Suppose a trickster, wishing to palm off a brass ring for gold, wants an accomplice and he goes up to another and tells him that he has got a gold ring by theft and should like to dispose of it. The two thus manage to get rid of the ring the true nature of which is afterwards disocvered and the two men are charged with having practised deception. Here the accomplice cannot be convicted of cheating, for he had not the same criminal knowledge as his companion though his criminal intent was different.[4] So in the common case presented by a party of rioters proceeding to take forcible possession of land in which one of them commits murder. Now, if the remaining persons had joined the party with the knowledge or intention of committing murder, they will all be equally liable for murder, though only one of them had committed it. But if suppose in such a case only one accused intended the murder, another wanted only to plunder the crops while the third had no particular intention but had joined the assembly to see the fun. Here the second and third accused could not be charged for murder and the first accused could not be charged for robbery, for the three accused did not possess the same criminal intention. So where several soliders, lawfully employed to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be, and having done so, some of the soldiers began to plunder, and stole some goods, the question was whether this was felony in all; and Holt, C. J., citing an old case,[5] said: "That they were

Examples.

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1. Adam Ali Taluqdar *v.* Emperor, A.I.R. 1927 Cal. 324. at. p. 325.
2. *Ibid.*
3. Section 212, I. P. C.
4. *Cf* Moore's case, 1 Leach 314: 1 Russ., Bk., Chap. III, p. 161 and 162.
5. 2 Hawk. P. C. 29, Sec. 8 : 1 Leach 7 (*a*) 1 Russ., p. 162.

all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first, yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; for this reason because they knew not of such intent, but it was chance opportunity of stealing whereupon some of them did lay hands."

But the particular intent here acquired may be proved not only by the evidence of common design, but it may also be inferred from a general resolution against all opposers, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or whether it may be reasonably collected from their number, arms, or behaviour at or before the scene of action. As Bramwell, B., in one case[1] told the jury : "Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder."

In *Ghurey* v. *Rex*,[2] where one of the two accused was armed with a deadly weapon, namely, a spear, and the other was armed with a *lathi*, and they had previous enmity with the deceased, in such a case the accused who only used a *lathi* also is guilty of murder even though his intention was merely to cause injuries to the deceased because it must be held that both the adcused had knowledge that the beating that would be given was likely to cause the death of the deceased.

Doctrine of joint liability of several persons.

The doctrine of joint liability of several persons for the guilt of some of them applies only to such assemblies as are formed for the purpose of carrying into execution some *unlawful* purpose. For if the original purpose was lawful, the liability of persons other than those actually taking part in the crime will depend upon, and be measured by, their actual participation in the crime and not upon the fiction of constructive liability.

Question of *mens rea* in the case of master and servant.

As regards the question of *mens rea* in the case of a master and servant, and principal and agent, in statutory offences, the law has been summarized by Dixit, C. J., in *Govind Prasad Sharma* v. *Board of Revenue, M. P.*,[3] his Lordships observed : "The well-established rule is that unless a statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the defendant could not be held guilty of an offence under a criminal law unless he has a guilty mind."[4]

In Halsbury's *Laws of England*, Vol. 10 (3rd Ed.), the following statement occurs in paragraph 508 on "*Mens rea* in Statutory Offences":

Halsbury's view.

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases, the courts have concluded that despite the absence of express language

1. Jackson, 7 Cox. 357; Allah Ditta, 4 A. L. J. 276.
2. A. I. R. 1949 All. 342 at pp. 344, 345: 1949 A. L. J. 87.
3. A. I. R. 1965 M. P. 66 at pp. 69-70.
4. *See* Srinivas Mall *v.* Emperor, A. I. R. 1947 P. C. 135, and Hariprasad Rao *v.* State, A. I. R. 1951 S. C. 204.

the intention of the Legislature was that *mens rea* was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of *mens rea*. Instances of this strict liability have arisen on the legislation concerning food and drugs, liquor licensing, and many other matters." (Pages 273, 274.)

Then, again, it has been stated in paragraph 511 of the same lvoume that :

"Where a particular intent or state of mind is of essence of an offence, the person committing the act is not criminally responsible if he had no *mens rea* and the act was ordered or procured by another person; but the person who ordered or procured to act is criminally responsible. In general a person is not criminally liable for an act or omission unless he has himself committed or omitted the act or authorised or known of or shut his eyes to the commission or omission. Consequently a principal or master is not generally criminally liable for the acts or omissions of his agents or servants whatever his civil liability may be; it is not to be inferred that because he has employed the agent or servant in the conduct of business that he has given him authority to commit crimes, and it is immaterial whether the act or omission is one for which he is liable civilly in an action for damages." (Pages 275 and 276.)

Exception to the general rule.

"The exceptions to the general rule about the existence of *mens rea* and that a master cannot be made liable criminally for an offence committed by his servant have been pointed out in the case of *Mousell Brothers* v. *London and North Western Rly.*[1] In that case Lord Reading, C. J., said :

'*Prima facie*, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Acts there are again instances well known in these Courts where the master is made responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the Legislature absolutely forbids the act and makes the principal liable without a *mens rea*.' (Page 844.)

"Atkin, J., while expressing his agreement with Lord Reading, stated the matter thus :

'I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down,

1. (1917) 2 K. B. 836

the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed and the person upon whom the penalty is imposed'." (Page 845.)

Discussing the implications of "offence" under Sec. 228(7) of the M.P. Land Revenue Code, the learned Chief Justice observed : "The offence under Sec. 228 (7) is of a kind what Channell, J., described in *Pearks, Gunston and Tee, Ltd.* v. *Ward*,[1] as 'quasi-criminal offences . . . where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine' which form exceptions to the rule that a master cannot be made liable criminally for an offence committed by his servant. The acts of extraction or removal of mineral are such as would normally be performed by servants or employees. Any particular intent or state of mind is not of the essence of the contravention of sub-section (7) and, therefore, if a servant in the course of his employment extracts or removes mineral without lawful authority, for his master's benefit even without his knowledge or consent, the master would be liable to penalty under sub-section (7)."

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Effect caused partly by act and partly by omission.

Illustration

A intentionally causes *Z*'s death, partly by illegally omitting to give *Z* food, and partly by beating *Z*. *A* has committed murder.

Comment

Analogous law.—This section would have been better placed after Sec. 36. It follows as a necessary corollary from Sec. 32, to which it might have been added by way of an explanation. Since an act includes an illegal omission, the result is the same whether the offence consists of one or more acts or one or more omissions, or partly of one and partly of the other. Criminal law looks in such cases to the result and not to the means by which it has been achieved.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Co-operation by doing one of several acts constituting an offence.

Illustrations

(*a*) *A* and *B* agree to murder *Z* by severally and at different times giving him small doses of poison. *A* and *B* administer the poison according to the agreement with intent to murder *Z*. *Z* dies from the effects of the several doses of poison so administered to him. Here *A* and *B* intentionally cooperate in the commission of murder, as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

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1. 1902 2 K. B. 1 at p. 11

(*b*) *A* and *B* are joint jailors, and as such, have the charge of *Z*, a prisoner, alternately for six hours at a time. *A* and *B*, intending to cause *Z*'s death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish *Z* with food supplied to them for that purpose. *Z* dies of hunger. Both *A* and *B* are guilty of the murder of *Z*.

(*c*) *A*, a jailor, has the charge of *Z*, a prisoner. *A*, intending to cause *Z*'s death, illegally omits to supply *Z* with food, in consequence of which *Z* is much reduced in strength, but the starvation is not sufficient to cause his death. *A* is dismissed from his office, and *B* succeeds him. *B*, without collusion or co-operation with *A*, illegally omits to supply *Z* with food, knowing that he is likely thereby to cause *Z*'s death. *Z* dies of hunger, *B* is guilty of murder, but, as *A* did not co-operate with *B*, *A* is guilty only of an attempt to commit murder.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Distinction between Secs. 34 and 37.
4. Meaning of words.
5. Liability of contributory.

1. Analogous law.—This is another instance of the commission of crime by conspiracy. The three illustrations amply illustrate not only this section, but Sec. 35 of which this is a corollary.

2. Principle.—This section is an illustration of the rule that in the case of conspiracy the measure of criminality of each conspirator is the cumulative result and not the individual share in the crime. Indeed, if it were otherwise, it would be safer to conspire and distribute criminal responsibility among its members. Such a thing, even if permitted, could not be proved. But it cannot be permitted, because it will be destructive of law and order. This section enunciates a rule of universal application. So, Mr. Bishop has summed it up in the following words :

Bishop's view.

"In the first place, if several, combining both in intent and in act, commit a crime jointly each is guilty of the same as if he had done the whole alone; and so it is, if each has his particular part to do, the whole contributing to one result. In the next place, since what a man does by his agent he does by himself, if one employs another to do a criminal thing for him, he is guilty of the same as though he had done the thing himself."[1]

3. Distinction between Secs. 34 and 37.—(*See* notes under Sec. 34.)

4. Meaning of words.—"*Intentionally co-operates*," i. e. he knows of the offence to be committed, but only takes a share in its commission which alone does not complete the crime apart from intention. His act alone might have been innocuous and insufficient, but as his act was in pursuance of a joint intention, his liability is equally joint.

5. Liability of contributory.—The liability of each of several persons for complicity in a joint action does not depend upon the nature and extent of his participation in the crime, but upon the community of intention. But that alone is not sufficient, for as this section shows, there must be community of action in consequnce of the community of intention, or a combining of both in intent and in act. If there was community of action without community of intent, the liability will be

1. 1 Bishop's *Criminal Law*, Vol. I, Chap. XXIII, Sec. 432

several and not joint. Illustration (*c*) is an example. Here there was community of action between *A* and *B* but not community of intention. They were, therefore, not held jointly liable for the result. If, however, there had been the community of intention between them, the case would then have been as presented in Illus. (*b*), while illus. (*a*) furnishes a normal case in which there is a combination both in intention and action. So in England, if several combine to forge an instrument and each executes by himself a distinct part of the forgery they are all principals, though they were not together when the instruments were completed. So in a case of forgery of currency note aginst Bingley, Dutton and Batkin, it appeared that Bingley and Dutton bought the paper, and cut it into pieces of the proper size at their house it was then taken to Batkin, who struck off in blank all the printed part of the note except the date, line and the number and impressed on the paper the wavy horizontal lines. The blanks were then brought back to the house of Bingley and Dutton, where the watermark was introduced into the paper after which Bingley, in the presence of Dutton, impressed the date, line and number and Dutton added the signature, in the absence of Batkin who was however held equally liable with the other two[1] so in another case where *A* had engraved the plate, *B* made the paper and *C* finished it, and it appeared that each acted without knowing anything about the part assigned to the other, it was held that all the three were liable as principals, it being immaterial whether the co-conspirators were mutually known.[2]

Scope of illustrations.

English law.

Examples.

Where two or more persons jointly attack another, the fact that one batters his skull with a stick while the other is content to hurl at him a heavy stone the result of which is the fracture of his skull, the case is obviously one of intentional co-operation making all the offenders conjointly and equally liable for the principal offence.[3] In such a case, it is not necessary to find which injuries were caused by which of the assailants so long as the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death.[4]

38. Where several persons are engaged or concerned in the commission of a criminal act they may be guilty of different offences by means of that act.

Person concerned in criminal act may be guilty of different offences.

Illustration

A attacks *Z* under such circumstances of grave provocation that his killing of *Z* would be only culpable homicide not amounting to murder. *B* having ill-will towards *Z* and intending to kill him, and not having been subject to the provocation, assists *A* in killing *Z*. Here, though *A* and *B* are both engaged in causing *Z*'s death, *B* is guilty of murder, and *A* is guilty only of culpable homicide.

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1. Bingley, R. & R. C. C. R. 446.
2. Kirkwood, 1 Mood C.C. 304 at p. 311 ; Dade, 1 Mood C. C. 307; Bingley, R. R. 466.
3. Subbappa Chenappa, 15 Bom. L. R. 393; Ram Newaz, I. L. R. 35 All. 506 ; but *see* Gulab, I. L. R. 40 All. 686.
4. Ram Newaz, *supra*, distinguishing Duma, I.L.R. 19 Mad. 483; Gouridas, I.L.R., 36 Cal.659; Dharam Rai, (1887) A.W.N. 236; Bhola Singh, I. L. R. 29 All. 282; Dhian Singh, 9 A. L. J. 180, overruled in State *v*. Saidu Khan, A.I.R. 1951 All. 21 following Subbappa Chennappa, *supra*.

SYNOPSIS

1. Analogous law.
2. Applicability.
3. Principle.
4. Sections 38 and 149.

1. Analogous law.—This section is the converse of Sec. 34. Under the latter section several persons act in furtherance of a common intention, so that their liability is joint irrespective of the nature or extent of their contribution to the crime. Under the present section several persons combine to commit a crime but not "in furtherance of a common intention". Therefore, as the intention differs, so does their criminal responsibility.

2. Applicability.—Section 38 applies where a criminal act jointly done by several persons and the several persons have different intentions or states of knowledge in doing the joint act.[1]

3. Principle.—Section 38, I. P. C., says that where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Hence, we can only hold each of the accused responsible for the individual acts committed by him. The scope of Sec. 38, I. P. C., came up for consideration before the Lahore High Court in *Sultan* v. *Emperor*,[2] a Bench of the Court laid down that—

> "Section 38, which is the converse of Sec. 34 provides for different punishmer ts for different offences where several persons are concerned in the commission of a criminal act, whether such persons are actuated by the one intention or the other."[3]

Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged are concerned in the commission of a criminal act are set in motion by one intention or by the other.[4] As observed in the preceding article, this section assumes the *absence* of a common intention. For if there had been community of intention, the case would be governed by Sec. 34, and the nature and proportion of the contributory act would be immaterial. It is only when there is an absence of a common design that there is room for the discrimination permitted by the section. Such a case would arise, where, in a sudden quarrel, a person is struck down by two or more persons. So, in a case, where a quarrel arose between one Cheranjan on the one side and Indar and Bacha on the other and Cheranjan abused Indar, whereupon the latter gave him a blow with a stick and Bacha struck him down by a blow on the head with an axe, inflicting two other wounds with the axe on other parts of the body, any one of the three axe wounds being sufficient to cause death, the Sessions Judge convicted both under Sec. 304 of the Code, but on appeal Oldfield, J., observed that the offences by Indar and Bacha could be distinguished from each other; and while Bacha was, no doubt, guilty of the more serious offence of culpable homicide, Indar's offence was that of voluntarily causing hurt. Bacha's blow alone was the cause of death, and neither the assault nor the killing was in furtherance of a common intention so as to render the one man liable for the act of the other. The case, therefore, fell under the provisions of this section, under which, while both are engaged in a criminal act, they may be liable for different offences.[5] There may be a common intention for one purpose, but not for another purpose, in which, too, the rule of the section would apply. Thus, in one case, two persons start to commit burglary and one of them

Section assumes absence of a common intention.

Example.

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1. State *v.* Bhimshanker Siddannappa Thobde, A. I. R. 1968 Bom. 254 at p. 259: 69 Bom. L. R. 788.
2. A. I. R. 1931 Lah. 749.
3. *In re* Mallappa Shivappa Kankanwadi, (1961) 2 Cr. L. J. 515 at p. 517.
4. Barendra Kumar Ghose *v.* Emperor, A. I. R. 1925 P. C. 1 at p. 7 : I. L. R. 52 Cal. 197 (P. C.) : 52 I. A. 40.
5. Indar, (1882) A. W. N. 23; *see* also Sutar, I. L. R. 12 Lah. 442.

encountering opposition shoots down his opponent : here the two burglars were engaged in a criminal act, and they had a common intention so far as regards the commission of that act, but the commission of murder was neither a part of the common intention nor in pursuance of a common aim. Therefore, while the person shooting will alone be responsible for murder, his companion could only be convicted of burglary.

4. Sections 38 and 149.—The principle of Secs. 38 and 110 applies to offences under Sec. 149 and that the liability of individual members of an unlawful assembly under the latter section depends on the intention of knowledge of the members.[1]

"Voluntarily."

39. A person is said to cause an effect "voluntarily when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery, and thus causes the death of a person. Here, *A* may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Operation of criminal volition.
5. Presumed intention.
6. Intention—Knowledge—Negligence.
7. "Malignantly"—"Wantonly".
8. Effect of coercion.

1. Analogous law.—The Code does not define the word "intentionally" though it is frequently used, and is presupposed in every crime. It, however, defines its lesser analogue "voluntarily". The difference between the two words is one of degree. The definition of this word has been avowedly borrowed from the definition of "wilfully" as prepared by the Commissioners on the Criminal Law of England, where they proposed to define it as follows :

Definition under Criminal Law of England.

"A hurt, damage or other evil consequence of an act shall be deemed to have been caused wilfully where the doer of the act intended such consequence to result or knew or believed that it was likely to result from his act, or where knowing or apprehending that such consequence would probably result from his act, he wilfully incurred the risk of causing it."[2] It will be observed that this definition differs from that of the Code only in having a third item which is absent in the Code, namely that relating to the probable result.[3]

It will be noticed that the Code does not define the word with reference to volition, but rather to the causation of effects. This word frequently occurs in describing offences affecting the human body,[4] and as these form by no means the least important of offences prescribed in the Code, it is essential that the exact import of the term should be clearly understood.

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1. Bhagwat Singh *v.* Emperor, A.I.R. 1936 Pat. 481 at p. 485 : 162 I. C. 563 : 37 Cr. L. J. 630 : 17 P. L. T. 350.
2. *Digest*, Chap. 1, Sec. 2, Art. 2 , First Report, Sec. 103. This definition of "wilfully" is now current in. England. Roper *v.* Knott, (1898) 1 Q. B. 868: Senior, (1898) 11 Q. B. 283.
3. First Report, Sec. 104.
4. Chapter XVI (Secs. 299-377), I.P.C.

Distinction between intention and knowledge.

The definition here given has been, from the commencement, the subject of hostile comment, as it overlooks the difference between "intention" and "knowledge of likelihood" and tends to regard these as convertible terms. But that "intention" is distinct from "knowledge" or "knowledge of likelihood" cannot be denied and was also clearly conceded in the Indian Law Commissioner's Report,[1] but they justified their draft definition on the ground that as the penal consequence in the two cases is the same the distinction between the two terms is a distinction without difference, and their retention enables the Court to define more accurately the state of mind present at the time of the doing of a criminal act.[2] Let it be supposed that *A* was wilfully to mutilate the person of *B*, not intending to kill him, but only to injure him from a motive of revenge. Suppose also, that he did this, knowing that death, though not a certain result, was yet likely to result from what he did, and that, in fact, death did result, it cannot be presumed, be doubted that the legal penalty ought to be just the same as if *A* had directly intended to kill.[3] This is, then, the sense now stereotyped in the Indian Criminal Law, so that a person shall be deemed to cause an injury "voluntarily" if he either intended it to result directly from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, he incurred the risk of causing it.

2. Principle.—The word "voluntarily" has been given an artificial meaning and at variance with its ordinary sense solely for the purpose of the Code. In that sense the predicament of "voluntary offenders will include not only those who directly intend to inflict a particular injury but also all such as wilfully and knowingly incur the hazard of causing it".[4] For the purposes of criminal law, an act or omission is voluntary if it might have been avoided by the exercise of reasonable care; thus a negligent act or omission is willed, because the person responsible does not will to prevent the commission or omission.[5] "The proper test of guilt in such cases is that of knowledge and consciousness on the part of the malefactor that hurt or damage is likely to result or will probably result, from what he does; his criminality consists in wilfully incurring the risk of causing loss or suffering to others. The case of a party so misconducting himself, and so regardless of the interests of others seems to be indistinguishable in point of legal guilt and penal consequences from that of a criminal who acts with the most direct intention to execute an illegal purpose, and it seems to us that he may properly by described as the voluntary author of the mischief produced."[6]

Test of guilt.

3. Meaning of words.—"*Causes it by means*" : Means here signifies acts as well as omissions. "*At the time of employing those means,*" which alone determines his criminality. "*Knew or had reason to believe*" : *See* Sec. 26, I. P. C.

4. Operation of criminal volition.—It is by no means easy to define in language at once precise and perspicacious the exact significance of the word "voluntarily". The section defines it by applying to it the test of

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1. First Report, Note B.
2. First Report, Sec. 101.
3. English Law Commissioner's Seventh Report, Sec. 25; Indian Law Commissioner's First Report, Sec. 107.
4. English Law Commissioner's Seventh Report, Sec. 22 approved and followed in First Report, Sec. 105.
5. Halsbury's *Laws of England*, 2nd Ed., Vol. 9, p. 10, footnote (*h*). cited and relied on in Ram Rup *v.* The Crown, A. I. R. 1951 Punj. 418 at p. 419 : 52 P. L. R. 193 : 5 D. L. R. (Simla) 223 : 4 A. I. Cr. D. 534 : 52 Cr. L.J. 930.
6. English Law Commissioner's Seventh Report, Sec. 23, cited in First Report, Sec. 106.

"intention", "knowledge" and "reasonable belief". The last has been defined before, and its meaning has been set out there. "Intention" and "knowledge" remain. Now the word "voluntary" as understood in the light of "intention" is, as Bentham pointed out, an ambiguous term,[1] for it may mean either "willing" or "uncoerced". Again the "intention or will" may regard either of two objects : (*a*) the act itself; or (*b*) its consequences. Of these objects, that which the intention regards may be styled *intentional*. If it regards the act, then the act may be said to be intentional; if the consequences, so also, then, may the consequences. If it regards both the act and the conseq ences, the whole *action* may be said to be intentional, whichever of those articles is not the object of the intention, may, of course, be said to be *unintentional*.[2] Now the act may be intentional, without the consequences, as when intending to touch a man you chance to hurt him. So the consequences of an act may be intentional without the act being intentional at every stage, as when you run against a man with a view to push him down, but a second man coming in on a sudden between you and the first man, before you can stop yourself, you run against the second man, and by him push down the first.[3] But the consequence of an act cannot be intentional, without the act being itself intentional in at least the first stage, as where the second man pushes down the first man before you have a chance to touch him.[4] The Code, therefore, adopts this test when it judges of a man's intentions by the consequences. But a consequence when it is intentional may either be directly or only collaterally intentional. It is directly intentional when the prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act. It is collaterally intentional, when, although the consequence was in contemplation, and appeared likely to ensue in case of the act being performed, yet the prospect of producing such consequence did not constitute a link in the aforesaid chain.

Voluntarily as understood in the light of intention.

5. Presumed intention.—Here the Code takes note of both intentions, direct or indirect. But it will be observed that the intention so far is real and not presumed. Presumption, no doubt, enters largely in the determination of collateral intention, but it is the *means* by which such intention is judged. It is never taken for granted, and it is here that the Indian law presents striking divergence from the English law, in that it only takes note of actual and not presumed intention in determining criminality, though this sometimes leads to awkward consequences, as in the case[5] where the accused intending to murder his father-in-law dealt him three stunning blows felling him senseless on the ground. The accused believing that he was dead, set fire to the hut in which he fell with a view to removing all evidence of the crime. The fire so kindled killed the man, and the question arose what offence the accused has committed. In so far as he attempted to murder him by dealing him three blows, he was admittedly guilty of attempt to murder under Sec. 307 of the Code. But was he guilty of anything more ? He had set the house on fire not with the intention of killing the man, but with the sole intention of destroying incriminating evidence against himself. He had not the remotest thought that his victim was still alive when he lighted the fire. At

Divergence between English and Indian law.

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1. *Principles of Morals and Legislation*, Vol. I, Chap. VIII, pp. 40, 41.
2. *Ibid.*, Chap. VIII, Sec. 1.
3. *Ibid.*, Chap. VIII, Sec. 4.
4. *Ibid.*, Chap. VIII, Sec. 5.
5. Khandu, I. L. R. 15 Bom. 194, followed in Palani Goundan, I. L. R. 42 Mad. 545 at p. 558 (F. B.); *contra* (obiter) in Khubi, A. I. R. 1923 All. 545; Kaliappa, A. I. R. 1933 Mad. 798, distinguished in Gajjan Singh, A. I. R. 1931 Lah. 27 at p. 28.

the same time it compassed his death. Under English law, such a case would present no difficulty, for it will presume an intention to kill from the fact accomplished. But this is not the test adopted in Indian jurisprudence. And hence the unsatisfactory decision of the majority of the Courts that the man could not be convicted of murder, as he did not light the fire with the *intention* of killing the deceased.[1] In another case,[2] the accused had killed his own mother, by beating and kicking her, and the question was raised but not decided, whether the brutal treatment of an old woman by a powerful man would, in such a case, raise an inference of knowledge of the likelihood of death.

6. Intention—Knowledge—Negligence.—But the case[3] last cited is instructive, for it draws a distinction between intention, knowledge of likelihood and mere rashness or negligence. "Culpable rashness" is acting *with* the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting *without* the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, corsciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death."[4] Eliminating, then, the two extreme cases of intention and rashness, we have the intermediate state of mind in which the culprit "knew or had reason" to believe that the effect" "likely" to be produced by the means which he had employed. These words play an important part in the description of offences dealt with by Secs. 279, 282, 284—289, I. P. C., and, of course, the important Sec. 299, I. P. C., defining culpable homicide and its allied sections. Under this clause if the reason existed, the Court presumes knowledge of the consequence apart from any *actual* knowledge that the accused may have possessed.[5] But even then the presumption is rebuttable and the accused may show that though he had reason to believe, he had also other reasons against it. Suppose, for instance, that a person should drive a buggy obviously along narrow, crowded street. He might not intend to kill anyone, but the fact the lane was narrow and crowded is reason from which he might well infer that his act was likely to kill some person. In such a case, then, if he should cause death, he would be guilty of culpable homicide, and even of murder, if it should be found as a fact that he further *knew* that his act was so imminently dangerous that it must, in all probability, cause death as contemplated in Cl. (4) of Sec. 300. Such an inference would be drawn, if a man should drive a buggy furiously not merely along a crowded street, but intentionally into the midst of a crowd of persons. On the other hand, though driving through a crowded street or a crowd of persons, he may show that he was making for a train to discharge an important business in

Culpable negligence.

Knowledge.

Intention.

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1. *See* this case further commented under Sec. 302, I. P. C., *post*.
2. Nidamarti, 7 M. H. C. R. 119.
3. *Ibid.*
4. *Per* Halloway, J., in Nidamarti, 7 M. H. C. R. 119; Morgan, 9 Cr. L. J. 393.
5. Sunku Seethaiah, 6 I. C. 774.

a distant part of the country which he could not otherwise fulfil. In such a case, the Court will presume that his intention was not to cause death, but to save time.[1]

Causal relationship between the doer and the deed to be established.

The question whether the effect produced was premediated or known to be probable by the author is, therefore, always a question of fact to be determined according to the particular circumstances of each case. But whatever the facts, the prosecution have to prove them with sufficient clearness so as to establish a causal relationship between the doer and the deed for, otherwise it may be merely a case of *post hoc ergo propter hoc* which is as great a fallacy in logic as it is in criminal jurisprudence. Suppose, a sportsman shoots at a fowl with intent to kill and steal it, and in doing so he kills a person who was hidden behind a bush and of whose presence the sportsman had no knowledge. Here, although the death was caused by the sportsman, still as he had no reason to believe that it was likely, he could not be said to have voluntarily caused it.[2] But if suppose that, in such a case, he had sent the deceased in the bush to raise fowls, that fact would alter his criminality, for it will, then, be a reason from which he could have foreseen the result.[3] This view finds support in an English case in which the prisoner was out poaching by night with two other men. He had a gun with him lent him by his brother. The prisoner had just cocked his gun when he was pursued by the watchman. He ran for a short distance and then turned round when his gun went off, wounding the watchman on the shoulder. The prisoner was tried by Lawrence, J., who charged the jury that a man must be presumed to intend the natural consequences of his acts. The prisoner was convicted and sentenced to 18 months' imprisonment, but the Court of Appeal set aside the conviction, holding that the direction of the Judge to the jury was incorrect and misleading, insmuch as a proposition of law it was incorrect that a man must be presumed to intend the natural consequences not only of his intentional acts but also of his accidental acts.[4]

Example.

7. "Malignantly"—"Wantonsly".—There are sections in which the Code does not confine itself to the terminology which it has explained in this chapter. It uses, for example, the words "malignantly"[5] and "wantonly"[6] which have been nowhere defined. As their use is limited, their significance will be considered under the sections in which they occur.

8. Effect of corecion.—The effect of coercion is stated in Sec. 94, I. P. C. It does not justify a murder. Consequently, the act of a person who by threats of death is induced to do an act in order to facilitate the commission of a murder is a "voluntary" act within the meaning of this section.[7]

"Offence."

[8][**40.** Except in the [9][chapters] and sections mentioned in Cls. (2) and (3) of this section, the word "offence" denotes a thing made punishable by this Code.

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1. *Per* Peacock, C. J., in Gorachand Gope, B. L. R. (Sup. Vol.) 443 (F. B.).
2. Section 299, I. P. C., Illus. (*c*), *post*.
3. *Ibid.*, Illus. (*b*), *post*.
4. William Davies, (unrep.), Times, 11th March, 1913 (summarized in 7 C. W. N. 125n.).
5. Sections 153, 270, I. P. C.
6. Section 155, I. P. C.
7. Killikyatra, (1912) M. W. N. 1103 : 19 I. C. 207.
8. Subs. by Act. 27 of 1870, Sec. 2, for the original section.
9. Subs. by Act 8 of 1930, Sec. 2 and Sch. I for "Chapter".

In Chapter IV, [1][Chapter V-A] and in the following sections, namely, Secs. [2][64, 65, 66, [3][67], 71], 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389, and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in Secs. 141, 176, 177, 201, 202, 212, 216, and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.]

SYNOPSIS

1. Analogous law.
2. Other offences, and no offences.
3. English law.
4. " 'Offence', in the Procedure Code."
5. Offence in the Code.
6. Continuing offence.
7. *Mens rea.*
8. *Mens rea* is an integral part of the offence.
9. Rules and bye-laws.
10. Clause (2).
11. Motive.
12. Offence without motive.

1. Analogous law.—This section, as originally drafted formed Cl. (27), but it has been since amended by several Acts.[4] Its terms are further enlarged by an explanatory definition added to Sec. 216 for the purpose of that section.[5] Section 216 very clearly provides for the punishment of harbourers only where the person harboured is wanted for an offence for which certain punishments are provided. No provision whatever is made in Sec. 216 for the punishment of a harbourer where the man harboured is wanted for an offence punishable with imprisonment of less than one year. Definition of the word "offence" in Sec. 40 cannot affect the clear provision made in Sec. 216 for the punishment of a person who harbours an offender.[6]

2. Other offences, and no offences.—An abetment[7] of, or an attempt[8] to commit an offence is in itself an offence within the meaning of this section. But vagabonds and habitual robbers, as such, though liable to arrest under Sec. 55 of the Criminal Procedure Code are not arrested for the commission of any "offence" within the definition here given so that resistance by them cannot be punished under Sec. 224 or Sec. 225 of the Indian Penal Code.[9] The object of this and other similar sections, e.g. Secs. 118, 144, 145 of the Criminal Procedure Code, is the *prevention* and not the *punishment* of crime.[10] Consequently, there can be no "offence", for as soon as there is one there can be, then, no prevention. So neglect to maintain a wife and children is not an offence; consequently, an order passed for maintenance under Sec. 488 of the Criminal Procedure Code does not amount to a conviction for an offence.[11] It has been held that a proceeding for

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1. Ins. by Act 8 of 1913, Sec. 2.
2. Ins. by Act 8 of 1882, Sec. 2.
3. Ins. by Act 10 of 1886, Sec. 21(1).
4. *See* footnote 6 on p. 327.
5. *See* amended Sec. 216, I. P. C., *post*. The term "offence" includes offences punishable under English law also, *vide* Act VIII of 1913, Sec. 23.
6. Deo Bakhsh Singh *v.* Emperor, A. I. R. 1943 Oudh. 51 at p. 52: 1942 A. W. R. (C. C.) 353 (2).
7. Spier, (1887) P. R. No. 49.
8. *Per* Banerji, J., in Ajudhia, I. L. R. 17 All. 120.
9. Kandhia, I. L. R. 7 All. 67, following Shasti Churn Napit, I. L. R. (1882) 8 Cal. 331; Gopilal Sharma, I. L. R. (1955) Nag. 395.
10. Umbica Prasad, 1 C. L. J. 271.
11. Ponnummal, I. L. R. 16 Mad. 234, following Golam Hoosein, 7 W. R. 10; Thakur Ira, 5 B. H. C. R. 81.

realising the legal fare under Sec. 28, Public Conveyances Act, 1867, is not a proceeding in respect of an offence.[1]

The unauthorised use of the water was not an "offence" and the order for levy of special rates for user thereof was not the imposition of a penalty for an offence.[2]

3. English law.—The Code adopts the simpler but less discriminating nomenclature of "offence" to describe what would be classed in England as treason, felonies and misdemeanours, treason itself being divided into two classes : (*i*) Grand Treason (or High Treason); and (*ii*) Petit Treason. High Treason consisted of any overt act signifying an intention to kill or destroy the King or to do him any bodily harm, tending to his death or destruction, maiming or wounding, imprisonment or restraint.[3] To levy war against the King,[4] to adhere to his enemies,[5] are other cases of High Treason. *Lese magistie* or active disloyalty is also cited by Glanvil as an instance of High Treason.[6]

High treason.

"Petit Treason" is when a servant kills his master, a wife, her husband, or when a secular or religious man kills his prelate or superior to whom he owes "faith and obedience".[7] Petit treason as a distinct offence has long since ceased to exist, such offences being now "deemed to be murder only and no greater offence".[8] The word "treason" is, therefore, now confined to signify High Treason merely.[9]

Petit treason.

"Felony" was a term reserved by English law to designate all offences punishable with death and forfeiture. It is variously derived and described. In *Terms de la ley* it is said of serious crimes that they are called felonies of the ancient English word "*fell*" or "fierce" because they are intended to be done with cruel, bitter, fell, fierce, or mischievous minds.[10] But another writer describes the word as signifying an offence which occasions a total forfeiture of property to which capital or other punishment may be superadded according the degree of guilt.[11] A large number of serious offences are now created felonies by statute, and their punishment is either death or penal servitude for seven years.[12]

Felony.

All other offences are now called misdemeanours, sometimes also termed *misprisons*, and which, therefore, include all crimes and offences not being treason and felonies, and which are punishable by either fine or imprisonment or both.[13] It may be added that while the Penal Code has adopted

Other offences.

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1. Vali Mittra, I. L. R. 44 Bom. 463.
2. Jawala Ram *v.* State of Pepsu, A. I. R. 1962 S. C. 1246 at p. 1248 : (1962) 2 S. C. R. 503.
3. Stephen's *Criminal Law*, 40.
4. Archbold's *Criminal Pleadings*, 883-990; Stephen's *Criminal Law*, 40—44 : 4 Black, Chap. VI.
5. *Ibid.*
6. Glanvil, Lib., 1 C. 2 ; Black. 75.
7. *Terms de la ley*, "Treason".
8. 9 Geo. IV, c. 31, Sec. 2 ; 24 & 25 Vict., c. 100, Sec. 8; Russ., p. 644.
9. *Per* Blackburn, C. J., in O'Brien, 1 I. L. (O. S.) 176.
10. *See* Co. Litt. 391a; 4 Black 307 ; 1 Pollock and Maitland's *History of Criminal Law*, 284, 286; *ibid.*, Vol. 2, 125, 463-466, 467-478, 509.
11. 42 Black 95:1 Hawak. Ch. 25, Sec. 1; 1 Russ., Chap. IV, p. 186.
12. 7 & 8 Geo. IV, c. 28, Sec. 8, under which transportation was the punishment provided, but it is now commuted into penal servitude, 20 & 21 Vict., c. 3, Sec. 2.
13. 1 Russ., Chap. IV, p. 187 ; but the use of the term "offence" is not foreign to English law. As Collins, J., remarked in a case "*Prima facie* an offence is equivalent to a crime"; Derbyshire Coal Co. *v.* Derby, (1896) 2 K. B. 57 and 58.

the simpler mode of describing all punishable acts as "offences", the Criminal Procedure Code had to sub-divide offences into warrant cases[1] and summons cases[2] the former being more in the nature of felonies, and the latter in the nature of misdemeanours.[3]

4. " 'Offence' in the Procedure Code."—The definition of "offence" as here given differs materially from that adopted in the companion Code,[4] where it is thus defined :

"Offence" means any act or omission made punishable by any law for the time being in force.

It also includes any act in respect of which a complaint may be made under Sec. 20 of the Cattle Trespass Act.

The definition is obviously much wider than the one given here because the Procedure Code provides for the trial of all offences under and without the Code, while the Code has to define the terms with strict reference to its future use in the Code itself. The term as used here has, then, no reference to the Procedure Code, or English law, and a conviction under either is, then, not a conviction for an "offence" within the meaning of the Code, unless it conforms to the definition of the term as here described.[5] (*See* also next paragraph.)

5. Offence in the Code.—What is then an "offence" as here described ? It is said to denote "a thing made punishable by this Code". Now the words "a thing" is as vague as it is comprehensive, for it may mean either a subject or an object, the doer or the deed. But it is obviously used in the latter sense as connoting acts and omissions made penal by the Code.[6] But no legal responsibility attaches to them apart from the doer. It is he who is punishable in respect of them. The term must mean, then, acts and omissions for which a person is punishable under the Code. But the language of the section is inapt, for it speaks of "a thing made punishable by the Code", which, of course, could only mean the doer punishable by the Code. But though this sense is clear, it is not inevitable and has been the subject of judicial comment.[7]

6. Continuing offence.—Giving daily exhibitions by means of a cinematograph in a building not licensed under the U. P. Cinemas (Regulation) Act (Act No. 3 of 1956), is not a continuing offence so as to give jurisdiction to the Magistrate to impose a daily fine.

An act of giving an exhibition by means of a cinematograph continues only so long as the exhibiton lasts; once the exhibition finishes the act ceases to remain in existence or to continue. If after an interval another exhibition is given by means of the cinematograph it is a repetition of the act and not its continuation.

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1. Section 4 (*w*), Cr. P. C.
2. *Ibid.*, Sec. 4 (*v*).
3. Warrant cases, *ibid.*, Chap. XXI (Secs. 251-259); Summons cases, *ibid.*, Chap. XX (Secs. 241-250).
4. Section 4 (*o*), Cr. P. C.
5. Ganpatrao, I. L. R. 19 Bom. 105; Ganesh Khanderao, I. L. R. 13 Bom. 506; Moorga Chetty, I. L. .R. 5 Bom. 338, in which full significance of the term is set out, *per* Melville, J.
6. Reference, 3 M. H. C. R. (App.) 11 ; Moorga Chetty, I. L. R. 5 Bom. 338 ; Narayan Dhondev, 6 I. C. (Bom.) 529; Keshwar Lal *v.* Girish I. L. R. 29 Cal. 496 ; Po Han, 7 L. B. R. 63; Lewis, I. L. R. 38 Mad. 733; Ganesh, 10 I. C. (S.), 168.
7. Moorga Chetty, I. L. R. 5 Bom. 338 (F. B.) ; Kandhia, 7 All. 67 at p. 71 : 3 M. H. C. R. (App.) 11.

"Continuing offence" means an offence that continues from moment to moment without any interruption or break. It is an offence that must continue without requiring any act on the part of the offender to keep it in existence. It is an offence which would come to an end only when the accused does an act to terminate it.

Continuing offence, meaning of.

The words "continuous offence" should be interpreted in the same manner as the words "continuing breach of contract" and "continuing the wrong independent of contract" occurring in Sec. 23 of the Limitation Act.[1]

7. Mens rea.—It is true that unless a statute expressly or by necessary implication rules out *mens rea* as a constituent part of a crime, a person should not be found guilty of the crime unless he is proved to have a guilty mind. But there may arise a case when the object of the Act and the language employed in it might reasonably entitle the Court to think that proof of guilty mind is not essential to proof of crime.[2]

It is true that *actus non facit reum nisi mens sit rea* is a cardinal doctrine of criminal law, but the Legislature can create offences which consist solely in doing an act or being in possession without any intention whatsoever. Whether *mens rea* is a constituent part of a crime or not must in every case depend upon the wording of the particular enactment.

When the Legislature intended that the state of the mind of a person should be a vital constituent element of an offence, words indicative of that intention would be expressly used.

But in the Indian Explosives Act, such or similar words are conspicuous by their absence, which must show beyond doubt that when the Legislature enacted Secs. 5 and 6 of the Act, it intended that the state of the mind of a person or his knowledge or his intention should be immaterial for the purpose of constituting an offence. The Legislature has enacted the Act and has provided that explosives should not be manufactured or that explosives should not be stocked except under conditions which would not be detrimental to the public safety, health and convenience. So stocking of prohibited explosives is made punishable without any proof of *mens rea*. There are other enactments, for instance, the Prevention of Food Adulteration Act which penalises sale of adulterated food without proof of *mens rea*.[3]

8. Mens rea is an integral part of the offence.— *Mens rea* is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*.

The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence.[4]

Welfare statute if include *mens rea*.

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1. Trilok Chand *v.* C. N. Srivastava, A.I.R. 1961 All. 88 at p. 89 ; 1960 A. W. R. (H. C.) 387 : 1960 A. L. J. 512.
2. Madan Lal Arora *v.* State, A. I. R. 1961 Cal. 240 at pp. 244-45 : (1961) 1 Cr. L. J. 488.
3. Sabastian *v.* State of Kerala, (1962) 2 Cr. L. J. 435 at p. 437.
4. *See* Srinivas Mall *v.* King-Emperor, I. L. R. 26 Pat. 460: A. I. R. 1947 P. C. 135; Hariprasada Rao *v.* State, A. I. R. 1951 S. C. R. 204 : 1951 S. C. R. 322 and Sarjoo Prasad *v.* State of Uttar Pradesh, (1963) 3 S. C. R. 324 : A. I. R. 1961 S. C. 631.

Unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of an offence, an accused cannot be held guilty of an offence under the criminal law unless he has a guilty mind.[1] There is a presumption that a guilty intent is an essential element of a statutory offence and this presumption is strengthened when the offence is made punishable with a sentence of imprisonment. This presumption can be rebutted by showing that the object of the statute would be defeated unless the language used in the enactment is constructed in a wider sense to include otherwise innocent persons.[2]

Most of the relevant English decisions on the subject were referred to in the judgment of the Supreme Court in *State of Maharashtra* v. *Mayer Hans George*.[3]

How to disprove *mens rea*.

How to disprove *mens rea* has been succinctly stated in Halsbury's *Laws of England*, 3rd Ed., Vol. 10 at p. 283, thus:

> "When the existence of a particular intent or state of mind is a necessary ingredient of the offence, and *prima facie* proof of the existence of the intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind, for example, by showing that he was justified in doing the act with which he is charged, or that he did it accidentally, or in ignorance, or that he had an honest belief in the existence of facts which, if they had really existed, would have made the act an innocent one. The existence of reasonable grounds for a belief is evidence of the honesty of that belief."[4]

The question whether the master can be held vicariously responsible for the acts of his servant should primarily be considered in the light of the statute. No doubt, the principle of *mens rea* is accepted by Criminal Courts but it is within the power of the Legislature to make a certain illegal act or omission penal and fix an absolute liability upon any person if a breach of a certain enactment is made. Those on whom the duty is cast to interpret the statutes cannot ignore the purpose and object of an enactment. If the Legislature expressly or in an implied manner has placed this vicarious responsibility on the master, the courts of law cannot question the discretion of the Legislature by relying upon certain well-recognised principles.

Such general principles apply to all offences but it is within the power of the Legislature to enact that an accused may be convicted without making a probe into his mind and without finding out whether he had knowledge of the crime that was committed or an intention of committing that crime. No doubt these principles can be given up only where the language of the statute either clearly express the fastening of the vicarious responsibility or it can safely be taken as implied.[5]

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1. Atul Chandra Pal *v.* State, A. I. R. 1970 Cal. 88 at p. 89 : 73 C. W. N. 651.
2. Commissioner of Sales-tax, M. P., Indore, *v.* M/s. Bombay General Stores, Shahdol, A. I. R. 1969 M. P. 213 at p. 215 : 1969 Jab. L. J. 289; Nathulal *v.* State of Madhya Pradesh, A. I. R. 1966 S. C. 43 at p. 45.
3. Criminal Appeal No. 218 of 1963, dated the 24th August, 1964 : A. I. R. 1965 S. C. 722.
4. Nathulal *v.* State of Madhya Pradesh, A. I. R. 1966 S. C. 43 at p. 45 : 1965 Mah. L. J. 783: (1965)2 S. C. W. R. 591.
5. Tharoo Lal *v.* State, 1962 Cr. L. J. 126 at p. 128.

9. Rules and bye-laws.—Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of Sec. 40, I. P. C.[1]

10. Clause (2).— It is to be noted that this clause widens the definition of "offence". Under Cl. (1) "offence" denotes only a thing made punishable under the Code, but in the chapters and sections mentioned in this clause it denoted not only a thing punishable under the Code, but also a thing punishable under any special or local law. Thus offences under the Excise Act (XII of 1890), Explosive Substances Act (VI of 1908), Police Act (V of 1861), Post Office Act (VI of 1898) and Registration Act (XVI of 1908) would be offences within the meaning of the word in the chapters and section mentioned in the clause.

Under statutory crimes whether element of *mens rea* is an essential ingredient.

Where there are statutory crimes the question arises whether the element of *mens rea* is an essential ingredient to make it punishable. This question came up for consideration before the Supreme Court in *State of Maharashtra* v. *M. H. George*,[2] and Subba Rao, J., who gave his dissenting judgment in the case considered some of the important text-books and decisions cited at the Bar and said :

"In Russell on *Crime*, 11th Ed., Vol. I, it is stated at page 64 :

Russell's view.

'.....there is a presumption that in any statutory crime the common law mental element, *mens rea* is an essential ingredient'."

On the question how to rebut this presumption, the learned author points out that the policy of the Courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In Halsbury's *Laws of England*, 3rd Ed., Vol. 10, in para. 508, at p. 273, the following passage appears :

Halsbury's view.

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute."

This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question whether *mens rea* is an ingredient of the offence or not : it depends upon the object and the terms of the statute. So too, Archbold in his book on *Criminal Pleading, Evidence and Practice*, 35th Ed., says much to the same effect at page 48 thus :

Archbold's view.

"It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law....In the case of statutory offences it depends on the effect of the

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1. Bux Soo Meah Chowdry *v.* King, A.I.R. 1938 Rang. 350 at p. 351 ; *see* also Ma Khwet Kyi *v.* Emperor, A. I. R. 1929 Rang. 791 : I. L. R. 6 Rang. 791.
2. A. I. R. 1965 S. C. 722.

statute....There is a presumption that *mens rea* is an essential ingredient in a statutory offence, but this presumption is laible to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals."

Leading case.

The leading case on the subject is *Sherras* v. *De Rutzen*.[1] Section 16(2) of the Licensing Act, 1872, prohibited a licensed victualler from supplying liquor to a police constable while on duty. It was held that that section did not apply where a licensed victualler *bona fide* believed that the police officer was off duty. Wright, J., observed :

Wright, J.'s view.

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of statute creating the offence or by the subject-matter with which it deals, and both must be considered."

The Privy Council in *Bruhn* v. *The King*,[2] observed :

Privy Council's view.

"By this Ordinance every person other than the opium farmer is prohibited from importing or exporting *chandu*. if any other person does so, he *prima facie* commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if established, justify or excuse what is *prima facie* a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that knowledge is a necessary element in crime, and it is answered by the same reasoning."

Channell, J.'s view.

In *Pearks' Dairies, Ltd.* v. *Tottenham Food Control Committee*,[3] the Court of Appeal considered the scope of Regulations 3 and 6 of the Margarine (Maximum Prices) Order, 1917. The appellants' assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer at the price of 1 *sh.* per lb. giving only 14½ oz. by weight instead of 16 oz. The appellants were prosecuted for seelling margarine at a price exceeding the maximum price fixed and one of the contentions raised on behalf of the accused was that *mens rea* on the part of the appellants was not an essential element of the offence. Lord Coleridge, J., cited with approval the following passage of Channell, J., in *Pearks, Gunston and Tee, Ltd.* v. *Ward*[4] :

"But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely."

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1. (1895) 1 K. B. 918 at p. 921.
2. (1909) A. C. 317 at p. 324.
3. (1919) 88 L. J. K. B. 623 at p. 626.
4. (1902) 71 L. J. K. B. 656.

In *Brend* v. *Wood*,[1] dealing with an emergency legislation relating to fuel rationing Goddard, C. J., observed :

Goddard, C. J.'s view.

> "There are statutes and Regulations in which Parliament has been fit to create offences and make people responsible before Criminal Courts although there is an absence of *mens rea*, but it is certainly not the Court's duty to be acute, to find that *mens rea* is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subjects that a court should always bear in mind that, unless a statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

Coming to Indian decisions the Judicial Committee in *Sri Nivasa Mall* v. *Emperor*,[2] through Lord Du Parcq, approved the view expressed by Goddard, C. J., in *Brend* v. *Wood*,[3] observing : "Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said : 'It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind'." Subba Rao, J., in the *State of Maharashrta* v. *M. H. George*,[4] summarised his conclusion thus : "The law on the subject relavant to the present enquiry may briefly be stated as follows. It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. To put it differently, there is a presumption that *mens rea* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : can he do anything to promote the observance of the law ? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea* that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof." Ayyangar, J., who gave the majority judgment while speaking for himself and also for Modholkar, J., held : "that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision".

Privy Council's view.

Conclusion summed up by Supreme Court.

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1. (1946) 62 T. L. R. 462 at p. 463.
2. A. I. R. 1947 P. C. 135 at p. 139 : I. L. R. 26 Pat. 460.
3. (1946) 62 T.L.R. 462 : 110 J. P. 317.
4. A. I. R. 1965 S. C. 722 at pp. 728, 729, 730, 731, 732 and 740.

Section 79, Penal Code, comes within Chapter 4 and therefore an offence to which Sec. 79, Penal Code, refers includes an offence under a local or special law like Punjab Pure Food Act.[1]

Section 40, I. P. C., governs Sec. 82. Section 82 is in Chapter 4 of the Act, and Sec. 40 says that in Chapter 4, I. P. C., the word "offence" denotes a thing punishable under this Code, or under any special or local law.[2]

It has been held that a proceeding for purposes of realising the legal fare under Sec. 28, Public Conveyances Act, 1867, is not a proceeding in respect of an offence.[3]

11. Motive.—Motive cannot be a substitute for evidence but whenever it is ascertainable it can help in understanding the evidence in proper perspective.[4]

12. Offence without motive.—As has often been explained, motive is treacherous and elusive ground. There may be an offence without a motive in the same way in which the strongest motive may not impel a person to commit an offence.[5]

41. A "special law" is a law applicable to a particular subject.

Special law.

SYNOPSIS

1. Analogous law.
2. "Law applicable to a particular subject."

1. Analogous law.—A particular subject is a subject dealing with an individual subject, e.g. the Excise, Opium, Cattle Trespass, Income-tax, Land Acquisition, Criminal Tribes, Emigration, Railways or the like.[6]

2. "Law applicable to a particular subject."—The expression "special law" means a provision of law, which is not applicable generally, but which applies to a particular or specified subject or class of subjects.[7] In *Emperor* v. *Po Han*,[8] it was held that the expression "special law" as defined in Sec. 41 only meant, enactments such as Excise Act, the Opium Act, and the Cattle Trespass Act, which create fresh offences other than those made punishable under the Penal Code, and that the *Whipping* Act (now repealed) was not a special law as it did not create any fresh offence but only provided an additional penalty for offences already punishable under the Penal Code.

Dictum of *Po Han's* case adopted in several decisions.

In the case of *In re Swami Arunagirinath*,[9] which was heard by a Bench consisting of Leach, C. J., and Abdul Rahman, J., the learned Chief Justice accepted the proposition laid down in the above case, but, instead of referring to the case itself, observed at page 25: "I am in agreement with the opinion expressed by the learned authors of Ratan Lal's *Law of Crimes*,

1. Abdul Aziz *v.* Emperor, A. I. R. 1943 Pesh. 72 at p. 73 : 209 I. C. 540.
2. King *v.* Ba Ba Sein, A.I.R. 1938 Rang. 400 at p. 400 : 178 I. C. 508.
3. Vali Mittra, I.L.R. 44 Bom. 463.
4. Babulal Gopichand *v.* State of M. P., (1962) 2 Cr. L. J. 682 at pp. 687, 688.
5. *In re* Tamappa, A. I. R. 1967 Mys. 71 at p. 76.
6. Inder Sain, 56 I. C. (Lah.) 210; Wasudeva, I.L.R. 52 Mad. 882; Aydroosk *v.* Emperor, A. I. R. 1923 Mad. 187.
7. Anjanaba Yeshwant Rao *v.* Yshwantrao Daulatrao Dudhe, A. I. R. 1961 Bom. 154 at p. 155 : 1961 Nag. L. J. 1 : 63 Bom. L. R. 98.
8. 7 Bur. L. T. 99 : 22 I. C. 147 : 7 L. B. R. 63 : 1914 L. B. 145 : 15 Cr. L. J. 3.
9. A. I. R. 1939 Mad. 21 at pp. 25-26: I. L. R. (1939) Mad. 87 : 179 I. C. 605 : 40 Cr.L.J. 224: (1938) 2 M. L. J. 863 : 41 L. W. 813 : 1938 M. W. N. 588.

14th Ed., p. 78, that the special laws contemplated in Secs. 40 and 41 are laws such as the Excise, Opium, and Cattle Trespass Acts, creating fresh offences, that is, law making punishable certain things which are not already punishable under the Penal Code. There it is pointed out that the Whipping Act is not a special law in this sense, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code." His Lordship went on, however, to hold that the particular enactment which was before him, viz. the Criminal Law Amendment Act, 1932, was a special law within the meaning of Sec. 41 of the Penal Code. "The Act of 1932 deals with picketing and makes picketing in certain circumstances an offence" and also further said on page 31, "there is no doubt in our minds that the Criminal Law Amendment Act falls well within the definition of special law as defined in Sec. 41, I. P. C." It may be pointed out that the passage in Ratan Lal's *Law of Crimes* referred to by the learned Chief Justice did not embody any opinion of the learned authors of that book, but merely reproduced the dictum in *Po Han's* case[1] mentioned above. Abdul Rahman, J., contended himself by observing: "We are holding the Criminal Law Amendment Act to be a special law within the meaning of Sec. 41, I. P. C., no useful purpose would be served by examining the case cited on behalf of the appellant in detail."[2]

In *Public Prosecutor* v. *Annadham Annamalai*,[3] also reliance was placed on *Po Han's* case[4] and the dictum mentioned above was accepted.

What may be special law.

If the intention of the Legislature was to confine the expression "special law" to laws creating fresh offences other than those made punishable by the Penal Code, the Legislature could easily have framed the definition accordingly. The Evidence Act[5] and the Coroners Act[6] have been held to be special laws, although they do not create any new offences. A law creating a fresh offence, like the Criminal Law Amendment Act, 1932, may be a "special law" as held *In re Arunagirinatha*,[7] but it cannot be said that a law applicable to a particular subject is not a "special law" if it does not also create a fresh offence.[8]

The usual rule of law is that where there is a specific punishment provided in a special Act it takes precedence of the general punishment under the Penal Code, and that where there is no specific punishment provided the general law of the land, under the Penal Code, comes into operation if the requirements under any section thereof are satisfied.[9]

3. Rajasthan Municipalities Act.—The Indian Penal Code has classified the offences for different purposes. In some cases offences are only

1. 7 L. B. R. 63.
2. 1939 Mad. 21 at pp. 25, 26, 31.
3. A.I.R. 1954 Mad. 321 at pp 322, 323: (1953) 1 M. L. J 653: 1953 M.W.N. 382
4. 7 L. B. R. 63.
5. Emperor *v.* Faujdar. A. I. R. 1933 All. 440 at p. 447 : 144 I. C. 1021: 34 Cr. L. J. 875: 1933 A L.J. 1518 : I L. R. 55 All. 463; *see* also Hakam Khuda Yar Khan *v.* Emperor, A. I. R. 1940 Lah 129: I.L.R. (1940) Lah. 242: 41 Cr. L. J. 591: 188 I. C. 498 (F. B.).
6. Queen-Empress *v.* Mahomed Rajauddin, I. L. R. (1892) 16 Bom. 159; Emperor *v.* Jageshwar Pasi, (1904) 31 Cal. 1: 7 C. W. N. 889.
7. A. I. R. 1939 Mad. 21 at pp. 25, 26: I. L. R. (1939) Mad. 87: 179 I. C. 605: 40 Cr. L. J. 224: (1938) 2 M. L. J. 863: 41 L. W. 813: 1938 M. W. N 588.
8. *Per* Bhide, J., in Hakam Khuda Yar Khan *v.* Emperor, A. I R. 1940 Lah. 129 at p 139: I. L. R. (1940) Lah. 242: 41 Cr. L J. 591: 188 I C. 498 (F.B.)
9. *In re* Mrs. B. Gervase, 51 Cr.L.J. 1518 at p 1520 (F. B.).

offences under the Indian Penal Code, but under Sec. 40, I. P. C., the definition of the word "offence" is enlarged for the purpose of Secs. 64 to 67 of the Code and the word "offence" for that purpose includes an illegal act under the Indian Penal Code, or under any special or local law, as defined in Secs. 41 and 42 of the Indian Penal Code. According to Sec. 41 "special law" is a law applicable to a particular subject and by virtue of Sec. 42, "local law" is a law applicable only to a particular part of India. There can, therefore, be no doubt that the Rajasthan Municipalities Act, 1959, is special law, as well as local law within the definition of Secs. 41 and 42 of the Indian Penal Code, and as such the application of Sec. 64, I.P.C., cannot ordinarily be ruled out to the offences under the Rajasthan Municipalities Act.[1]

Local law.

42. A "local law" is a law applicable only to a particular part of [2][3]* * * [4][India]].

SYNOPSIS

1. Analogous law.
2. Amendment.
3. Madras Maintenance of Public Order Act and other Local Acts.

1. Analogous law.— As a "special law" applies to special subjects, the operation of "local law" is confined to particular localities, such as, for example, "the several Revenue Acts, Excise Acts, Court of Wards Act, Port Trust Acts and the like".[5]

2. Amendment.—Originally the section stood as follows: "A 'local law' is a law applicable only to a particular part of British India."

In 1948, the words "British India" were replaced by the words "the territories comprised in the provisions" by the Adaptation of Laws Order, 1948. Again, in 1950 the word "State" was substituted for the word "Province" by the Adaptation of Laws Order, 1950, and finally the word "India" replaced the word "States" by virtue of Act III of 1950. The words "the territories comprised" were omitted by the Repealing and Amending Act, XLVIII of 1952.

As, however, rules made under "local laws" do not form a necessary part of such laws, but are made for their convenient working, they do not fall under the category of "local laws".[6]

But where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of Sec. 40 of the Code. Therefore, when the act in respect of which apprehension or detention was made was in respect of an offence falling within a local law it will be a detention in respect of an offence falling within the meaning of Sec. 40, Penal Code and a rescue by others and the escape by the detainee will attract the application of Sec. 225-B, I.P.C., provided the detention was lawful.[7]

3. Madras Maintenance of Public Order Act and other Local Acts.—The Madras Maintenance of Public Order Act is not a special law.

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1. Mst. Dhoopo *v.* State, A. I. R. 1966 Raj. 238 at p. 240.
2. Subs. by the A. O. 1948 for "British India".
3. The words "territories comprised in" omitted by Act 48 of 1952, Sec. 3, Sch. II.
4. Subs. by Act 3 of 1951, Sec. 3 and Schedule for "the States" which had been subs. by the A. O. 1950 for "the Provinces".
5. Reference, 3 M. H. C. R. (App.) 21.
6. Ganda Sha, (1894) P. R. No. 23; Ma Khwet Kyi *v.* Emperor, A. I. R. 1929 Rang. 75: 115 I. C. 664: 6 Rang. 791.
7. Public Prosecutor *v.* Annadham Annamalai, A.I.R. 1954 Mad. 321 at p. 323: (1953) 1 M. L. J. 653: 1953 M.W.N. 382.

On the other hand, it can be considered to be local law applicable to the State of Madras.[1] Rajasthan Municipalities Act, 1959, has been held to be special law as well as local law within the meaning of Secs. 41 and 42 of the Indian Penal Code respectively.[2]

43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

"Illegal." "Illegally" bound to do.

SYNOPSIS

1. Analogous law.
2. "Unlawful" distinguished.
3. Acts excluded.
4. "Legally bound to do".

1. Analogous law.—In several sections[3] the word used is "unlawfully", a concept which has been nowhere defined in the Code. Here the term defined is "illegally", but it is explained by the Law Commissioner that the terms are intended to be used in the same sense and bear the same meaning.[4]

Word "illegal" given wide meaning.

The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for a civil suit, ending in damages.[5] "These appear wide words", said the Law Commissioner, "but we think it would be difficult to restrict them without the risk of excluding something which ought to be included. Generally, we apprehend it will be found unobjectionable to resignate as illegal anything done or omitted to be done by man for which he is liable to a civil action."[6]

2. "Unlawful" distinguished.—The section defines the term "illegal" but the Code frequently uses the term "unlawful" in connection with an act where it is intended to connote an act not supported by law[7] as distinct from an act which is "illegal" in the sense that it is prohibited by law. As such, the term "unlawful" is wider in its import, since an act may not be illegal in that there is no law prohibiting it and it may not furnish ground for a civil action since, in the absence of a statutory law of torts applicable to this country, the right of civil action depends upon the rule of justice, equity and good conscience, which does not rule out customary usages, e.g. forced labour, and slavery—now prohibited by Secs. 370 and 371, I. P. C. The term "unlawful" is then an elastic term and its sense varies and eludes legal definition. In a Bombay case,[8] it has been observed by Beaumont, C. J., that, generally speaking, there is no difference in meaning between the word "unlawful" and the word "illegal", but it does not follow that if one of those words is specially defined in a statute, and the other is not the two words must necessarily have the meaning given to the one word by the definition. *Prima facie*

Words "illegal" and "unlawful" distinguished.

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1. Public Prosecutor *v.* Annadham Annamalai, A.I.R. 1954 Mad. 321 at p. 323.
2. Mst. Dhoopa *v.* State, 1964 Raj. L. W. 408 at p. 410.
3. E. g., Secs. 23 and 24.
4. First Report, Sec. 658.
5. Bhagwan Din *v.* Emperor, A.I.R. 1929 All. 935 at p. 936; *see* also Rahimat Ali, 62 I. C. (Bom.) 401; Ganpat Subras *v.* Emperor, A.I.R. 1934 Bom. 202: I. L. R. 58 Bom. 491: 36 Bom. L. R. 373.
6. First Report, Sec 91.
7. Mahendranath, I. L. R. 62 Cal. 629 at pp. 634, 636; Fazlur Rahman, I. L. R 9 Pat. 72 (unlawful and illegal held identical, *sed quaere*).
8. Punjaji Bapuju Bagul *v.* Emperor, A. I. R. 1935 Bom. 164 at p. 165: 37 Bom. L.R. 96: I. L. R. 59 Bom. 177.

the word "unlawful" or the word "illegal" used in a Penal Code would not cover anything which gives rise to a civil suit. The word "illegal" has been defined as covering everything which gives rise to a civil suit, but it is difficult to say that in the Penal Code the word "unlawful", which has not been so defined, must be taken throughout as having that very wide meaning. Section 23 of the Contract Act furnishes an apt illustration of an enactment in which the two terms have got blended, though it is easy enough to distinguish contracts which are unlawful from those that are illegal.[1] (For a further commentary, *see* para. No. 2 of Sec. 23.)

According to Sec. 43 of the Indian Penal Code, the word "illegal" is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action. Hence if it is held that directly or indirectly the defendant had defamed the plaintiff, then his action must be held to be illegal.[2]

Section classifies as illegal everything prohibited by law.

The section classifies as "illegal" everything *prohibited* by law. Now law prohibits not only illegal contracts but also those that are void. In other words, contracts may be illegal in the sense of being punishable or forbidden,[3] or they may be void in the sense of being merely unenforceable in law.[4] For instance, contracts of a wagering nature are void without being illegal, in so far as they are not prohibited, though there is a legal prohibition against their enforcement in law.[5] It is, however, apparent from the section that such contracts are not intended to be designated "illegal", for they do not furnish a ground for a civil action. The only contracts, then, that the Code recognises as illegal are those that are described in Sec. 23 of the Indian Contract Act. But we are dealing in the section not with contracts but with things prohibited, which means the doing of which is prohibited, though it may not be punishable by law. The latter is no doubt "illegal", but then it is also an offence. In other words, by illegal acts we should understand acts which are either penal or prohibited or tortious, as, for instance, the putting of irrelevant and indecent questions to a witness under examination, not permitted by Indian Evidence Act,[6] or the publication of a libellous matter concerning one whose identity is thinly veiled.[7] Where the managing committee of a co-operative society passed a resolution recommending to the general body that a certain grant made by the general body to the applicant on certian considerations be rescinded as those considerations had failed, it was held that the passing of such a resolution cannot possibly be said to be an offence or an act prohibited by law or to afford a ground for a civil action.[8]

Example.

3. Acts excluded.—The prohibition here referred to must be by law and not merely under, say, departmental rules or orders. So where a person in Government service was bound to make a true return of lands in his possession, falsely entered "nil" in his return and made a false statement to the

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1. *Cf.* Sec. 23, Contract Act, Illus. (*f*)-(*h*).
2. B. Gangaiah *v.* D. P. Gangadharan, A. I. R. 1961 Mys. 178 at p. 181 : (1961) 2 Cr. L. J. 247.
3. Section 23, Indian Contract Act (IX of 1872).
4. Indian Contract Act, Secs. 24-30.
5. *Per* Lush, J., in Haigh *v.* Sheffield, L.R. 10 Q. B. 102, approved by Smith, L.J., in Strachan *v.* Universal Stock Exchange, (1895) 2 Q. B. 697; but in English law this difference is not always easy to observe; Wool *v.* Hamilton, (1898) 2 Q. B. 337. "Illegal" has in a statute a meaning very near to, but not the same as *void*, as where a thing is only illegal *qua A*, it is inoperative as against him and yet may be binding on *B* (*per* Alderson, B., in Job *v.* Lanch, 11 Ex. 542).
6. Fazlur Rahman, I. L. R. 9 Pat. 725.
7. Rahmat Ali, 62 I. C. (B.) 401.
8. Jhamandas Thawerdas *v.* Khemchand Gellaram, A. I. R. 1933 Sind 196 at p. 198: 34 Cr. L. J. 884 : 145 I. C. 136 : 27 S. L. R. 214.

same effect in a revenue enquiry before the Assistant Collector, it was held that he could not be convicted under Sec. 177 of the Code as he was not bound under any law to make a true return.[1] In two previous cases[2] another Bench of the same Court appears to have considered even a breach of duty "illegal" within the meaning of this section, but there is no authority for it.

Section refers to legislative enactments and not departmental rules or orders.

The "law" here referred to is a legislative enactment of rules having that force, but not merely disciplinary orders, though they may be made under the sanction of law. In this view, the furnishing of false returns,[3] or the preparation of a false diary,[4] though contrary to Government rules, is not contrary to law, and is, therefore, not "illegal" within the comprehension of the section.

4. "Legally bound to do."—A person cannot be said to be "legally bound" to furnish information when failure to do so is an offence punishable not under the Penal Code but under some other enactment.[5]

44. The word "injury" denotes any harm whatever illegally caused to any person in body, mind, reputation or property.

Injury.

SYNOPSIS

1. Analogous law.
2. Meaning of words.
3. Injury.
4. Death of husband.
5. Social boycott.

1. Anologous law.—An injury is simply an act contrary to law.[6] There can be, therefore, no "injury" unless there is an actionable wrong.[7] The question whether there is an "injury" in a given case must, then, be answered with reference to the civil law.

2. Meaning of words.—"*Any harm whatever*": The harm here contemplated may be by word or deed, e. g. defamation causes injury because it "harms" a man in reputation. "*Illegally caused to any person*", not necessarily directly, for it may, then, amount to "hurt", which is also an injury but of a serious kind. An injury may be caused to a person through another as in the case of adultery, or it may be caused to one's property as in the case of mischief or theft. "*Or property*": The property here spoken of is something in existence, i. e. corporeal property. "It cannot with any propriety be applied to the reasonable expectation of pecuniary benefit for the loss of which an action is maintainable by the representative of a deceased person."[8] It should be noted that the "illegality" of harm is the gist of the term. It implies an illegal act or omission.[9] Where the accused had taken away the complainant's cattle and declined to release them until he was paid a certain sum and on the receipt of that sum he released them, it was held that an injury had been caused to the complainant. If the injury was not illegal it is not injury within the meaning of this section. So where

1. Appaya, I. L. R. 14 Mad. 484; contrary in Virasami, I. L. R. 4 Mad. 144, dissented from.
2. Virasami, I. L. R. 4 Mad. 144; Revision case, 6 M. H. C. R. (App.) 48.
3. Revision case, 3 Mad. C. R. (App.) 48.
4. Virasami, I. L. R. 4 Mad. 144.
5. Ali Mahomed Adamali *v.* Emperor, A. I. R. 1945 P. C. 147 at p. 151.
6. *Per* Halloway, J., in Swami Nayudu *v.* Subramania, 2 M. H. C. R. 158 at p. 160.
7. Rickett *v.* Metropolitan Railway, L.R. 2 H. L. 175; Metropolitan Board of Works *v.* McCarothy, L. R. 7 H. L. 243; Cowper Essex *v.* Acton, 14 App. Cas. 153.
8. Yalla Gangulu *v.* Mamidi Dali, 21 Mad. 74 at p. 76 (F. B.); Morgan, I. L. R. 36 Cal. 302; Appalasami, 1 Weir 441.
9. Habibul Razak *v.* King-Emperor, A. I. R. 4 All. 81.

the accused was entitled to prevent the smuggling of liqour his detention of the complainant was held to constitute no injury.[1]

3. Injury.—"Injury" is wider in import than damage. As defined in Sec. 44, I. P. C., "injury" denotes any harm whatever illegally caused to any person in body, mind, reputation or property. If a person wants to save himself from injury, such as conviction in a criminal case, it does not mean that he caused injury to another.[2]

Injury as understood in civil and criminal law.

The word "injury" as here defined has a wide meaning,[3] and does not appear to possess all the attributes of "actionable wrong", for which it appear to be a substitute adopted for the purpose of the Code. In civil law, "injury" implies only such infringement of rights for which a person may obtain legal redress in compensation. Such rights, for instance, as rights of personal security, liberty, reputation, or property, and whatever is comprised therein, e.g. rights of copyright, patent, and trade mark, are all rights, the infraction of which causes "injury" both within the meaning of the Code as well as of civil law. So it has been held "that a false charge laid before the police, and never intended to be prosecuted in Court, may, obviously, subject the accused party to very substantial injury as defined in the section".[4] In this way not only an actual harm but even the risk of a harm may constitute injury. For a false complaint made against person may not cause any actual harm in body, mind, reputation, or property, it may not cause any mental anxiety or grief, but as it is a complaint which exposes the party accused to the risk of a prosecution, it falls within the definition of injury as understood in the Code.

Injury includes every tortious act.

Injury includes every tortious act.[5] Thus an unlawful detention of a cart at a toll-gate caused as a result of illegal demand of toll has been held to amount to an injury.[6] The same may be said of obtaining money against the will of a person on the threat of loss of appointment.[7] Again, it has been held that a threat to employ the process of law with the object of obtaining more money that is actually due is a threat of injury.[8] The threat of a decree that cannot be executed by any competent authority is a threat of harm or injury within the meaning of the Code.[9]

4. Death of husband.—It would seem that the term not only includes risk of harm to persons, but also risk of harm to property. Such would appear to be the case in Sec. 285. But is the term wide enough to cover a case, say, of an injury suffered by a wife by the death of her husband? At any rate, it would cover a case of an injury suffered by the wife by the death of her husband, though in view of the unamended

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1. Mantripragada, 44 I. C. (Mad.) 973.
2. Prayag Das *v.* State, A.I.R. 1963 All. 131 at p. 133: 1963 A. W. R. (H.C.) 184.
3. Jagdish Narain *v.* Emperor, A.I.R. 1942 Oudh 163 at p. 168: 197 I. C. 277: 43 Cr. L. J. 139.
4. Ashraf Ali, I.L.R. 5 Cal. 281, followed in Salik Roy, I.LR. 6 Cal. 582 at p. 583; Ramaswami, I.L.R. 7 Mad. 292; Sheikh Beari, I. L. R. 10 Mad. 232; Priyanath Gupta *v.* Lalji Chowkidar, A.I.R. 1923 Cal. 590: 24 Cr. L. J. 396: 27 C.W.N. 479.
5. Shamumal *v.* R. A. Gordon, A.I.R. 1936 Sind 29 at p. 30: 161 I.C. 295: 37 Cr. L. J. 457; Priyanath Gupta *v.* Lalji Chowkidar, *supra*; B. Appalaswami, (1892) 1 Weir 441.
6. B. Appalaswami, *supra*.
7. Ameer Abbas Ali *v.* Umed Ali, (1872) 18 W. R. Cr. 17; Shamumal *v.* R. A. Gordon, *supra*.
8. B. Appalaswami, *supra*.
9. Baijnath Bhagat *v.* Emperor, A.I.R. 1940 Pat. 486 at p. 492: 41 Cr. L. J. 427: 187 I. C. 267; Priyanath Gupta *v.* Lalji Chowkidar, *supra*.

provisions of Sec. 545 (*b*) of the Criminal Procedure Code which provided for the payment of compensation out of the fine "for injury caused by the offence committed", the Court held that, as the death of the husband did not involve loss of property, the wife did not suffer any "injury" by the death of the husband within the meaning of that clause.[1] But this view has since been rectified by the amendment of Cl. (*b*) and by the addition therein of words "for any loss, or injury".[2] The cases now overruled by the Legislature were animadverted upon in a previous edition of this work.[3]

5. Social boycott.—A threat of a social "boycott" or of a "labour boycott" is not a threat of injury as defined in this section.[4] Excommunication may in some cases give a cause of action for a civil suit, but not for a criminal case. A threat to deprive persons of the services of the barber and the washerman may stand on a somewhat different footing, but it is difficult to see how it can be illegal to ask persons not to shave or wash the clothes of those who refuse to help in securing better conditions of agricultural service. Where, therefore, certain agricultural labourers trying to improve their lot by bargaining with the *mirasdars* to obtain better conditions, persuaded their fellow labourers not to work until they secured better terms and threatened them with social boycott in case they decided to work, it was held that such a threat did not amount to injury. It was also held that it was not illegal to ask the barbers and washermen not to serve those of the agricultural labourers who did not strike work in order to secure better conditions for agricultural labourers.[5]

Example.

45. The word "life" denotes the life of human being, unless the contrary appears from the context.

"Life."

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

"Death."

47. The word "animal" denotes any living creature, other than a human being.

"Animal."

Analogous law.—Sir James Stephen animadverts on the superfluity and incorrectness of this definition. He says it is wholly vague as it might include "an angel, forg-spown, and probably a tree". Superfluous, the definition is not for it is intended to include fish, insects, and other creature, not ordinarily classed as animals. I is here equivalent to the fauna of Biology. A tree cannot by any mistake be called an animal, for, though living it is not a "creature" but a "thing".

48. The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

"Vessel."

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1. Yalla Gangulu *v.* Mamidi Dali, I.L.R. 21 Mad. 74 (F.B.), affirming Luchmaka, I.L.R. 12 Mad. 352, which was followed in Abdul Rahiman, (1895) B.U.C. 763, to the same effect; Roop Lall Singh, 10 W. R. 39; Nana Sahib, (1888) B. U. C. 373; Amar Singh, 5 C. P. L. R. (Cr.) 45; Hyat, (1890) P. R. No. 6, but *contra* in Saif Ali, (1898) P. R. No. 17 (F.B.).
2. Criminal Law Amendment Act (Act XXXVIII of 1923), Sec. 152.
3. *See* 1 Penal Law, (4th Ed.), p. 318.
4. Arumuga Mudaliar *v.* Mathia Mudaliar, 1933 M.W.N. 736 (i); *In re* Selathu, A.I.R. 1949 Mad. 546 at p. 546: 50 Cr. L. J. 797: (1948) 2 M.L.J. 522: 1948 M.W.N. 814 (1): 61 L.W. 785.
5. *In re* Selathu, *supra*.

Analogous law.—"Property" here includes livestock or the lower animals, otherwise vessels made for the conveyance of animals would be excluded.

49. Wherever the word "year" or the word "month" is used it is to be understood that the year or the month is to be reckoned according to the British Calendar.

"Year."
"Month."

Analogous law.—The terms "year" and "month" are defined in the same terms in the General Clauses Act.[1] The British Calendar has been since the 2nd September, 1752, the same as the Gregorian Calendar. And so it is provided by Sec. 25 of the Indian Law of Limitation.[2] The British Calendar is now universally adopted in calculating all periods in British and Indian enactments.

The true measure of "year" is the period of time during which the earth describes one complete revolution in its orbit, and which is the period taken by the sun to leave either equinoctial point of either tropic, and his return to the same. This period is also called the solar or tropical year, and though it is not uniform, its mean length is about 365 days, 5 hours, 48 minutes and 51.6 seconds. To do away with the odd hours, the New Style Calendar has adopted the average length of 365 days and every fourth year of 366 days.[3] It is now settled by statute that the increasing day in the leap-year as well as the preceding day should be counted as one day only.[4] It was enacted that the commencement of the year shall be counted from 1st January instead of the 25th March as theretofore,[5] and it began to be so counted from that year. In computing the period of sentence, a year will thus mean 12 calendar months, and a month according to the number of days comprised therein. In calculating sentences passed on prisoners, the day on which the sentence is passed is counted as a whole day,[6] so that a person sentenced to imprisonment for the space of one calendar month is entitled to be released on the day preceding the date of the previous month on which he was sentenced.[7] In other words, if a prisoner is sentenced, say, on the 25th October, then his sentence would be counted as from the midnight of 25th, the prisoner being entitled to count the whole of the 26th as a day of imprisonment.[8]

True measure of "year".

In this view a sentence for one calendar month does not imply imprisonment for a fixed number of days. It may vary according to the month in which the sentence was passed. Thus, for example, if the imprisonment began on the 30th of a month it will expire at midnight of the 29th of the following month, if the following month is not February, in which case it will expire on its last day whatever be the total number of days served by the prisoner. So if the month which the prisoner was sentenced had 31 days, he is only entitled to be released on the 30th of the following month, though in that case he shall have spent in prison

Measure of month.

1. "Month" Sec. 3 (35); "Year" Sec. 3 (66), Act X of 1897, the older Act had the same definition, Sec. 2(4), Act I of 1868.
2. Act XV of 1877; now *see* Sec. 25 of Act XI of 1908.
3. It is so enacted by 24 Geo. II, c. 25.
4. 21 Hen. III.
5. 24 Geo. II, c. 23.
6. Co. Lit. 255a, Stephen's *Criminal Law*, p. 155; hence the practice of fixing a year, and a day in certain cases of crimes, e.g. death to constitute murder.
7. Migotti *v.* Colvill, 4 C. P. D. 233; Combe *v.* Pitt, 3 Bur. 1434; Field *v.* Jones, 9 East 151; Glassington *v.* Rawlins, 3 East 407; Wright Mills, 4 H. & N. 488; Edwards, 9 Ex. 628.
8. Migotti *v.* Colvill, 4 C. P. D. 233 at p. 236, affirmed O. A., *ibid.* 237.

31 and not merely 30 days. So where the prisoner was on the 31st of October sentenced to imprisonment for one calendar month, and for a second offence for a fortnight, commencing after expiration of the calendar month, it was held that the calendar month did not expire until the 30th of November so that he was not entitled to be discharged from the second term of imprisonment until the full period of 15 days computed from the first December had expired, i. e. until midnight of the 14th December.[1]

"Section."

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

Analogous law.—As no numericals have been prefixed to sub-sections and clauses, they do not constitute sections by themselves, and cannot be referred to or detached from the full sections of which they form a part.

"Oath."

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorised by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

SYNOPSIS

1. Analogous law.
2. Meaning of "oath".
3. Solemn affirmation.
4. Declarations.

1. Analogous law.—An "oath" is a general term and includes an affirmation where it is so allowed, and an affidavit whether used in a court of law or otherwise. An affidavit, filed before a Revenue Officer assessing income-tax, is thus an "oath" within the meaning of the section. A mere declaration, as is used in the verification of plaints and petitions is however not an oath, because it is not made before a public servant, nor is it admissible for the purpose of proof.

An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he dose not speak the truth.[2]

English interpretation

In Aots of Parliament passed since the end of 1850, "the words 'oath', 'swear' and 'affidavit' shall incude 'affirmation,' 'declaration,' affirming and declaring the case of persons by law allowed to declare or affirm instead of swearing."[3] The same words occur in the English Interpretation Act, 1889,[4] and in the General Clauses Act.[5]

Indian Oaths Act.

As to the persons allowed to affirm instead of swearing, reference must be made to the provisions of the Indian Oaths Act,[6] which substitutes affirmation for an oath in the case of Hindu and Mohammedan witnesses, interpreters and jurors; in other cases affirmation is admissible only if an oath is objected to.[7]

For *ex majori cautela* the same Act enacts that in Secs. 178 and 181 of the Code the words "or affirmation" shall be deemed to have been inserted,[8] but in view of the extensive meaning of the word here given, that addition would have been assumed as a matter of construction.

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1. Migotti *v.* Colvill, 4 C. P. D. 233 at p. 237.
2. White, 1 Lcach 430 at p. 431.
3. 13 & 14 Vict., c. 21, Sec. 4.
4. Section 3.
5. Sec. 3 (17), Act I of 1868; Sec. 3 (36), Act X of 1897.
6. Act X of 1873.
7. *Ibid.*, Sec. 6.
8. *Ibid.*, Sec. 15.

2. Meaning of "oath".—The primary object of an oath is, of course, an invocation addressed to God as an avenger of perjury or as a witness of truth. The form of oath, therefore, naturally differs, and has to be accommodated to the religious persuasion of the swearer; it being vain to compel a man to swear by a God in whom he does not believe, and whom he, therefore, does not reverence.[1] The rule of law, therefore, is to let a man swear according to the peculiar ceremony of his religion, or in a manner as he may consider binding on his conscience.[2] So while a Christian usually swears on the Bible,[3] and a Roman Catholic with a Crucifix or a cross placed upon it,[4] a Jew is allowed to swear upon the Pentatuech,[5] and a Mohammedan upon *Quran*,[6] while a Hindu may swear on the *Gita*, or touching the feet of a Brahman.[7] The oath of a Chinaman is much more elaborate. He must be provided with a china saucer which he strikes and breaks and whereupon he solemnly swears as follows: "I shall tell the truth, and the whole truth, the saucer is cracked, and if I do not tell the truth, my soul will be cracked like the saucer."[8] And there is the record of a trial for high treason in which a recalcitrant witness who was arraigned for treason having objection to be sworn was said to have complied with the law on his touching his buttons and declaring that he was sworn and was under an oath.[9] In this country where innumerable sects and creeds prevail a witness is usually given the choice of swearing by his favourite deity but this is by no means necessary, nor is it the law for a Hindu and Mohammedan have the statutory right to be affirmed, and all that he should be required to do is to affirm in some such language: "The evidence that I shall give shall be the truth, the whole truth and nothing but the truth," "so help me God" being added by a witness desiring to swear.

Oath according to faith of different sects.

The provision as to the form and administration of oath is not stringent, and an omission to administer an oath or affirmation cannot be availed of by the witness as a defence in a prosecution for perjury.[10]

3. Solemn affirmation.—A solemn affirmation is equivalent to an oath only in the case in which it is "substituted by law for an oath". It is not *per se* equivalent to an oath, but attains its solemnity by virtue of the statute. The Indian Oaths Act[11] is, of course, the law in this country which has made that substitution.[12] The form in which an oath or an affirmation shall be made is left to be provided by the High Courts.[13]

4. Declarations.—Similarly, a declaration, merely as such, is not tantamount to an oath. But it has that effect for the purpose of the Code, if it is made (*a*) because it was required by law, or if, at any rate, it was made (*b*) because it was *authorised* by law and (*c*) as such, it was made to a public servant;[14] or (*d*) was legally admissible in evidence. In the case of a prosecution for making a false declaration, it is on prosecution to show that the declaration was so made, failing which the prosecution would fail.

Such a declaration need not be in any set form. It is a simple affirmation of a fact, statement of belief as regards matter upon which declaration is required. Such declarations are required in a variety of cases such as those which relate to

Declaration need not be in any set form.

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1. Puffendorf, Bk. IV, c. 2, Sec. 4.
2. Miller *v.* Solomons, 7 Ex. 534 at p. 558.
3. Gilham, 1 Esp. 285.
4. Love, 5 How. S. T. 113.
5. Omichand *v.* Barker, 1 Atk. 21.
6. Morgan, 1 Leach 54.
7. Omichand *v.* Barker, *supra*.
8. Enterchman, C. & M. 248.
9. Christopher Love, 5 Sec. Trials 113.
10. Section 13, Indian Oaths Act (X of 1873).
11. Act X of 1873.
12. *Ibid.*, Sec. 6.
13. *Ibid.*, Sec. 7.
14. Section. 21, I. P. C.

the revenues of customs, or income-tax[1] or excise, the post office, railways and other departments of administration. Where a declaration is made in regard to matters only some of which are required or authorised by law to be so declared, only so much of the declaration shall fall within the definition of an "oath", the remainder being ignored. The law, here spoken of, means a legislative enactment, or, at least, rules and regulations framed under the authority of such an enactment. It does not mean a mere departmental or disciplinary order, though it may be perfectly legal, being within the competency of the executive authority. So a person could not be prosecuted under Sec. 177 of the Code for making a false return of lands in his enjoyment, because the return was only required by a departmental order, and not by law.[2] So a policeman who had secured his enlistment by giving false information to the recruiting District Superintendent of Police could not be convicted under Sec. 177,[3] but in so far as it was held that he could not also be convicted under Sec. 182, the decision appears to be unsound.[4] A purchaser of a stamp paper giving a false name cannot be said to have made a false declaration, because there is no law under which he is bound to give any information.[5] So a false representation in a memorandum of appeal is not an offence as it is not required by law to be verified.[6] So a person, being now under no legal obligation to state the truth to a police officer, cannot be convicted under either Sec. 177 or Sec. 182, for giving him false information without intending to injure anybody.[7] Similarly, a false declaration prepared and not filed before a public servant would constitute an "oath" within the meaning of the section, though there is no section in the Code to punish it. Such a declaration must be authorised to be made either before a public servant, within the meaning assigned to that term in Sec. 21, I. P. C., or it may be authorised by law to be used for the purpose of proof.

Examples.

52. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

"Good faith."

SYNOPSIS

1. Analogous law.
2. Principle.
3. Distinction between definition of "good faith" in General Clauses Act and Penal Code.
4. "Due" care.
5. Belief must be reasonable.

1. Analogous law.—This definition of "good faith" is merely a negative one. It does not define "good faith" but rests content with stating what it is not. The positive aspect of the term is presented by the General Clauses Act,[8] in which it is thus defined:

> "3. (22) A thing shall be deemed to be done in 'good faith', where it is in fact done honestly, whether it is done negligently or not."

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1. Section 277, Income-tax Act (43 of 1961).
2. Appayya, I. L. R. 14 Mad. 484 (contrary in Virasami, I. L. R. 4 Mad. 144 dissented from).
3. Dwarka Prasad, 6 All. 97.
4. *See* Muhammad Khalil, I.L. R. 10 All. 49; Ganesh Khanderao, I. L. R. 13 Bom. 506 ; Budha, (1880) P. R. No. 14, in which it was held that he would be guilty under Sec. 182, I. P. C. In Jaggat Singh, Oudh Cas. 11, it was said that he would be guilty even under Sec. 117.
5. Parmaya, (1885) B. U. C. 210, *contra* in Raghoji, 3 B. H. C. R. 42, under the Stamp Act of 1862.
6. Ghanaya, (1879) P. R. No. 17 ; Sunt Lal, (1881) P. R. No. 41.
7. Suraji Mohan, (1873) B. U. C. 76 ; but if he intends to injure any body, Sec. 182, Ill. (*c*), I. P. C., meets the case.
8. Act X of 1897. No definition of the term existed in the earlier Acts.

This definition in the General Clauses Act is the *verbatim* reproduction of the definition of the term as given in the English Bills of Exchange Act, 1882,[1] and the Sale of Goods Act, 1893.[2]

As regards good faith, bearing in mind the negative definition of "good faith" as given in Sec. 52 of the Indian Penal Code, it must be safely stated that good faith has no reference to the moral elements of honesty and right motive which are involved in the popular significance of "good faith" and which are predominant in the positive definition enacted in the other Acts of the Legislature. To establish "good faith" under the Indian Penal Code it is necessary to prove that the person pleading good faith acted with due care and attention and an honest blunderer cannot be protected under Sec. 52 without establishing the exercise of due care and attention. Of course, good faith requires no logical infallibility but due care and attention. How far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and the intelligence of the person whose conduct is in question.[3]

What has to be proved to establish "good faith" under the Code.

The element of honesty which is introduced by the definition prescribed by the General Clauses Act is not introduced by the definition of the Code.[4]

2. Principle.—"Good faith" plays an important part in the law of crimes, and its presence is ordinarily a sufficient answer to a charge of criminality in many cases. The definition here given is, therefore, the keynote of all sections in which "good faith" enters. Its precise significance must, therefore, be properly appreciated.

This is a negative definition, but it indicates that an act is said to be done in good faith when it is done with due care and attention. Indeed, it does not require logical infallibility. The plea of good faith may be negatived on the ground of recklessness indicative of want of due care and attention if the imputations in question, have been made as categorical statements of facts. Apart from that, there is no doubt that the accused must substantiate his plea of good faith to be entitled to the protection of the exception. Of course, the degree of proof that is to be offered by the accused for the purpose is not the same as is expected of the prosecution which is required to prove its case, beyond reasonable doubt, but is as in civil proceedings.[5]

Section defines good faith by exclusion.

It will be observed that the section defines good faith by exclusion. It says that an act done without due care and attention shall not be deemed to have been done in good faith. The section makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of "good faith" and which are prominent in the positive definition enacted in other Acts of the Legislature. It, therefore, follows that while an honest blunderer acts in "good faith" within the meaning of the General Clauses Act, an "honest blunderer" can never act in good faith

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1. 45 & 46 Vict., c. 61, Sec. 90.
2. 56 & 57 Vict., c. 71, Sec. 62, sub-section (2).
3. Dhanna *v.* State of Rajasthan, 1964 Raj. L. W. 126 at p. 139.
4. Harbhajan Singh *v.* State of Punjab, A. I. R. 1966 S. C. 97 at p. 103.
5. Gulabchand Bhurdarbhai Soni *v.* State of Gujarat, A. I. R. 1970 Guj. 171 at p. 173 : 11 Guj. L. R. 776.

within the meaning of the Code, for, being "negligent", he has not acted with due care and attention. Absence of good faith within the meaning of this section means simply carelessness or negligence, want of due care and caution and does not imply any idea of dishonesty.[1] In the Burma case of

Examples.

Bux Soo Meah Chowdry v. *The King*.[2] The question was whether the accused permitted his coolies to work in an area which was outside the licensed area, and, secondly, whether in so permitting them and abetting them in the work they were doing, he was acting without due care and attention, having regard to the limits of the licensed area. It was held by their Lordships that—

> "....but it is fair to say, in dismissing this application, that it must be dismissed not because of any fraudulent action on his part (which is no part of the charge against him) but because of his want of due care and attention in neglecting to see that the area which his coolies worked over was that over which Gul Mohammad was licensed to do work....The applicant is guilty not of dishonesty but of not taking due and proper care."

In the Oudh case of *Prag* v. *Emperor*,[3] "warrants were issued by an Assistant Collector, authorising a *kurk amin*, to execute them. The warrants authorised this *kurk amin* to realise from certain persons arrears of land revenue by attachment of their property....This *kurk amin* endorsed on the warrants his inability to execute them on account of offer of resistance by the defaulters. The warrants were received back in the tahsil and thereupon instead of returning them to the Assistant Collector for further orders the Naib-Tahsildar on his own initiative asked for police help and ordered another *kurk amin* to execute the warrants. The Sessions Judge remarked that it was wholly unjustified and illegal on the part of the Naib-Tahsildar to give such orders, without any authority or power, to another *kurk amin* not mentioned in the warrants which already bore a report from the *kurk amin* who had been authorised to execute them. The warrant should have been sent to the Assistant Collector for his orders....There were, however, legal defects in the procedure in the case, firstly, because the warrants had been returned with a report by the *kurk amin* who had been authorised to execute them and were therefore no longer in force, and secondly, because the *kurk amin* who was ordered by the Naib-Tahsildar to execute them had no authority to do so, his name not being entered in the warrants....The Naib-Tahsildar may have acted with the best of intentions and may have believed himself entitled to act as he did, but if he had examined the warrants he would have seen at once that only the *kurk amin* named in it, namely, was authorised to execute them and if he had considered the matter for a moment he must have realised that it was not within his power to authorise any other *kurk amin* to execute them. He acted without due care and attention, and if he did not act with due care and attention, he cannot be said to have acted in good faith and the accused acted in self-defence." Similarly, it has been held by the same Court in another case[4] that where an *amin* who executes a warrant is aware of the fact that the date fixed for execution of the warrant is over he cannot be said to be acting in good faith and the person whose property is sought to be attached in execution of the warrant has a right of private defence of his property. But

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1. Bux Soo Meah Chowdry *v.* King, A. I. R. 1938 Rang. 350 at p. 352: 39 Cr. L. J. 985; Prag, 17 Luck. 591: 199 I. C. 135: 43 Cr. L. J. 518: 1942 O. W. N. 74.
2. A. I. R. 1938 Rang. 350 at pp. 351, 352.
3. A. I R. 1942 Oudh 256 at p. 257: 199 I. C. 135: 1942 O. W. N. 74.
4. Raghubir *v.* Emperor, A. I. R. 1942 Oudh 57 at p. 58: I. L. R. 17 Luck. 314: 196 I. C. 734: 43 Cr. L. J. 60; 1941 O. W. N. 1175.

from the mere fact that a Sub-Inspector goes to a village dressed up in his uniform to arrest the accused, he cannot be said to be acting in good faith, when as a matter of fact, he is acting in entire bad faith and in the most illegal and reprehensible manner.[1] It will thus be seen that the two definitions approach the question from two different stand-points, and there is nothing common between them. For while the general definition condones negligence and carelessness, if only there was honesty, the Code regards honesty as immaterial, and the presence of "care and intention" as all in all. In this respect the definition would appear closely to correspond with the English notion of "reasonable and probable cause" or "reasonable and justifiable cause" as used in criminal jurisprudence.

A Magistrate tendering a pardon without complying with the provisions of the Code acts either in gross ignorance or in conscious disregard thereof. It is therefore, clear that the Magistrate did not bestow due attention within the meaning of Sec. 52, I. P. C., in tendering pardon and, therefore, cannot be said to have acted in good faith within the meaning of Sec. 529 of the Code of Criminal Procedure, 1898 (V of 1898).[2]

In an Allahabad case,[3] "In August 1944 Sri A. Sen was working as the District Supply Officer in Agra. Being the District Supply Officer and a Magistrate, first class, he directed the arrest of a person whom he wished to prosecute. No order sheet for this date was prepared nor was any date in future fixed for hearing. He subsequently directed another enquiry and then the matter was sent up to the District Magistrate for sanction to prosecute the appellant. It was thereafter that the complaint was filed in the Court of another Magistrate who then took cognizance of the case. Sri Sen never intended to try the case himself as a first class Magistrate, nor do we think he had taken cognizance of the offence as a trial Magistrate. . . . The only question then that requires serious consideration is whether this was done in good faith. That it was honestly done there can be no doubt, because there was no previous enmity between the appellant and Sri Sen. In fact, Sri Sen did not even know him from before. A report was placed before him that the appellant had been guilty of the contravention of the Control Order and, as the contravention was punishable with three years' rigorous imprisonment or fine or both. Sri Sen thought he could arrest the appellant. The facts already mentioned would also show that he acted with care and circumspection,"

Question of good faith is always a question of fact.

The law does not exact the same degree of care and attention from all persons. It varies with the positions they occupy.[4] In this sense, the question of "good faith" is always a question of fact to be determined in accordance with the proved facts and circumstances of each case. The standard of "due care and attention" is not the standard of the hypothetically "reasonable man". But it is the standard of the man whose "good faith" is on trial. The Court has to see whether he, circumstanced as he was, had exercised the care and attention which might be expected of him. It is, therefore, irrelevant to say that, in such a case, any other man would have acted differently. It may be so, but the question is not what another man would have done but what the accused did at the time, and what more he could have done, but

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1. Gaya Din, A. I. R. 1934 Oudh 124 at p. 129: 9 Luck. 517: 35 Cr. L. J. 804: 148 I. C. 870: 11 O. W. N. 337.
2. *In re* Mukesh Ramchandra Reddy, A. I. R. 1958 A. P. 165 at p. 169: I.L. R. (1957) A.P. 742: 1957 Andh. L. T. 709: (1958) 1 Andh. W. R. 9: 1958 M. L. J. (Cr.) 31: 1958 Cr. L. J. 343.
3. L. Ram Narain Singh *v.* A. Sen, A. I. R. 1958 All. 758 at pp. 759, 763.
4. Bhawoo Jivaji, I. L. R. 12 Bom. 377: Po Pye, I. L. R. (1940) Rang. 109.

which he had failed to do. As Batty, J., remarked in a case, "good faith requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions of statements are to be imputed to want of due care and caution, must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusion of a calm and philosophical mind may differ very largely from the honest conclusion of a person excited by sectarian zeal aud untrained to habits of precise reasoning."[1]

The words "good faith" used in the 9th Exception to Sec. 499 has been the subject of judicial interpretation in numerous cases. The term has been defined in Sec. 52, I. P. C., in the negative form and all actions and statements have been eliminated from the definition which are not done or believed without due care and attention.[2] The earliest case in which the "good faith" of a person charged with defamation came in for consideration was in *In the matter of Shibo Prosad Pandah.*[3] It was observed in that case that in dealing with the question of "good faith" the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed and had good reason after due care and attention to believe that such allegations were true.

The case, *Promotha Nath Mukhopadhya* v. *King-Emperor*,[4] reiterated the above principle. Suhrawardy, J., observed in that case that—

> "The Court in determining whether the accused should or should not have placed implicit reliance on the credibility of his source of information, should not, in my opinion, place before itself the standard which it would demand to convince it, of the trustworthiness of the persons supplying the information."

In the case of *Dr. N.B. Khare* v. *M. R. Massani*,[5] it was held that the press has no special privilege and that it is in the same position as any other man. If assertion of facts is made and the same is defamatory, it must either be justified or it must be shown that it was made in good faith for public good.

The latest decision is *Harbhajan Singh* v. *State of Punjab*,[6] where it has been held that the onus on accused under the 9th Exception to Sec. 499 is discharged by proof of a preponderance of probability and the standard of proof is comparable to the standard in civil proceedings. "Good faith", it was observed, does not, however, require logical infallibility, and in this connection the case *In the matter of Shibo Prosad Pandah*[7] was referred to with approval.

In *Harbhajan Singh* v. *State of Punjab*,[8] the Supreme Court in paragraph 21 of its judgment has dealt with the relevant considerations to support the plea of good faith to invoke the benefit of Exception 9 in Sec. 499. It is clear from the said judgment that the plea of good faith would be a question to be considered on the facts and circumstances of each case.[9]

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1. Abdool Wadood, 9 Bom. L. R. 230 at p. 298: I. L. R. 31 Bom. 293; Mohd. Gul *v.* Haji Fazley, I. L. R. 56 Cal. 1013; Upendra Nath Bagchi, I. L. R. 36 Cal. 375; Yad Ali, I. L. R. 57 Cal. 843; Bhola Nath, I. L. R. 51 All. 313.
2. Bibhuti Bhushan Das Gupta *v.* Sudhir Kumar Mazumdar, A. I. R. 1966 Cal. 473 at p. 476.
3. I. L. R. 4 Cal. 124.
4. 27 C. W. N. 389: A. I. R. 1923 Gal: 470.
5. A. I. R. 1942 Nag. 117.
6. (1965) 2 S. C. A. 213: A. I. R. 1966 S. C. 97.
7. I. L. R. 4 Cal. 124.
8. Cr. App. 53 of 1961: A. I. R. 1966 S. C. 97.
9. Thangavelu Chettiar *v.* Ponnammal, A. I. R. 1966 Mad. 363 at p. 364.

"Good faith" in criminal law is different from "good faith" as understood in civil law. If an act is not done with due care and attention, it cannot be said to be done in good faith as far as criminal law is concerned.[1]

Good faith in criminal law is different from civil law.

3. Distinction between definition of "good faith" in General Clauses Act and Penal Code.—The term "good faith" is defined both in Sec. 3 (22) of the General Clauses Act (No. X of 1897), and also in Sec. 52 of the Penal Code.

The definition of "good faith" in the Penal Code is a negative one. The term "good faith" is not attempted to be befined there but all that is stated is that if an act is not done with due care and attention it would not be said to be done in "good faith". This definition comes into conflict with the definition in the General Clauses Act to this extent only that if a thing has been done negligently, though honestly, it would not be deemed to have been done in "good faith". The definition of term in the General Clauses Act lays stress on one aspect only, but, that in the Penal Code places emphasis on two aspects, namely the honesty of intention along with due care and attention.

Thus Sec. 52 excludes the element of negligence from the purview of "good faith". Both the definitions retain the real essence of "good faith" which is that a thing is done "honestly". This is a feature common to both definitions without which the term "good faith" will lose its real meaning. "Good faith" therefore implies, not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person. "Good faith" contemplates an honest effort to ascertain the facts upon which exercise of the power must rest. It must, therefore, be summed as "an honest determination from ascertained facts". "Good faith" precludes pretence or deceit and also negligence and recklessness. A lack of diligence, which an honest man of ordinary prudence is accustomed to exescise, is, in law, a want of good faith. Once this is shown, good faith does not require a sound judgment.[2]

Both sections retain the real essence of good faith.

In order to act in good faith, a person must act honestly. A person cannot be said to act honestly unless he acts with fairness and uprightness. A person who acts in a particular manner in the discharge of his duties in spite of the knowledge and consciousness that injury to some one or group of persons is likely to result from his act or omission or acts with wanton or wilful negligence in spite of such knowledge or conciousness cannot be said to act with fairness or uprightness and, therefore, he cannot be said to act with honesty or in good faith. Whether in a particular case a person acted with honesty or not will depend on the facts of each case. If, for example, with a view to construct a road as municipality wishes to blast a rock with dynamite near a town and acts against expert opinion that the town is within the range of harm, and the rock should be removed by quarrying it cannot be said to act honestly if it proceeds to blast the rock. It can also not be said to act honestly if it proceeds to blast the rock without taking expert advice. If it refuses to

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1. Pagla Baba *v.* State, A. I. R. 1957 Orissa 130 at p. 147: 23 Cut. L. T. 88: 1957 Cr. L. J. 769.
2. Harbhajan Singh *v.* State of Punjab, A. I. R. 1961 Punj. 215 at pp. 222-23 : 63 Punj. L. R. 294; *see* also Kailas Sizing Works *v.* Municipality of Bhivandi, A. I. R. 1969 Bom. 127 : 70 Bom. L. R. 554.

see light and hides its face from the light it would be acting with wanton and wilful negligence and its negligence coupled with want of honesty and good faith would be actionable.[1]

The definition of the term in the General Clauses Act lays stress on the one aspect of honesty only irrespective of negligence, but that in the Indian Penal Code lays stress on two aspects, viz. honesty of intention along with due care and attention. Both the definitions retain the real essence of good faith, which is honesty. This is a feature common to both the definitions. "Good faith" implies upright mental attitude and clear conscience. It contemplates an honest effort to ascertain the facts upon which the exercise of the power must rest. It is an honest determination from ascertained facts. "Good faith" precludes pretence, deceit or lack of fairness and uprightness and also precludes wanton or wilful negligence.[2]

4. "Due" care.—The relevant meaning of "good faith" is as defined in Sec. 3 (22) of the General Clauses Act. "Due care and attention" stipulated by Sec. 52 of the Indian Penal Code is not pre-requisite.[3]

The "due" care required must depend upon the nature of the act, its magnitude and importance, and the facility a person has for the exercise of care and attention. It does not constitute "good faith" necessarily because the person making the imputation believed it to be true. Due care and attention imply a genuine effort to reach the truth, and not the ready acceptance of an ill-natured belief.[4] A butcher unskilled in surgery, employed to set a bone on board a vessel on the high seas, would be judged by a standard very different from that applicable to a qualified surgeon discharging the same duty. So a surgeon working in his surgery would be judged by a different standard from that applicable to a surgeon in the field. But where a quack unskilled in surgery performs an operation which even a trained surgeon seldom dares, he cannot be accredited with good faith, if his patient trusting him succumbs to his operation. Such was the case of one Kabiraj who, having no knowledge of surgery beyond that he had acquired in his practice, operated a man for internal piles by cutting them out with an ordinary knife, in consequence of which he died from haemorrhage. It was held as the operation was one so imminently dangerous that even educated surgeons scarcely ever attempted it, the accused was guilty of an offence punishable under Sec. 304-A of the Code.[5]

Examples.

In another case, the accused saw a stooping child in the early gloaming and believing it to be a demon, dealt it blows, of which it died. It was proved that the place had the reputation of being haunted but the Court held that, though he was under a mistake of fact he had acted without care and caution and that, therefore, he was guilty under Sec. 304-A of the Code.[6] So again, in another case, *A* caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and *B*. *B*'s men having proceeded to reap the crops on behalf of *B*, the servants of *A*

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1. Kailas Sizing Works *v.* Municipality of Bhivandi, A. I. R. 1969 Bom. 127 at p. 130 : 70 Bom. L. R. 554.
2. *Ibid* at p. 131.
3. Public Prosecutor *v.* Vattem Venkatramayya, A. I. R. 1963 A. P. 106 at p. 109 : (1962) 2 Andh. L. T. 96 : 1962 M. L. J. (Cr.) 435 : (1962) 2 Lab. L. J. 21 : 1961 Andh. W. R. 109.
4. Anandrao Balkrishna, 17 Bom. L. R. 82 : 27 I. C. 657 ; Channing Arnold, I.L.R. 41 Cal. 1023 at p. 1058 (P.C.); Gaya Din *v.* Emperor, A. I. R. 1934 Oudh 124 at p. 126.
5. Sukaroo *v.* Kabiraj, I. L. R. 14 Cal. 566.
6. Hayat, 1888 P. R. No. 11 ; Levett, Cro. Car. 536.

went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse, which they did not do ; he them told one of the constables to fire, and he fired into the air. Upon this some of the reapers flew away while others remained there and assumed a defiant attitude. The station-house officer without attempting to make any arrests and without also warning the reapers that if they did nor desist from reapings, they would be fired at, gave orders to shoot, and one of the constables, fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them. It was, therefore, held that the station-house officer and the constables were not acting in good faith and that the order to shoot was illegal and did not justify the act of the constable, and that both he and the station-house officer were guilty of murder.[1]

Proof—Requirements.

The circumstances that operate on the exercise of care and attention are thus so varied and variable that it is not possible to fix a general standard by which the presence or absence of "good faith" may, in any case, be tested. But at the same time, in such cases, it is always permissible to argue *ex post facto* ; that is to say, it may be shown that there was a want of "good faith" because there was the absence of the requisite care and caution. On the other hand, a person relying upon "good faith" may show that he had taken the necessary care and caution, and that, therefore, his act was done in good faith. As the Law Commissioners observed: "He will be required to prove that his conduct was such as to lead fairly to the inference that he acted in good faith as alleged. It is true that he cannot prove directly what was in his mind, but he may be able to prove facts by which this may be sufficiently manifested."[2] "To satisfy the Court of his good faith, he must show at least that he acted advisedly and that he had reasonable ground *prima facie* for believing that he ought to do what he did."[3]

The public servants who are empowered to take search are presumed to know the law and if the act is done in contravention of the mandatory provisions of law it must be held to have been done without due care and attention and cannot be said to be done in good faith.[4]

5. **Belief must be reasonable**.—So, in order to establish *belief* in good faith, a person's simple belief in good faith that circumstances are such and such, ought not to be sufficient: there ought to be sufficiently strong and just grounds for his belief. An instance has been known of a person shooting his own servant who had come to his room at night mistaking him for a robber. Such a person ought not to be held blameless for he ought to have ascertained that he was a robber before he killed him. The party, in such cases would have to satisfy the Court that he believed in good faith that the man was a robber, which must be taken, we conceive to exclude a mere reckless conjecture or suspicion. Belief must have a

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1. Subh Naik, I. L.R. 21 Mad. 249.
2. First Report, Sec. 113.
3. First Report, Sec. 114 ; Channing Arnold, I. L.R. 41 Cal. 1023 at p. 1058 (P. C.).
4. Mithuhan *v.* State of Rajasthan, I. L. R. 1969 Raj. 121 at p. 123 : I. L. R. (1969) 19 Raj. 559.

Belief must have a foundation and that must be shown.

foundation, and that must be shown.[1] A person in ragged attire was seen carrying under his arm three pieces of cloth and a police constable thereupon suspecting him to be in possession of stolen goods questioned him and was told that the cloth was made in England. But noticing that each piece bore Gujarati marks, and not knowing that such marks are placed on English-made goods, he concluded that the statement was false, and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely, but as the complainant objected to it, there was a scuffle. The constable then arrested the complainant but he was subsequently released. The latter prosecuted him for wrongful restraint, but the Court held that the putting of questions to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions was an indication of good faith, and the constable was, therefore, protected under Sec. 79.[2] When a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge. Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified, but the law could not adopt so vague and unsafe a criterion.[3] A writer cannot claim to act in good faith when he ignores the sources of the truth which were open to him.[4]

On the other hand, where a person acts with thoughtless precipitancy, without making sufficient inquiries and jumping to a conclusion upon materials wholly unjustifiable, it cannot be said that he had exercised good faith. Such was the case of a Police Sub-Inspector who saw a horse tied up without any concealment, and because it resembled the animal his father had lost some time previously, he jumped at once to the conclusion that the horse was either stolen or acquired as stolen property. The Sub-Inspector never sent for the supposed owner of the horse, nor took the trouble of getting any credible information as to whether it was his father's horse or not. Had he done so he would have found that his father's horse had already been found in another place. The Sub-Inspector could not, therefore, plead good faith in exoneration of his conduct.[5] The same view was taken in another case in which the Sub-Inspector had made a search without complying with the prerequisities of Sec. 165 of the Criminal Procedure Code.[6]

Exemption from criminal responsibility.

As a person, acting in good faith, is excepted from criminality under the chapter relating to General Exceptions, and as the words "good faith" are there used in varied collocation, its presence, in each case must depend upon the circumstances which alone entitle a person to exemption from criminal responsibility. The sense of the term in that connexion will have, therefore, to be considered elsewhere.[7]

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1. First Report, Sec. 161.
2. Bhawoo *v.* Mulji, I. L. R. 12 Bom. 377.
3. Gayadin, A. I. R. 1934 Oudh 124 at p. 126 : 19 Luck. 517 : 35 Cr. L. J. 804 : 148 I. C. 870 : 11 O. W. N. 337.
4. Emperor *v.* P. C. Tarapore, Chief Editor, Printer and Publisher, Daily Gazette, Karachi, A. I. R. 1940 Sind 239 at p. 246 (F. B.): I.L.R. (1941) Kar. 3 : 42 Cr. L. J. 1 : 91 I. C. 519.
5. Sheo Surun *v.* Mohd. Fazil, 10 W. R. 20.
6. Gopi Mahto, I. L. R. 10 Pat. 821 ; Chatterjee, A. I. R. 1933 All. 434.
7. *See* Chapter IV, *post* and the several sections in which the word occurs.

The leading authority as to the meaning of the expression "while acting or purporting to act in discharge of his official duty" is to be found in *H. H. B. Gill* v. *The King*.[1] The observations of their Lordships are :

Acting or purporting to act in discharge of one's official duty—Interpretation.

> "Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that what he does, he does in virtue of his office."

This decision has been followed by the Supreme Court in a series of decisions, *Aorrik Singh* v. *State of Pepsu*,[2] *Motaj ng* v. *H. C. Bhari*,[3] *Satwant Singh* v. *State of Punjab*.[4] The question, however, is substantially one of fact to be determined with reference to the act complained of and the attendant circumstances. Each case must be decided on its own fact. In *Prasanna Kumar* v. *State*,[5] Panigrahi, C. J., fully analysed the principle on examination of the Privy Council and Supreme Court decisions.

Privy Council's view approved by Supreme Court decisions.

It was held in the undernoted case that judged by the aforesaid test, the action of the *sarpanch* in entertaining the defamatory applications and directing enquiries thereof by procurement of evidence could not be said to have been done by him while purporting to act in the discharge of his official duty. Sanction under Sec. 197, Cr. P. C., was not necessary even assuming that he was a public servant removable with the sanction of the State Government. The Magistrate misconceived the legal position, took an easy course of not going to the relevant law and acted contrary to law in holding that sanction was necessary.[6]

52-A. Except in Sec. 157 and in Sec. 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, ammunition or means of conveyance, or the assisting a person by any means whether of the same kind as those enumerated in this section or not, to evade apprehension.

"Harbour."

SYNOPSIS

1. Amendment.
2. Reasons for the change.

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1. A. I. R. 1948 P. C. 128.
2. A. I. R. 1955 S. C. 309.
3. A. I. R. 1956 S. C. 44.
4. A. I. R. 1960 S. C. 262.
5. A. I. R. 1966 Orissa 86.
6. Bisweswar Misra *v.* Swetakumar Panigrahi, 31 Cut. L. T. 314 at pp. 318-19.

1. Amendment.—Before the passing of the Indian Penal Code (Amendment) Act VIII of 1942, the term "harbour" was defined by Sec. 216-B of the Code which had been added to the Code by the Criminal Law (Amendment) Act, 1894. That definition was intended only for purposes of Secs. 212, 216, and 216-A. It ran as follows :

> "In Secs. 212, 216 and 216-A, the word 'harbour' includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to evade apprehension."

The Indian Penal Code (Amendment) Act, VIII of 1942, repealed Sec. 216-B and enacted the present section.

2. Reasons for the change.—The reason for the enactment of the present section and repeal of Sec. 216-B of the Code is given in the Statement of Objects and Reasons of the Amending Act, 1942, in the following words: "Section 216-B of the Indian Penal Code widens the meaning of the word 'harbour' as used in Secs. 212, 216 and 216-A. The word is also used in Secs. 130, 136 and 157, and as used in those sections bears its narrower dictionary meaning. There is no rational justification for differentiating between the meaning of the word as used in different sections of the Code and the fact that the word is used in sections other than Secs. 212, 216 and 216-A appears to have been overlooked when Sec. 216-B was inserted by Act III of 1894. The fact that the wider meaning does not attach to the word as used in Sec. 130 which provides for the punishment of persons who harbour an escaped prisoner of war might well produce untoward results in existing circumstances, and it is proposed to render the definition in Sec. 216-B applicable to the Code generally by transferring that section to Chapter II of the Code. It is also proposed to insert words in the definition with a view to resolve a conflict of judicial opinion on the question whether the concluding words of the definition as contained in Sec. 216-B embrace all forms of assistance or only forms of assistance *ejusdem generis* with those previously mentioned in the section. The Allahabad High Court[1] has held that the meaning is so limited while the Calcutta[2] and Lahore High Courts[3] have taken the contrary view. It is proposed to clarify the point in the sense of views taken by the Calcutta and Lahore High Courts."

Conflict of judicial opinion.

The following note which appeared in the last edition of this book may be read with the above:

"3. *Meaning of 'in any way' (in the repealed Sec. 215-B).*—According to Blair, J., the words 'or assisting a person in any way to evade apprehensions must be meant to point to some method *ejusdem generis* with those that have been specified in the section. In the case before Blair, J., the police being informed that a dacoit by name Subba had visited the accused and others, and was at that moment in their company, proceeded to arrest him. At that time Subba, the accused and others were sitting near a well. They saw the police approach whereupon Subba withdrew and hid himself in an adjoining sugarcane field. The police inquired from the accused as to who the man was who had just left them, and he swore that it was not Subba, who was, however, afterwards arrested in the field. The accused was prosecuted for harbouring a dacoit under Sec. 216 of the Code, and the question was whether the false statement made by the accused, constituted

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1. Emperor *v.* Hussain Baksh, I. L. R. 25 All. 261: 23 A.W.N. 29.
2. Muchi Mian *v.* Emperor, A.I.R. 1918 Cal. 826: 18 Cr. L. J. 731: 26 Cr. L. J. 141: 21 C.W.N. 1062.
3. Tara Singh, I.L.R. 7 Lah. 30.

such assistance as is here defined. But Blair, J., having read the words *ejusdem generis* held that it did not:"[1]

It is submitted that this view is unsound and has been dissented from in Calcutta, where the words have been held to be words of general enlargement and should not be read *ejusdem generis* with supplies of food or other necessary articles. In the Calcutta case the offender lived with his undivided brother. The police ordered the accused to produce him for which he went inside, soon afterwards returning with the brother's son, whom he said he had mistaken for his brother. The police searched the house and found the offender concealed therein. He was held rightly convicted of this offence.[2] The same view was taken in another case when the accused had warned a proclaimed offender of the approach of the police and had done his best to assist him to make good his escape."[3]

CHAPTER III

Of Punishments

53. The punishments to which offenders are liable under the provisions of this Code are:

"Punishments."

First.—Death.

[4][*Secondly*.—Imprisonment for life;]

[5]* * * *

Fourthly.—Imprisonment, which is of two descriptions, namely:

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly.—Forfeiture of property;

Sixthly.—Fine.

SYNOPSIS

1. Analogous law.
2. True measure of punishment.
3. Principle.
4. Effect of Sec. 53-A.
5. Discarded punishment.
6. Flogging.
7. Other forms of punishment.
8. Punishment on conviction not the invariable rule.
9. Measure of punishments.
10. Death.
11. Supreme Court practice.
12. Suspension and remission of sentence.
13. Punishment of deaf and dumb.
14. Sentence and punishment.
15. Children and sentence of death.
16. Transportation.
17. Justification of transportation.
18. Imprisonment.
19. Why minimum sentences not fixed.
20. Commencement and suspension of imprisonment.
21. Imprisonment till the rising of the Court.
22. Principles of punishment.
23. Aggravating circumstances.
24. Offences against property.
25. Offences against peace.
26. Fine.
27. Forfeiture.
28. Pecuniary forfeiture or fine.
29. Whipping.
30. Detention cannot be regarded as punishment.
31. Detention in Reformatory Schools.
32. Illegal orders.
33. Admonition or release on probation.

1. Analogous law.—This chapter on Punishments is really a chapter on adjective law, though it is naturally connected intimately with the

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1. Emperor *v.* Hussain Baksh, I. L. R. 25 All. 261: 23 A. W. N. 29; *contra* in Muchi Mian *v.* Emperor, 21 C.W.N. 1062: 40 I. C. 731; Balkaran Singh *v.* Emperor, A. I. R. 1925 Oudh 423: 89 I. C. 152; *contra* in Tara Singh, I. L. R. 7 Lah. 30.
2. Muchi Mian *v.* Emperor, A.I.R. 1918 Cal. 826 at pp. 826, 827: 21 C. W. N. 1062: 40 I.C. 731.
3. Akhan Ali, 72 I.C. 949.
4. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "*Secondly*—Transportation" (w.e.f. 1st January, 1956).
5. Clause *Thirdly* omitted by Act 17 o 1949, Sec 2 (w.e.f. 6th April, 1956).

substantive law enacted in the Code, in which, accordingly, it finds a place. But all the same, it is a chapter relating to procedure and its provisions have, therefore, to be read with the Criminal Procedure Code which largely affects those provisions. The authors of the Code had appended a long note[1] to this chapter, which is partly explanatory and partly vindicative. This chapter was, again, exhaustively reviewed by the Indian Law Commissioners, the result of whose minute and critical examination is embodied in Secs. 433—528 of their Second Report. Jeremy Bentham has in his *Principles of Penal Law* denoted several chapters to the *rationale* of Punishment[2] and the subject has, in fact, received a consideration which has created quite a literature on the subject. It is not here proposed to pursue the subject from any desire to present the result of studies in this branch of law, for it is unnecessary and would be beyond the scope of the present work. At the same time, it would be conducive to an intelligent study of a subject, which is otherwise obviously repellent and repulsive from its nature and association, if sufficient light is thrown upon it as may be useful alike to the student studying its principles, and the Judge and the lawyer adminstering its stern provisions in practice.

Rationale of punishment.

2. True measure of punishment.—It is a standing complaint against the Code that it is Draconian in its severity as regards punishments. This criticism was not overlooked by the authors who wrote: "We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison discipline exists, where the criminal, without being subject to any cruel severities, is strictly restrained, regularly employed in labour not of an attractive kind and deprived of every indulgence not necessary to his health, a year's confinement will generally prove as efficacious as confinement for two years in gaol where the superintendence is lax, where the work exacted is light and where the convicts find means of enjoying as many luxuries as if they were at liberty. As the intensity of the punishment is increased, its length may safely be diminished. As members of the Committee which is now employed in investigating the system followed in the gaols of this country we have had access to information which enables us to say with confidence that, in this department of the administration, extensive reforms are greatly needed and may easily be made. The researches of that Committee will, we hope, enable the Law Commission, hereafter, to prepare such a Code of prison discipline as, without shocking the human feelings of the community may yet be a terror to the most hardened wrongdoers. Wherever such a Code shall come into operat on, we conceive that it will be advisable greatly to shorten many of the terms of imprisonment which we have proposed."[3]

Law is good but justice is better and it is expedient in the interests of justice that the sentence passed in a case should reasonably be balanced to the exigencies of the case.[4]

No hard and fast rule for determination of the right measure of punishment.

The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the Court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is

1. Note A.
2. Volume I. Collected Ed., pp. 390—578.
3. Note A, Reprint, p. 65.
4. Gopal Khaitan *v.* State A. I. R. 1969 Cal. 132 at p. 138: 73 C. W. N. 22.

necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.[1] It is no doubt true that the offence of black-marketing is very generally prevalent in this country at the present moment and when it is brought home against a person, no leniency in the matter of sentence should be shown and a certain amount of severity may be very appropriate and even called for. Where, however, quite a substantial sentence of imprisonment has been awarded to the appellant, a person belonging to the commission agency class, imposition of unduly heavy fines which may have been justified to some extent in the case of the principals, will not be called for in his case. As a matter of practise the Supreme Court will not interfere by special leave in the matter of punishment imposed for crimes committed, except in exceptional cases where the sentences are unduly harsh and do not really advance the ends of justice.[2]

Nature of proof has nothing to do with punishments but Court has to decide on all circumstances of the case.

If the Court is convinced about the truth of the prosecution story, conviction has to follow. The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the Court is satisfied that there are such mitigating circumstances, only then it would be justified in imposing the lessor of the two sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment. The nature of the proof can only bear upon the question of conviction—whether or not the accused has been proved to be guilty. If the Court comes to the conclusion that the guilt has been brought home to the accused, and conviction follows, the process of proof is at an end. The question as to what punishment should be imposed is for the Court to decide in all the circumstances of the case with particular reference to any extenuating circumstances. But the nature of proof has nothing to do with the question of punishment.[3]

Proper exercise of judicial discretion elucidated by the Supreme Court.

The Supreme Court in allowing the appeal on the question of sentence, made the following observation in *Bed Raj* v. *State of Uttar Pradesh*,[4] at p. 588 (of S. C. R.) : at p. 781 (of A.I.R.) :

> "A question of a sentence is a matter of discretion and it is well settled that when discretion has been properly exercised along accepted judicial lines, an Appellate Court should not interfere to the detriment of an accused person except for very strong reasons which must be disclosed on the face of the judgment. . . . . In a matter of enhancement there should not be interference when the sentence passed imposes substantial punishment. Interference is only called for when it is manifestly inadequate."

These observations are entitled to great weight. But it is impossible to lay down a hard and fast rule, for each case must depend upon its own

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1. Zeal to crush the evil of black-marketing and free the common man from this plague should not perturb the judicial mind in the determination of measure of punishment.
2. Adamji Umar Dalial v. State of Bombay, A. I. R. 1952 S C 14 at p. 16.
3. Vadivelu Thevar *v.* State of Madras, A. I. R. 1957 S. C. 614 at pp. 619-20.
4. (1955) 2 S.C. R. 583: A I.R. 1955 S.C. 778.

facts. Whether in a given case there was proper exercise of judicial discretion by the Trial Judge depends upon the circumstances of that case.[1]

3. Principle.—Punishment is the mode by which the State enforces its laws forbidding the doing of something, or omission to do something. Punishment may take different forms. It may be a mere reprimand; it may be a fine; it may be whipping; it may be imprisonment—simple or rigorous; it may even extend to death. But whatever the form, punishment is always co-related to a law of the State forbidding the doing or the omission to do something. Unless such a law exists, there is no question of any act or omission being made "punishable".[2]

Punishment is the suffering in person or property inflicted on the offender under the sanction of law. It is the retribution due for violation of the rules of society which are made for its preservation and peace and the infraction of which is a crime. The Code measures the gravity of the violation by the seriousness of the crime and its general effect upon public tranquillity.

Measure of guilt is measure of punishment.

The measure of guilt is, therefore, the measure of punishment. And it is, therefore, essential that the punishment must fit the crime. It was, at one time, a moot question whether retribution or reform was the sole motive of punishment. Bentham regarded the prevention of mischief as the sole aim of punishment.[3] Other writers regard retribution as its chief mission,[4] but it is evident that so long as punishment was the concern of the person aggrieved, retribution was the sole object. But when it became a function of the State and as society progressed, retribution receded into the background, and prevention of crime and reform of the criminal became as much its concern as the primitive wreaking of revenge.[5] The true doctrine of punishment in modern civilized State is, therefore, now based on the prevention of crime, but it is only its main, though not its sole, object. For, notwithstanding what has been said by Plato, both personal as well as public sentiments demand that the person who has made others suffer unjustly should himself be made to suffer in return. This is quite distinct from the moral side of an act with which properly the Courts are not concerned. They are concerned solely with the nature of the act viewed as a crime, or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.

Principal object of punishment.

The principal object of punishment, however, is the prevention of crime and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another. It may generally be taken as a sane principle to follow, that punishment should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a reaction of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not

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1. Kapur Chand Pokhraj *v.* State of Bombay, A. I. R. 1958 S. C. 993 at pp. 998-99.
2. Jawala Ram *v.* State of Pepsu, A. I. R. 1962 S. C. 1246 at p. 1248: (1962) 2 Cr. L. J. 303: (1962) 2 S.C.R. 503.
3. *Principle of Penal Law*, Pt. 2, Chap. III, p. 396 (Vol. I, Coll. Ed.).
4. Mercer's *Criminal Responsibility*, p. 19.
5. *See* Emperor *v.* Dukalha, 34 Cr. L. J. 271; 141 I. C. 861 : 15 N. L. J. 46.

only bad for the man himself, but also it is a useless piece of cruelty, and economically wasteful and a source of loss to the community.[1]

Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all time in the future. True the discretion is of the Trial Court and the High Court would not ordinarily interfere with the exercise thereof. The sentence must be such as to serve as a deterrent to others.[2] It is true that what should be an adequate punishment within the maximum provided for an offence, is primarily for the convicting Court to decide, but that discretion should exhibit that a reasonable proportion has been maintained between the seriousness of the crime and the punishment imposed. While Courts should not pass a sentence disproportionately severe as compared with the nature of the offence committed they should also be careful not to award a sentence that on account of its manifest inadequacy would fail to produce a deterring effect on the offender and serve as an eye-opener to the rest. Although no hard and fast rule can be laid down for measuring what in a particular case would be a proper sentence, yet Courts are expected to observe a desirable proportion between the gravity of the offence and the punishment for it.[3] It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime.[4] But it is perfectly clear that the maximum punishment prescribed by the law should not automatically follow upon a conviction and the Court should not shirk its responsibility for determining an appropriate sentence by awarding maximum sentence.[5] A court in passing a sentence should inflict such sentence as the gravity or otherwise of the crime of which the accused has been convicted warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not. The Court cannot take into consideration the prayer of the accused that an appealable sentence should be passed.[6] The Court should weigh the sentence with reference to the crime committed and the circumstances of the case and not with reference to anything which may happen subsequently.[7] Punishment is in itself an evil and can be justified only by its effects in deterring the offender from committing the offence in future and in deterring others by the example from the commission of it. In each case punishment must be the minimum that will produce both these effects.[8] Greater discretion should be exercised in making the penalty fit the crime, and that the practice of committing petty offenders to the Sessions Court after 3 or 4 convictions should cease.[9] Where the case against the accused was that he was an employee in the colliery and that he bore a grudge against the Assistant Manager of the colliery, as the latter

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1. *Per* Burgess, J. C., in Nga Ku, (1897) U. B. R. 330 at p. 334 ; Nga Tha Kin, 11 I. C. (U. B.) 792 ; Rul Lal Mehra *v.* Emperor, A. I. R. 1945 Lah. 158: 47 P. L. R. 134 : 47 Cr. L. J. 44; *see* to the same effect Bentham's *Principles of Penal Law*, Pt. 2, Bk. I, pp. 406—408.
2. State *v.* Bhalchandra Waman Pethe, A.I. R. 1966 Bom. 122 at p. 126.
3. State *v.* Kapur Singh, A. I. R. 1953 Pepsu 118 at p. 119.
4. Emperor *v.* Maiku, A. I. R. 1930 All. 279 at p. 279.
5. Kehr Singh *v.* Emperor, A. I. R. 1929 Lah. 29 at p. 31 : 30 Cr. L.J. 15; *see* also Adamji Umar Dalal *v.* State, A. I. R. 1952 S.C. 14: 1952 S. C. R. 172: 54 Bom. L. R. 400 ; Emperor *v.* Maiku, A.I.R. 1930 All. 279: 31 Cr. L.J. 631; Jainarain Sah *v.* Emperor, A. I. R. 1944 Pat. 16 : I. L. R. 22 Pat. 600; Emperor *v.* Yar Mohammad, A. I. R. 1931 Cal. 448 : I. L. R. 58 Cal. 392: 32 C. L. J. 1181; Gouranga Mohapatra *v.* State, A. I. R. 1954 Orissa 49: I. L. R. (1953) Cut. 428 ; State *v.* Kapur Singh, A. I. R. 1953 Pepsu 118.
6. Emperor *v.* Yar Mohammad, A. I. R. 1931 Cal. 448 at p. 450 ; Kesri Chand, I. L. R. (1945) Nag. 450.
7. Emperor *v.* Yar Mohammad, A. I. R. 1931 Cal. 448 at p. 450.
8. Mst. Nanhi Gond *v.* Emperor, A. I. R. 1927 Nag. 221 at p. 221: 18 Cr. L. J. 493.
9. King-Emperor *v.* Gala Mana, A. I. R. 1924 Bom. 453 at p. 453 : 26 Cr. L. J. 759.

refused to recommend him for promotion to the post of Munshi. It is said that the Assistant Manager was going round the colliery, as usual, and went to the Token Office in the course of his daily supervision work. It is said that at the time, the accused appeared with a pickaxe and gave him a violent stroke, on his left buttocks, resulting in a grievous injury. It was observed by their Lordships J that—

> "It was a dastardly attack made on the Assistant Manager, by a labourer who happened to be an active member of the Labour Union, the reason for the attcak being that he did not get the post he wanted. Unless such acts are put down no colliery can work, particularly as such attacks may too often be made in the pits when absolutely no evidence will be available. We therefore think that a deterrent sentence is called for and we would accordingly enhance the sentence to one and a half year's rigorous imprisonment.[1]"

Consideration in cases of habitual offenders.

Where a man has shown from his past conduct that he intends to adopt a criminal career, three things should be borne in mind. *Firstly*, it is necessary to pass a sentence upon him which will make him realise that a life of crime becomes increasingly hard and does not pay. *Secondly*, the sentence should serve as a warning to others who may be thinking of adopting a criminal career. *Thirdly*, the public must be protected against people who show that they are going to ignore the rules framed for the protection of the society.[2]

Principles of punishments placed into two broad categories.

Cases illustrative of principles of punishment fall broadly into two classes : (1) those in which the Courts have favoured the passing of lenient sentences and the observance of moderation,[3] and (2) those to which the Courts have encouraged the passing of heavy or deterrent sentences.[4]

Principles stated.

From the foregoing classes of cases the foliowing principles emerge : "The twin objects of punishment are to prevent a person who has committed a crime repeating it and to prevent others from committing similar crimes. The sentence passed on the offender must be the least that will achieve both these objects. In deciding the measure of punishment the Court ought to take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender and his age, character and antecedents.

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1. Gouranga Mohapatra *v.* State, A. I. R. 1954 Orissa 49 at pp. 49, 50, 51 : I. L. R. 1953 Cut. 428; *see* also State *v.* Kapur Singh, A. I. R. 1953 Pepsu 118.
2. Mohammad Hanif *v.* Emperor, A. I. R. 1942 Bom. 215 at p. 216 : 43 Cr. L. J. 754.
3. *See* Nga Ku *v.* Queen-Emprees, (1897-1901) 1 U. B. R. 330 at pp. 334-35 (P. C.) ; Adamji Umar Dalal *v.* State of Bombay, A. I. R. 1952 S. C. 14 : 1952 S. C. R. 712 : 1951 S. C. J. 820 : 1952 A. L J. 94 : 1952 B. L. R. (S. C.) 43 : 54 Bom. L. R. 400 : 65 L. W. 209 : 1952 M. W. N. 129 : 54 P. L. R. 129 ; Emperor *v.* Yar Mohammad, I. L. R. 58 Cal. 392 : 3 Cr. L. J. 1181 : 134 I. C. 536 : A. I. R. 1931 Cal. 448; Emperor *v.* Sakinabai Badruddin, A. I. R. 1931 Bom. 70 : I. L. R. 55. Bom. 220 : 32 Bom. L. R. 1506 : 32 Cr. L. J. 283 : 129 I. C. 346; Thamana Ramalingayya, *In re*, A. I. R. 1942 Mad. 723 : (1942) 2 M. L. J. 357 : 1942 M. W. N. 592 : 204 I. C. 65; Ananda Parbi *v.* Emperor, 12 P. L. T. 791 : 32 Cr. L. J. 1166: 134 I. C 432: A. I. R. 1931 Pat. 342: Jainarain Sah *v.* Emperor, A. I. R. 1944 Pat. 16 : I. L. R. 22 Pat. 600; 25 P. L. T. 12 : 45 Cr. L. J. 332 : 211 I. C. 219.
4. *See* Mahomed Hanif *v.* Emperor, A. I. R. 1942 Bom. 215 : 44 Bom. L. R. 456 : 43 Cr. L. J. 754 : 201 I. C. 651 ; Emperor *v.* Maiku, A. I. R. 1930 All. 279 : 31 Cr. L. J. 631 : 124 I. C. 46 ; Om Prakash *v.* State, A. I. R. 1956 All. 163 : 1956 A. L. J. 206 : (1956) A. W. R. (H. C.) 1 : 1956 Cr. L. J. 358 (2) ; Dulla *v.* State, A. I. R. 1958 All. 198 : 1958 Cr. L. J. 316.

"The prevalence of a particnlar crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious pre-conceptions should be strictly disregarded. The Court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty provided for any offence is meant for only the worst cases.

"No sentence should ever appear to be vindictive. An excessive sentence defeats its own object and tends to further undermine the respect for law. The jails should be reserved for the reception of those who perform criminal acts of not merely a technical but of a criminal character. If the law permits a sentence of fine as an alternative, there is no need of the sentence of imprisonment, unless of course the gravity of the offence or the antecedents of the offender demand it.

"First and/or youthful offenders should invariably be treated leniently, and in applying provisions of law like the First Offenders' Probation Act or Sec. 562, Code of Criminal Procedure, it would be better for the Court to err on the side of liberality. On the other hand, a person who has taken to a life of crime or who has refused to take a lesson from his previous conviction should be meted out severe punishment.

"A deterrent sentence is wholly justifiable when the offence is the result of deliberation and pre-planning is committed for the sake of personal gain at the expense of the innocent, is a menace to the safety, health or moral well being of the community, or is difficult to detect or trace. Unlike those acts which are universally acknowledged to be of a criminal nature, an act which has only recently been made an offence or which is not unlawful in other parts of the country or State which is not essentialy criminal in character, deserves leniency except in the case of persistent offenders.

The above principles were stated by James, J., in *Dulla* v. *State*.[1] This was a case under the U. P. Prevention of Cow-slaughter Act (U. P. Act No. 1 of 1956). The accused were convicted under Sec. 8 (1) of the Act for slaughtering a cow and sentenced to eighteen months' rigorous imprisonment. On the application of the above principles, James, J., said that "were I to uphold the applicants conviction, I would have considered a fine of Rs. 50 on each of them sufficient."[2]

4. Effect of Sec. 53-A.—"Whether the expression 'transportation' in Sec. 4 (*a*) of the Reformatory Schools Act meant 'transportation for life' and, therefore, now means imprisonment for life?"[3]

The following observations by Bhava, J., who wrote the judgment in the above-noted case for the Full Bench will prove instructive :

"The learned Single Judge, however, feels that there is a conflict between the decisions of this Court, referred to above, and that *Gangaram Raghunath* v. *State of Madhya Pradesh*[4] leaves certain measure of doubt as to whether on the true interpretation of Secs. 53 and 53-A of the Indian Penal Code, the expression 'transportation' in the definition of 'youthful offender' in the Reformatory Schools Act should be altogether omitted or should be substituted by the words 'imprisonment for life'. At least, that is what we could gather from the order of reference.

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1. A. I. R. 1958 All. 198 at pp. 203, 204: 1958 Cr. L. J. 316.
2. *Ibid* at pp. 200, 206.
3. Sibbu Munnilal *v.* State of Madhya Pradesh, A. I. R. 1968 M. P. 97 at p. 98.
4. A. I. R. 1965 M. P. 122.

"It is no doubt true that there is a conflict between *Rama* v. *Emperor*[1] and *Daljit Singh Ajallsing Sikh* v. *Emperor*[2] on the one hand and *Gangaram* v. *State of M. P.*[3] on the other and that the decision in *Gangaram's* case[4] had not the effect of over-ruling the previous decisions. But the question of resolving that conflict does not really arise in the present case. In those cases the question at issue was as to whether a person convicted of an offence, the highest punishment for which was death, could be dealt with under the Reformatory Schools Act if the offender was awarded the lesser punishment, namely, that of imprisonment for life. In those cases no dispute was raised that in place of the expression 'transportation' the words 'transportation for life' or 'imprisonment for life' could not be substituted. Those cases proceeded on the assumption that the expression 'transportation' means 'transportation for life'. We, however, propose to decide as to what view is correct, as it is necessary that the two conflicting views should not be allowed to hold the field at the same time.

"In *Rama's* case,[5] the accused was found guilty of murder punishable under Sec. 302, I. P. C., where the punishment prescribed was death or transportation for life. The question which came up for decision before the learned Additional Judicial Commissioner was whether the words 'punishable with transportation or imprisonment' are to be read as inapplicable to offences also punishable with death. This is what the learned Additional Judicial Commissioner observed :

> 'The provision under discussion requires that the offence, for which the candidate for a Reformatory School is convicted, should be punishable with imprisonment or transportation, but it obviously does not require that such offence should not be subject to any other form of punishment. If that were so, then it would be impossible to find any offence for which a youthful offender could be sent to a Reformatory School. If the words "punishable with imprisonment" or "transportation" are to be read as inapplicable to offences also punishable with death, then consistency of construction would make then equally inapplicable to offences also punishable with fine, forfeiture, or whipping. Therefore, it seems to follow that all that is necessary to satisfy the requirements of the Reformatory Schools Act, 1897, as to an offender under the age of 15 years is that he should be convicted of an offence which includes imprisonment or transportation among the forms of punishment provided for it by law.... Murder is capable of punishment by transportation, and, in a case where in fact such punishment is decided upon, it seems to me that the convict, if of proper age and otherwise a fit person for attempted reform, is eligible as a pupil for a Reformatory School.' (Page 182.)

"A similar view has been expressed by Jagannadhadas, J., in *Ulla Mahapatra* v. *The King*[6]:

> 'I agree also that this is a case in which in exercise of our powers under Sec. 8, Reformatory Schools Act, the appellant, instead of having to undergo the sentence of transporation, should be sent to a Reformatory School for a period of five years. It is not disputed before us that the appellant is a "youthful offender" as defined. He is nonetheless so, though Sec. 302, Penal Code, is also punishable with

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1. (1908) 4 Nag. L. R. 180.
2. A. I. R. 1937 Nag. 274.
3. A. I. R. 1965 M. P. 122.
4. *Ibid.*
5. (1908) 4 Nag. L. R. 180.
6. A. I. R. 1950 Orissa 261 at p. 264.

death. It is enough to satisfy the definition of "youthful offender" in the Act if the offence of which he is convicted is also punishable with transportation.'

"In *Daljit Singh's* case,[1] the accused was convicted of an offence punishable under Sec. 302, I. P. C. and was sentenced to trnsportation for life. In that case, the Division Bench observed :

'That such action is possible in the case of a youthful offender who has been sentenced to tranportation for life has buen held by Stanyon, A. J. C., in (1908) 4 Nag. L. R. 180, and this has been accepted later in Cr. App. No. 27 of 1926 (Nag.). We are in respectful agreement with the decision in (1908) 4 Nag. L. R. 180 and hold that recourse may be had to the Reformatory Schools Act if such action is desirable.' (Page 280.)

"It would thus be seen that in the Orissa case there is no discussion of the matter, and the reasoning which was advanced by the learned Judge was that if one of the sentences prescribed under the particular section was transportation and if the accused was in fact awarded that sentence, the provisions of the Reformatory Schools Act applied to his case notwithstanding the fact that the offence could as well be punished with death. In *Daljit Singh's* case,[2] the decision in *Rama's* case[3] was simply accepted which means the reasoning of the learned Additional Judicial Commissioner was approved by the Division Bench.

"In *Gangaram's* case,[4] the matter came up for hearing before a Division Bench consisting of Naik and Shiv Dayal, JJ. The accused, who was a boy of 13 or 14 years of age, was convicted under Sec. 302 of the Indian Penal Code and was sentenced to imprisonment for life. In appeal both the learned Judges came to the unanimous conclusion that the accused was rightly convicted. Shiv Dayal, J., however, was of the opinion that the accused came within the definition of a 'youthful offender' and that the provisions of the Reformatory Schools Act were applicable to him. This is what Shiv Dayal, J., held :

'The offence under Sec. 302 of the Penal Code is punishable not only with transportation for life but also with death....is the offence, therefore, excluded from the purview of the above definition? (the definition of "youthful offender"). To put it differently, is the above definition restricted to the offences which are punishable only with transportation or with imprisonment and is inapplicable to an offence which is also punishable with death?

'The object of the enactment is obvious enough. Sending of the youthful offenders to ordinary jails has the effect of making them hardened criminals. They were to be safeguarded against this irrespective of the term of imprisonment or transportation so that the definition is so widely worded as to bring within its scope every offence which is punishable with transportation or imprisonment irrespective of the term. The only offences to which the definition does not apply—and there is no point in applying it to them—are those for which the law does not provide for punishment with transportation or imprisonment at all. Section 53 of the Penal Code, as it was worded when the Reformatory Schools Act, 1897, was enacted, enumerated six kinds of punishments. Then this evil which was intended to be safeguarded

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1. A. I. R. 1937 Nag. 274.
2. *Ibid.*
3. (1908) 4 Nag. L. R. 180.
4. A. I. R. 1965 M. P. 122.

against by the Act was present only in the punishment with transportation or imprisonment but not in others, e.g. death sentence or sentence or forfeiture of property or fine. To an offence for which death penalty alone is provided (*see* Sec. 303 of the Penal Code), or where only fine can be imposed application of this Act is meaningless. On a natural and plain meaning of Sec. 4 (*a*), the very fact that an offence is punishable with transportation or imprisonment is sufficient. If the intention of the Legislature were to exclude those offences which are punishable with death also, the wording would have been "any offence not punishable with death", instead of "any offence punishable with transportation or imprisonment.

'On this analysis, the only questions to be asked are:

(1) Is the offence punishable with transportation ? and
(2) Is the offence punishable with imprisonment ?

'If the answer to either of them is in the affirmative, then it is within Sec. 4(*a*) of the Act; if the answers to both of them are in the negative, then only the offence will be outside the definition. Therefore, in my judgment, it is enough to bring an offence under Sec. 8, read with Sec. 4(*a*) of the Reformatory Schools Act, 1897, that the offence is punishable with transportation or imprisonment and it is immaterial that it is also punishable with death or fine or any other kind of punishment. This view is supported in *Ullah Mahapatra* v. *The King*.[1] . . . .'

"Naik, J., took a contrary view. Naik, J., after considering the effect of the amendment of Sec. 53 and the addition of Sec. 53 (53-A?) to the Indian Penal Code, reconstituted the definition of a 'youthful offender' thus:

'. . . . a "youthful offender" means—"any boy who had been convicted of any offence punishable with imprisonment or who has been sentenced to imprisonment under Sec. 123 of the Code of Criminal Procedure, 1898, and who, at the time of such conviction or sentence, was under the age of sixteen years"

and on that basis proceeded to consider the question. The reasoning adopted by Naik, J., is as under:

'The question, therefore, arises whether the accused-appellant is a "youthful offender" within the meaning of the Act. This in turn raises the question whether an offence under Sec. 302 of the Indian Penal Code can be said to be "any offence punishable with imprisonment" within the meaning of the aforesaid definition.

'Section 53 of the Indian Penal Code tells us that there are five kinds of punishments to which offenders are liable under the provisions of the Code—*first* Death; *secondly*, Imprisonment for life; *thirdly*, Imprisonment (rigorous or simple); *fourthly*, Forfeiture of property; and *fifthly*, Fine. It is also the scheme of the Code that generally maximum punishments are prescribed leaving the minimum to the discretion of the Judge who would have the means in each case of forming an opinion as to what sentence would meet the ends of justice in that particular case. However, in offences of the gravest nature, it has prescribed both the maximum and the minimum punishments. Keeping this scheme in view, I am of opinion that in any attempt at classification of offences with reference to punishments prescribed for them it would be more in consonance with the

1. A. I. R. 1950 Orissa 261

aforesaid principle to understand the classification as implying that the offences have been classified with the reference to the maximum punishment to which an offender may be liable in respect of them. Thus, when we speak of a capital offence, we imply that an offender committing it is liable to be sentenced to death, not that he must necessarily be sentenced to death for in most cases imprisonment for life has been also prescribed as an alternative sentence to the sentence of death. In my opinion, the word "punishable" when used in the phrase "punishable with imprisonment" as categorizing offences with reference to punishments, itself implies a liability to punishment which is the highest in the hierarchy of punishment for that class of offences.

'The expression "offences punishable with imprisonment" ordinarily has two meanings. It may mean offences in which imprisonment is one of the permissible punishments prescribed, or it may mean offences, the commission of which exposes the offender to imprisonment as its highest penalty though, in fact, he may be sentenced to any prescribed sentence short of that. What meaning the expression bears in a particular context would depend on its use in that context ; and in my opinion, when used to categorise offences so that offenders committing them are to be differently sentenced, then it must bear the latter meaning.

'On this view, broadly speaking, there can be offences punishable with death, i.e. offences for which the maximum penalty to which an offender can be subjected is death; offences punishable with imprisonment for life, i.e. offences for which the maximum penalty can be imprisonment for life ; offences punishable with imprisonment, i.e. offences for which the maximum penalty can be imprisonment short of imprisonment for life ; and, lastly offences punishable with fine, i.e. offences for which the maximum penalty can be a sentence of fine only. It would thus be seen that "imprisonment for life" is a form of punishment distinct from imprisonment *simpliciter* and both are distinct and different from the sentence of death, and in my opinion, "offences punishable with imprisonment" cannot be equated with "offences punishable with imprisonment for life" which must be treated as offences of a separate category. For, whereas the former, viz. "imprisonment" can be of two categories—simple and rigorous—the latter, viz. "imprisonment for life" can only be rigorous; and again whereas "imprisonment" can be for any period from twenty-four hours to fourteen years in accordance with the period prescribed in the Penal Code, the sentence of "imprisonment for life", can mean but one thing, namely, rigorous imprisonment for twenty years.

'An offence under Sec. 302 of the Penal Code is punishable with death or imprisonment for life, and also with fine. The law thus prescribes for that offence a maximum as well as a minimum punishment. The minimum punishment prescribed is, no doubt, imprisonment for life, but, as explained above it cannot be said that it is a form of punishment which is included in the expression "imprisonment" as used in Sec. 53 of the Code or Sec. 4 (*a*) of the Act. In any case it cannot be said that murder is an offence which is "punishable with imprisonment". To so describe it would be a misdescription of that offence.

'Some help in the interpretation of the clause can also be derived from the phrascology in Sec. 4 (*a*) of the Act. It makes a distinction

between an offender who was has been convicted of any "offence punishable with imprisonment" and an offender who has been "sentenced to imprisonment"; and I think that this distinction is not without substance. "Liability to punishment for an offence" is something different from the actual sentence awarded therefor. While the first implies the limit to which a sentence can go, the second implies that which the justice of the case warrants or requires under the facts and circumstances of any particular case. The fact, therefore, that a sentence of "imprisonment for life" can be awarded for an offence under Sec. 302 of the Penal Code cannot warrant its being called an offence "punishable with imprisonment". If it were the intention of the Act to include within the ambit of the expression "punishable with imprisonment" all offenders against whom a sentnce of imprisonment had been passed irrespective of the nature and gravity of the offence of which they had been convicted, it could well have more simply defined the expression "youthful offender" under Sec. 4 (*a*) by saying as "any boy who has been convicted of any offence and sentenced to imprisonment therefor, etc.". If the mere fact of having sentenced to a term of imprisonment for any offence were the criterion to attract the provisions of the Act, it would not have been necessary to co-relate the conviction with an offence "punishable with imprisonment". On the other hand, the fact that the Legislature has attempted to co-relate convictions with the offences and not with the sentence of imprisonment, and at the same time classifying the offences with reference to punishment, shows that the mere fact that an offender was sentenced to a term of imprisonment was not enough as it was further necessary that the offenee was of a class which was "punishable with imprisonment". So that, if the offence was punishable with something more than imprisonment, viz. with death or imprisonment for life, then it was not meant to be included amongst the offences to which reference was made in Sec. 4 (*a*) of the Act.'

"On difference of opinion between the two learned Judges, the matter was referred to the third Judge for his opinion on the question. Pandey, J., agreed with Naik, J. He held:

'I am of the view that murder cannot be called an offence punishable with imprisonment only because the lesser penalty for that offence is imprisonment for life. As provided by Sec. 53 of the Indian Penal Code, the punishment of imprisonment for life is in a category different from the one providing for the punishment of imprisonment, rigorous or simple. Secondly, it is usual to describe an offence with reference to the maximum punishment provided therefor. An example is Sec. 497, Cr. P. C. Under that section, bail cannot be granted if there are reasonable grounds for believing that the accused has been guilty "of any offence punishable with death or imprisonment for life". This expression has been interpreted disjunctively as including offences like those under Sec. 307 of the Indian Penal Code, the maximum sentence for which is imprisonment for life.[1] Finally I do not consider it right to interpret Cl. (*a*) of Sec. 4 of the Act as if it did not take into account the gravity of the offence and merely provided for substituting in all cases the

1. King-Emperor *v.* Nga San Htwa, I. L. R. 5 Rang. 276: A.I.R. 1927 Rang. 205 (F.B.); Naranji Premji *v.* Emperor, A. I. R. 1928 Bom. 244 and Emperor *v.* Mst. Janki, I. L. R. 28 Nag. 260: A. I.R, 1932 Nag.130.

sentence of imprisonment by a term in the Reformatory School. If it were so, that could have been more easily provided as follows :

"Youthful offender" means any boy who has been convicted of any offence sentenced to imprisonment or who has been sentenced to ipmrisonment under Sec. 123 of the Code of Criminal Procedure, 1898, and who, at the time of such conviction or sentence, was under the age of sixteen years.

'In my opinion, the offence of murder which is punishable with death or imprisonment for life, is not included in the offences referred to in Cl.(*a*) of Sec. 4 of the Act.'

"From the extracts of the decision in *Rama's* case[1] quoted above, it is clear that the learned Additional Judicial Commissioner proceeded on the view that if an accused oonvicted of an affence punishable under Sec. 302 of the Indian Penal Code is excluded from the definition of a 'youthful offender' in Sec. 4 (*a*) of the Reformatory Schools Act on the ground that the punishment prescribed under that section is not only transportation but death as well, then in that case offenders convicted of offences, wherein the punishment of transportation of imprisonment is prescribed but in addition or alternatively the punishments of forfeiture, fine, etc. are prescribed, shall also be excluded and the Reformatory Schools Act will become inapplicable to majority of the cases. It was, therefore, held that the enquiry should be directed to see as to whether the punishment of transportation or imprisonment are prescribed for that particular offence or not. The fact that any other punishment is also prescribed is wholly irrelevant.

"Naik, J., on the contrary, adopted the reasoning that when one speaks of an offence punishable with a particular sentence, one always speaks of the highest punishment that is prescribed for that particular offence and, therefore, it is immaterial in deciding this question to consider whether any other punishment is prescribed for that offence or not. Naik, J., also emphasizes the fact that in determining the scope of Sec. 4(*a*) of the Reformatory Schools Act the enquiry is not to be directed to find out what punishment is actually inflicted but the enquiry is to be directed to find out as to what punishment is prescribed under that particular section. If the punishment prescribed is death, then certainly the person, even though he is sentenced to transportation, cannot be included in the definition of a 'youthful offender'. We find it difficult to accept the reasoning of the learned Additional Judicial Commissioner in *Rama's* case.[2]

"The expression used in Sec. 4(*a*) of the Reformatory Schools Act is 'punishable' and not 'punishable also'. In our opinion, it would be inappropriate to describe an offence as punishable with fine when the higher sentence prescribed is imprisonment for life or any shorter period. We, therefore, respectfully adopt the reasoning given by Naik, J., in *Gangaram's* case[3] and hold that in all those cases, where an accused is convicted of an offence punishable with a sentence higher than the sentence of transportation which means imprisonment for life or imprisonment, the accused is not included within the definition of a 'youthful offender'.

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1. (1908) 4 Nag. L.R. 180.
2. *Ibid.*
3. A.I.R. 1965 M. P. 122.

"In passing, we may observe that there is one more case of the Nagpur High Court reported in *Provincial Government, Central Provinces and Berar* v. *Mekhoo*[1] wherein it was held by Niyogi, J. (as he then was) that the expression 'youthful offender' could not include the case of a boy under the age of 16 years at the time of conviction and sentence who had been convicted of any offence punishable with death. In that case, the Court was called upon to consider the definition of 'youthful offender' as given in Sec. 3 of the C. P. and Berar Children Act, 1928. The purpose of Sec. 3 is to amend the definition of 'youthful offender' occurring in Sec. 4 (*a*) of the Reformatory Schools Act. In that case, unfortunately no reference was made to *Rama's* case[2] or to that of *Daljit Singh's* case[3] and the point was decided on the first impression. There is also no discussion on the point.

"In *Daljit Singh's* case,[4] the Division Bench of the Nagpur High Court accepted the decision in *Rama's* case,[5] without any discussion. In the Orissa case, Jagannadhadas, J., concluded the matter by observing:

> 'It is enough to satisfy the definition of "youthful offender" in the Act if the offence of which he is convicted is also punishable with transportation.'

"We respectfully differ from both the judgments.

"In *Gangaram's* case,[6] Naik, J., reconstituted the definition of a 'youthful offender' in the light of the amended provision of Secs. 53 and 53-A of the Penal Code thus:

> "Youthful offender" means "any body who has been convicted of any offence punishable with imprisonment or who has been sentenced to imprisonment under Sec. 123 of the Code of Criminal Procedure, 1898, and who, at the time of such conviction or sentence, was under the age of sixteen years".'

"It appears that through inadvertance Naik, J., omitted to substitute for the word 'transportation' the words 'imprisonment for life'. We have already given our reasons why in the reconstituted definition the expression 'transportation' should be substituted by the expression 'imprisonment for life'. On this interpretation of ours no further difficulty should arise in applying the provision of the Reformatory Schools Act in the case of persons who are convicted of offences, the highest punishment for which is imprisonment for life.

"For the aforesaid reasons, we agree with the view expressed by Naik, J., in *Gangaram's* case,[7] and hold that the decision in (1908) 4 Nag. L. R. 180 and A. I. R. 1937 Nag. 274 do not lay down the correct law. We also hold that in the definition of 'youthful offender' in Sec. 4 (*a*) of the Reformatory Schools Act for the expression 'transportation' the expression 'imprisonment for life' should be substituted."

5. Discarded punishment.—Besides the forms of punishment here prescribed two other forms were specially considered by the draftsman, namely dismissal from office, and pillory or exhibition of the offender on a donkey. They considered the first as unfit for executive action, and the

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1. I. L. R. (1942) Nag. 305: A.I.R. 1942 Nag. 74.
2. (1908) 4 Nag. L.R. 180.
3. A.I.R. 1937 Nag. 274.
4. *Ibid.*
5. (1908) 4 Nag. L. R. 180.
6. A. I. R. 1965 M.P. 122.
7. *Ibid.*

second as unequal. "To employ a punishment which is more bitter than the bitterness of death by the man who has still some remains of virtuous and honourable feelings, and which is a mere matter of justice to the utterly abandoned villain, appears to us most unreasonable."[1]

6. Flogging.—Flogging is not included in the list of punishments provided by the Code.[2] This punishment was also passed in review by the draftsmen and condemned for the same reason as pillory and donkey-riding on the ground that, to a person in decent station in life, it adds disgrace to the severity which could not be justified except when inflicted upon juvenile offenders.[3] The draftsmen, however, admitted that their remarks did not apply to juvenile offenders in whose case that form of sentence is both deterrent as well as unexceptionable. In 1864, a Whipping Act was passed and it introduced the sentence of flogging as punishment for certain crimes.[4] This Act was replaced by the Whipping Act, 1909 (Act 4 of 1909) which modified the rigour of the old Act and confined the sentence of flogging to old and juvenile offenders only. The Abolition of Whipping Act, 1955 (44 of 1955), has abolished whipping and repealed the Whipping Act, 1909 (Act 4 of 1909). There was an element of brutality in the sentence of flogging and it was a stain on civilisation. The Indian Parliament has removed this blot disfiguring the Statute Book.

7. Other forms of punishment.—The list of punishments given in Sec. 53, Penal Code, is not exhaustive. Other punishments besides those mentioned in the section can be inflicted by Criminal Courts in certain cases, e. g. whipping, detention in a Borstal Institute or a Training School, an order under Sec. 565, Criminal Procedure Code, etc.[5] An order passed under Sec. 25, Burma Prevention of Crime (Young Offenders) Act, is a punishment within the meaning Sec. 3, Whipping Act.[6] But an order under Sec. 562 of the Code of Criminal Procedure directing release on probation is not a punishment.[7] In the Madras Presidency the punishment of stocks is prescribed for offenders of lower castes.[8]

8. Punishment on conviction not the invariable rule.—The study of human behaviour individually and in relation to society has shown that the behaviour and the mental attitude of one prisoner differ from those of another. An element of cruelty is inseparable from any form of punishment which frequently proves an indelible stain on the convicted person. Moreover, it is realised today in all civilised countries that in many cases the criminal is more sinned against than sinning. Therefore, the emphasis has shifted from the punitive and vengeful aspect of punishment to the reformation and rehabilitation of the offender as a useful member of society. The criminal is a social misfit, he is a liability on the wrong side of the social ledger and the object of modern punishment is to transform that liability into an asset. A prison sentence has the effect of herding the convicted person with miscellaneous lot of criminals and

Emphasis of punishment has shifted from punitive to reformative aspect.

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1. Note A, Reprint, p. 103 (Pothen, L. B. R. 62).
2. Now, whipping as a form of punishment has been abolished by the Abolition of Whipping Act, 44 of 1955.
3. Note A, Reprint, p. 104.
4. *Ibid.*
5. Garanand Singh *v.* Emperor, A. I. R. 1933 Rang. 329 at p. 330 : 146 I. C. 545 (2) : 35 Cr. L. J. 116 ; but *contra* Krishna, 27 I. C. (Mad.) 198; and Jugroo, 9 N. L. R. 88.
6. The King *v.* Kyaw Aye, A. I. R. 1940 Rang. 81 at p. 82 : 41 Cr. L. J. 445 : 187 I. C. 405.
7. Baba *v.* Emperor, A. I. R. 1924 Nag. 37 at p. 38 : 24 Cr. L. J. 738 : 23 N. L. R. 166.
8. Madras Regulation, X of 1816, Sec. 10.

thereby diminishes, if not destroys, the chances of reforming that person. In consequence, legislative provision has been made to avoid prison sentence in many cases of conviction. Accordingly a system of releasing criminals, especially youthful and first offenders, on suspended sentence with liberty during good behaviour, has been evolved.

Punishment on conviction when not an invariable rule.

In India this solicitude of the reformation of the criminal has received statutory expression in the Probation of Offenders Act, 1958 (20 of 1958). The Act empowers Courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. In respect of offenders under 21 years of age special provision has been made putting restrictions on their imprisonment. During the period of probation, the offenders will remain under the supervision of probation officers in order that they may be reformed and become useful members of society.[1] The Court, in exercise of its powers under the Probation of Offenders Act, 1958 (20 of 1958), must have regard to the circumstances of the case including the nature of the offence and the character of the offender and consider it expedient not to award the punishment by way of imprisonment or fine (Secs. 3, 4 and 6). A person found guilty of an offence and dealt with under the provisions of Sec. 3 or Sec. 4 suffers no disqualification attaching to a conviction (Sec. 12) unless he has been subsequently sentenced to punishment under the provisions of Sec. 9. The Court is empowered to release certain offenders (1) after admonition (Sec. 3) or (2) on probation of good conduct (Sec. 4). Section 6 imposes restrictions on imprisonment (not for life) of offenders under 21 years of age. Sections 3 and 4 expressly refer to punishments under the Penal Code. Thus, the Act provides for orders in lieu of punishment under the Penal Code (whether by way of imprisonment or fine). Therefore, punishment on conviction is not the invariable rule.

9. Measure of punishments.—The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the Court has always to bear in mind the necessity of proportion between an offence and the penalty.[2]

Considerations for the measure of sentence.

The appropriateness of the nature and measure of sentence in each case depends upon the gravity of offence, the position and status of the offender, the previous character and the existence of aggravating or extenuating circumstances. A day's imprisonment to an honourable man will have far more deterrent effect than a life spent in durance vile by a hardened criminal. The measure of punishment is, therefore, the measure that must be adapted to each case. But there are certain general considerations which may be here set out, for they are the basic principles upon which the enactment has announced the maximum punishments, leaving their adjustment, in each case, to the discretion of the Judge. In order to judge the appropriateness of the sentence, Court cannot take into account the subsequent notoriety which the appellant acquired.[3]

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1. *Vide* Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Pt. II, Sec. 2, No. 37, dated the 11th November, 1958.
2. Adamji Umar Dalal *v.* State of Bombay, A. I. R. 1952 S. C. 14 at p. 16: 1952 S. C. R. 172: 1951 S. C. J. 820: 1952 A. L. J. 94: 1952 B. L. R. (S.C.) 43: 54 Bom. L. R. 400: 65 L.W. 209: 1952 M. W. N. 129: 54 P. L. R. 129.
3. Tahsildar Singh *v.* State, A.I.R. 1958 All. 214 at p. 234: 1957 A. L. J. 857.

It is provided in Sec. 16 (1) (*g*) (*ii*) of the Prevention of Food Adulteration Act that for a second offence the punishment is to be imprisonment for a period which may extend to two years and fine. The proviso further enjoins that the imprisonment shall not be less than one year and the fine shall not be less than Rs. 2,000, unless there are some special and adequate reasons to the contrary to be mentioned in the judgment of the Court. Therefore the minimum punishment that has to be awarded in the circumstances would be imprisonment for one year and a fine of Rs. 2,000. However, in view of the fact that this offence had to be retried and there has been considerable delay in the disposal of this case it would be a fit case where the ends of justice would be met by awarding a lesser punishment than that provided for by the proviso.[1]

Apportionment of sentence is left to the discretion of the Court.[2]

10. Death.—The sentence of death stands in the forefront in the category of punishments. The question whether the State has the right to take away a man's life has often been agitated, but it is a question upon which the moralist and the jurist are never likely to agree. For, while the one condemns it as a relic of barbaric age in which "life for life" was the common form of revenge, the other justifies it on the ground that its retention in the Penal Laws is itself a terror or which has a deterrent effect upon criminals, while its application furnishes an object lesson which not only purges society of its canker worms but tends generally to elevate its conception of, and respect for, human life.

Trend of modern times to abolish capital punishment.

All the same the tendency of modern times has been to abolish the capital sentence, and its abolition in several European States does not appear to have had any unfavourable effect on crime. England is, however, one of those countries in which the capital sentence is still retained. It is, however, confined to the following cases, namely:

(1) High treason (*Treason Act*, 1814, Secs. 1 and 2),

(2) Piracy with violence (*Piracy Act*, 1837, Sec. 2),

(3) Setting fire to any of Her Majesty's ships, stores, etc. (Dockyards Protection Act, 1772), and

(4) Capital murder, that is to say, any murder (*a*) done in the course or furtherance of theft; (*b*) by shooting or by causing an explosion; (*c*) done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from lawful custody; (*d*) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting; (*e*) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting.[3] The above are subject to sub-section (2) of the same Sec. 5. Further, the death penalty is also incurred for repeated murders, that is, where before a conviction of murder, a person has been convicted of another murder on a different occasion, both murders being done in Great Britain.[4]

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1. Municipal Committee, Ambala *v.* Basakhi Ram, A. I. R. 1963 Punj. 175 at p. 178: 64 Punj. L. R. 949.
2. State of Kerala *v.* Chacko, 1961 Ker L.J. 122: 1961 Ker. L. T. 328: (1961) 1 Ker. L. R. 184.
3. *See* sub-section (1) of Sec. 5 of the Homicide Act, 1957.
4. *See* Sec. 6 of the Homicide Act, 1957.

It will, therefore, be seen that the extreme penalty of the law in England is reserved for offences regarded as particularly heinous at the present day.

Capital punishment is confined to six principal offences.

From the tabulated statement elsewhere given, it will be seen that the capital punishment is confined by the Code only to six principal offences, namely :

(1) Treason, e. g. waging war against the Government of India (Sec. 121); abetment of mutiny (Sec. 132).

(2) Perjury resulting in conviction and death of an innocent person (Sec. 194).

(3) Murder (Secs. 302 and 303).

(4) Abetment of suicide of a minor or insane person (Sec. 305).

(5) Attempted murder by a life convict (Sec. 307, Cl. 2).

(6) Dacoity with murder (Sec. 396).

The offences for which the Code award the sentence of death are thus really two, namely, (*a*) treason, and (*b*) murder. In this respect the Code presents a notable contrast to the English law, and the authors had deliberately made the departure adding "that to put robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security for life".[1] Then as regards offences in which there is a close connection with murder, the draftsmen observed that as those offences were almost always committed under such circumstances that the offender had it in his power to add murder to his guilt, there would be no restraining motive if the punishment of the crime which he has already committed were exactly the same with the punishment for murder. "A law which imprisons for a rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which also hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished or robbed, it holds out to him a strong motive to follow up his crime with a murder."[2]

Death sentence to be sparingly inflicted.

As regards the sentence of death itself, though the draftsmen could not dispense with the sentence, they added that it is a sentence that ought to be very sparingly inflicted.[3] It is provided by the Code of Criminal Procedure that "when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead".[4] And "when the accused is sentenced to death by Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred".[5] Where a sentence of death is passed by a Court of Session, the proceedings have to be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.[6] The High Court may confirm the

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1. Note A, Reprint, p. 93.
2. Note A, Reprint, p. 39, approved by the Law Commissioners in 2nd Report, Sec. 462.
3. *Ibid.*
4. Section 368 (1), Cr. P. C.
5. Section 371 (3), Cr. P. C.
6. Section 374, Cr. P. C.

sentence, or pass any other sentence warranted by law, or annul the conviction.[1] If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.[2]

11. Supreme Court practice.—It is not the practice of the Supreme Court to interfere by special leave in the matter of punishment imposed for crimes committed, except in exceptional cases where the sentences are unduly harsh and do not really advance the ends of justice.[3]

12. Suspension and remission of sentence.—Suspension of a sentence and its remission are two distinct things. Section 401, Criminal Procedure Code, 1898, clearly provides both for remission and for suspension of a sentence with or without condition. If the Legislature had meant that there should be no difference between the two, then it would not have separately provided for suspension of sentences without conditions. Suspension clearly means that the sentence has not been remitted and it is only in abeyance at the pleasure of the person, who is authorised to suspend the sentence, and if no conditions are imposed, then the Provincial Government has the right to have the accused person re-arrested and direct that he should undergo the rest of the sentence without assigning any reason.[4]

13. Punishment of deaf and dumb.—There is no provision in the Indian Penal Code under which a person can be exempted from punishment merely because he is deaf and dumb. The Courts have to do their best to see that the trial is a fair trial and the accused gets a chance of putting up such defence as he may have. Where a deaf or dumb person is committed to stand his trial in the Court of Session or is convicted, a reference has to be made under Sec. 341, Cr. P. C., as a measure of extra precaution so that the High Court may satisfy itself that, under the circumstances, it was a fair trial or enquiry and in the case of an order of commitment the High Court may further give directions as to how the trial may proceed in the Court of Session.[5]

14. Sentence and punishment.—For convenience, a sentence imposed upon a person for an offence punishable under the Indian Penal Code is generally referred to as a sentence under the Indian Penal Code but a more precise view is that it is a sentence under the Criminal Procedure Code for an offence rendered punishable by the Indian Penal Code.[6]

15. Children and sentence of death.—In certain States of the Indian Union there are Acts which have done away with the sentence of death or transportation for life in case of children below the age of sixteen, e. g. Bombay Act LXXI of 1948, Central Provinces (now Madhya Pradesh) Act X of 1928, Bengal Act II of 1922 and Madras Act IV of 1920. Even in States

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1. Section 376, Cr. P. C.
2. Section 382, Cr. P. C.
3. Adamji Umar Dalal *v.* State of Bombay, A. I. R. 1952 S. C. 14 at p. 16: 1952 S. C. R. 172: 1952 B. L. R. (S. C.) 43: (1951) S. C. J. 820: 54 P. L. R. 129: 1952 A. L. J. 94: 1952 M. W. N. 147: 65 L. W. 209 : 54 Bom. L. R. 400. In this case fines ranging from Rs. 10,000 to Rs. 15,000 (which were in addition to imprisonment) were reduced to Rs. 1,000.
4. Jagdish Prasad *v.* Rex, A. I. R. 1949 All. 626 at pp. 626, 627: I. L. R. (1950) All. 816 : 50 Cr. L. J. 999 : 1950 A. L. J. 219.
5. Emperor *v.* Ulfat Singh, A. I. R. 1947 All. 301 at p. 301: I. L. R. (1948) All. 490: 1947 A. W. R. (H. C.) 99: 1947 A. L. W. 190: 1947 A. Cr. C. 106: 1947 A. L. J. 73.
6. Akbar *v.* Emperor, A. I. R. 1933 Pesh. 90 at p. 93 : 35 Cr. L. J. 899 : 147 I. C. 180.

in which there is no legislative enactment providing for the immunity of children from the extreme penalty of death, the tender age of the accused is taken into consideration passing the lesser penalty of transportation for life[1] (now imprisonment for life, *see* Act 26 of 1955).

16. Transportation.—Though "transportation" as a form of punishment has been abolished by Criminal Procedure (Amendment) Act, 26 of 1955, this paragraph and the next written by the learned author before its abolition will be seen to be of historical interest and are reproduced here.

Sentence of transportation a historical retrospect.

The sentence next after death in gravity is transportation for life, which is only another name for banishment. At the time the Penal Code was enacted transportation meant transportation beyond the seas. For many years the only place to which they have been sent is the Andaman Islands. In England transportation beyond seas ceased as a punishment in 1854. In India it is still a part of the penal system, but Acts passed since the Penal Code have radically changed the law relating thereto. Under Sec. 368 (2), Cr. P. C., no sentence of transportation shall specify the place to which the person sentenced is to be transported. Sections 29 to 32 of the Prisoners Act of 1900 make it plain that when a sentence of transportation is passed it is no longer necessarily a sentence of transportation byond the seas. Nowhere is any obligation imposed on the Government of India or of the States to provide any places overseas for the reception of the prisoners sentenced to transportation. Under Sec. 32 of the Prisoners Act the State Government may appoint the places within the State or within another State, to which the prisoners so sentenced shall be sent, and the State Government or some officer duly authorised by it shall give orders for the removal of such prisoners to the places so appointed. So, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment.[2]

Transportation if is always for life.

With two exceptions when, where transportation is a part of the sentence, the term of transportation is always for life, a sentence of transportation for life[3] means a sentence of transportation for the whole of the remaining period of the convicted person's natural life.[4] Convicts serving this sentence may be granted remission for good conduct, and for the purpose of calculating remission in the case of life sentences, they are treated as sentences of 20 years. This is no doubt the reason why Sec. 57 of the Code provides that for calculating fractional part of a life sentence it should be treated as one of 20 years.[5]

The sentence is probably as ancient as the other sentence of death, and it has been the favourite method of putting out of the way pol'tical offenders and schismatics, rebels and revolutionaries, patriots and reformers. It is even now the method of lopping off tall poppies, and semi-barbaric nations resort to it sanctifying its usage on the ground of *lettres de catchet*, which is however not a judicial but an executive act.

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1. *See* Nasib Singh Prem Singh *v.* Emperor, A. I. R. 1943 Lah. 89 at p. 92 : 44 Cr. L. J. 552 ; Jhiktu Bhogta *v.* Emperor, A. I. R. 1942 Pat. 427 at p. 429 : 43 Cr. L. J. 544. For further notes *see* under Sec. 302.
2. Section 59, I. P. C. (now repealed by Act 26 of 1955).
3. Reference to transportation for life should now be considered imprisonment for life.
4. Nga Tha Byit, (1893-1900) L.B.R. 13.
5. *See* Kishori Lal *v.* Emperor, A. I. R. 1945 P. C. 64 at pp. 66, 67: I. L. R. (1945) Lah. 325 : 72 I. A. 1 : 49 C. W. N. 339 : (1945) 1 M. L. J. 399: 58 L. W. 251 : 1945 A. L. J. 265; 46 Cr. L. J. 626.

In *Gopal Vinayak Godse* v. *State of Maharashtra*,[1] the Supreme Court explained the legal position thus: A prisoner sentenced to life imprisonment is bound in law to serve the life term in prison, unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure. For the purpose of working out remission which a prisoner is enabled to earn under the rules framed under the Prisons Act, the sentence of imprisonment of life is ordinarily equated with a definite period; but it is only for that particular purpose and not for any other purpose. As the sentence of imprisonment for life is of indefinite duration, the remission earned by such a convict does not, in practice, help him unless the appropriate Government remits the sentence under Sec. 401 of the Code of Criminal Procedure on a consideration of the relevant factors including the period or remission earned. The question of remission is exclusively within the province of the appropriate Government.

In view of this legal position, it is clear that the petitioner, the sentence on whom was commuted to transportation for life, is not entitled to be released unless the appropriate Government remits the remaining part of the sentence, under Sec. 401 of the Code of Criminal Procedure.[2]

Life imprisonment reserved for following offences.

The sentence of transportation (now imprisonment for life) figures more largely than the extreme penalty of law. It is the maximum sentence reserved for the following offences:

(1) Sec. 121. Waging war (alternative with death).
(2) Sec. 121-A. Conspiracy against the State.
(3) Sec. 122. Collection of arms, etc. with the intention of waging war against the Gavernment of India.
(4) Sec. 124-A. Sedition.
(5) Sec. 125. Waging war against any Asiatic power.
(6) Sec. 128. Pulbic servant allowing prisoner of State or war in his custody to escape.
(7) Sec. 130. Aiding, etc. of such escaped prisoner.
(8) Sec. 131. Abetment of mutiny.
(9) Sec. 132. Abetment of mutiny if it is committed in consequence (alternative with death).
(10) Sec. 194. Perjury in a capital crime.
(11) Sec. 195. Perjury in a crime punishable with transportation.
(12) Sec. 225. Resistance to apprehension of a convict sentenced to death.
(13) Sec. 225-A. Omission to apprehend or sufferance of escape on the part of public servant in certain cases.
(14) Sec. 226. Unlawful return from transportation (omitted by Act 26 of 1955).
(15) Sec. 232. Counterfeiting coin.
(16) Sec. 238. Import or export of counterfeit coin.
(17) Sec. 255. Counterfeiting Government stamps.
(18) Sec. 302. Murder (alternative with death).
(19) Sec. 304. Culpable homicide.
(20) Sec. 305. Abetment of suicide by a minor or insane person (alternative with death: alternative punishment omitted by Act 26 of 1955).
(21) Sec. 307. Attempted murder with hurt.
(22) Sec. 311. Being a *thug*.
(23) Sec. 313. Causing miscarriage without woman's consent.

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1. A. I. R. 1961 S. C. 600.
2. Alfred J. Peries *v.* State of Mysore, A. I. R. 1967 Mys. 181 at p. 182.

(24) Sec. 314. Causing miscarriage without women's consent, if the woman dies.
(25) Sec. 315. Abortion.
(26) Sec. 326. Causing grievous hurt by a dangerous weapon.
(27) Sec. 329. Causing grievous hurt for extortion.
(28) Sec. 364. Kidnapping and abduction in order to murder.
(29) Sec. 371. Trade in slaves.
(30) Sec. 376. Rape.
(31) Sec. 377. Unnatural offence.
(32) Sec. 388. Extortion by threat of accusation of offence.
(33) Sec. 389. Intimidation by threat of accusation of offence.
(34) Sec. 394. Robbery with hurt.
(35) Sec. 396. Murder in dacoity (alternative with death).
(36) Sec. 400. Belonging to a dacoit gang.
(37) Sec. 409. Criminal breach of trust by public servant, banker, merchant, agent, etc.
(38) Sec. 412. Receiving property stolen in dacoity.
(39) Sec. 413. Trade in stolen property.
(40) Sec. 436. Mischief by fire to destroy a house, etc.
(41) Sec. 437. Mischief by fire with intent to destroy vessels, etc.
(42) Sec. 449. House-trespass to commit an offence punishable with death.
(43) Sec. 459. Grievous hurt caused whilst committing lurking house-trespass.
(44) Sec. 460. Death or grievous hurt by a confederate concerned in house-breaking.
(45) Sec. 467. Forgery of a valuable security, etc.
(46) Sec. 472. Manufacturing seal with intent to commit forgery.
(47) Sec. 474. Possession of a forged security, etc.
(48) Sec. 475. Counterfeiting device or mark for forgery, etc.
(49) Sec. 477. Fraudulent tampering of a will, etc.
(50) Sec. 511. Certain attempts.

17. Justification of transportation.—Previous convicts may also in certain other cases be sentenced to transportation. This sentence is thus one which presents as much variety, as it is one which is the maximum sentence which may be passed in any case in which an enhanced sentence admissible. The draftsmen explained the appropriateness of this sentence as follows: "The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is an unmixed evil. It is by the terror which it inspires that it produces good, and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance, but it is not so much dreaded before hand, nor does a sentence of imprisonment strike either the offender or the bystanders with so much horror as the sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion, over an element which they regard with extreme awe, to a distant country, of which they know nothing, and from which he is never to return. It is natural that his fate should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends."[1]

Horrors of Black Water.

1. Note A, Reprint, p. 94

The concluding remark has, however, no application, for law now allows transportation for seven or more years, in which case, the transported convicts do return to the scene of their earlier years, though the terror of exile has by no means abated on that account. Indeed, it may be doubted, if the learned draftsmen have not attributed the terror to a cause which is not all in all. For no little terror of transportation is due to the fact that the person banished is as good as dead, for his relations cannot see him, and if a Hindu, his crossing the Black Water involves forfeiture of his caste. That this last terror has not wholly disappeared will be testified to by those who have to cross the Black Water for their intellectual advancement, and who on return find themselves strangers in their native land.

18. Imprisonment.—Imprisonment is ordinarily confinement of a person in a penitentiary or gaol by way of punishment. But such confinement must necessarily be in a place prescribed for the purpose. "It seems clear that any place, whatsoever, wherein a person under a lawful arrest for a supposed crime is restrained of his liberty—whether in the stocks at the street, or in the common gaol, or in the house of a constable or or private person, or the prison of the ordinary—is properly a prison within the statute; for imprisonment is nothing else but a restraint of liberty."[1] So it is imprisonment in the true sense of the term where a person is sentenced till the rising of the Court,[2] as the liberty of the person is thus restrained though the person so sentenced is not confined in gaol or subjected to gaol discipline. Of this sentenee the framers of the Code wrote : "Of imprisonment we propose to institute two grades, *rigorous* imprisonment and *simple* imprisonment. But we do nor think the Penal Code is the proper place for describing, with minuteness, the nature of either kind of punishment." This was, therefore, left to the gaol discipline, and tasks varying with the locality, health and culture of the prisoners have been prescribed as forms of rigorous imprisonment. In England the picking of oakum and working the treadmill, in India the picking of wool, the crushing of grain, the breaking of metal and the pressing of oil are regarded as the usual tasks allotted to rigorously imprisoned offenders; while lighter work or no work at all is exacted from those sentenced to simple imprisonment. Indeed, simple imprisonment is really detention in gaol custody, the prisoner being at liberty to do light work to break the monotony of prison life, if he is so disposed. Such sentence is appropriate to men of position or culture to whom the ignominy of imprisonments is a sufficient punishment.[3]

Rigorous and simple imprisonment.

19. Why minimum sentences not fixed.—It was originally proposed to fix both a minimum as well as a maximum punishment in several cases, but the propriety of prescribing a minimum sentence in all cases was questioned by the Select Committee, who were of opinion that considering the general terms in which the offences had been defined, and

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1. 2 Hawk, P. C. 18, Sec. 4. The statement is made with reference to 1 Edw. II ; *De frangentibus prisonam*. *See* also Bird *v.* Jones, (1885) Q. B. 742 : 115 E. R. 668 and Narasayya Pantulu *v.* Capt. R. A. C. Stuart, (1864-65) 2 M. H. C. R. 396.
2. See *In re* Muthu Nadar, A. I. R. 1945 Mad. 313 at p. 313 : I. L. R. (1945) Mad. 529 : 47 Cr. L. J. 50 : (1945) 1 M. L. J. 180 : 1945 M. W. N. 181 : 8 L.W. 77, overruling Kunhi Bava *v.* Emperor, A. I. R. 1929 Mad. 226 : 56 M. L. J. 550 : 114 I. C. 234 and Thamana Ramalingayya, A. I. R. 1942 Mad. 723 : I. L. R. (1943) 2 M. L. J. 723 : 55 L. W. 587 : 1942 M. W. N. 592, where such a sentence was considered to be evasion of justice merely.
3. Section 397, I. P. C.

the presence of mitigating circumstances which may render adherence to the prescribed minimum a matter of hardship and even injustice, it was ultimately resolved to fix only the maximum, the apportionment of sentence, in each case, being left to the discretion of the Judge. But in the case of certain heinous offences, it was considered indispensable to fix deterrent minimum sentences, and so the Code prescribes minimum sentences in the two following cases : (*i*) Where at the time of committing robbery or dacoity, the offender uses any deadly weapon or causes grievous hurt to any person—in which the minimum term of imprisonment fixed is seven years; and (*ii*) the same sentence is prescribed as the minimum in the case of a robber and dacoits armed with a deadly weapon at the time of the commission of the offence.[1] In all other cases the Code fixes no minimum sentence. The maximum sentence fixed for a single offence is 14 years,[2] and the lowest term actually named for one offence is twenty-four hours.[3] And so while the kind of imprisonment to be awarded in in each case is left to the judgment of the Judge, the Code instances three cases in which the flagrant nature of the crimes is marked with the single sentence of rigorous imprisonment. These are (*i*) offences of giving or fabricating false evidence with intent to procure conviction for an offence which is capital by the laws in force in India,[4] (*ii*) unlawful return from transportation[5]; and (*iii*) house-trespass in order to commit an offence punishable with death.[6]

Deterrent minimum punishment for heinous crimes.

On the other hand, there are a number of delinquencies for which the sentence prescribed is only simple. These cases are :

Simple sentences for the following offences.

(1) Sec. 168. Public servant unlawfully engaging in trade.
(2) Sec. 169. Public servant unlawfully buying or bidding for property.
(3) Secs. 172, 173. Evasion of summons.
(4) Sec. 174. Failure to attend on summons or order.
(5) Sec. 175, Failure to produce document.
(6) Sec. 176. Failure to give information.
(7) Sec. 177. Failure to render assistance.
(8) Sec. 178. Refusal to take oath.
(9) Sec. 179. Refusal to answer questions.
(10) Sec. 180. Refusal to sign statements.
(11) Sec. 188. Disobedience of legal order.
(12) Sec. 233. Escape from confinement through negligence of a public servant.
(13) Sec. 225-A (*b*). To apprehend, etc. negligent omission.
(14) Sec. 228. Interruption of judicial proceedings.
(15) Sec. 291. Continuance of nuisance after injunction to discontinue.
(16) Sec. 341. Wrongful restraint.
(17) Secs. 500, 501, 502. Defamation and knowingly printing or selling defamatory matter.
(18) Sec. 509. Indecent behaviour.
(19) Sec. 510. Misconduct by a drunken person.

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1. Section 398, I. P. C..
2. Section 55, I. P. C.
3. Section 510, I. P. C.
4. Section 194 I. P. C., as amended up to date.
5. Section 226, I. P. C. 1 (now omitted by at 26 of 1955).
6. Section 449, I. P. C.

The classification is made only to show what the view of the Legislature is as regards the gravity or otherwise of the various crimes described in the Code. This, however, gives only a general idea of the relative importance of the various crimes. It gives no further suggestion. In fact, as observed before, the Legislature has advisedly left the apportionment of punishment, in each case, to the Judge. And so left, the Judges often find themselves in a quandary as to the principles by which they should regulate their discretion. The result has been a gross inequality of the punishments awarded by the different Courts, and this has led to the establishment of principles, which, though leaving sufficient discretion to the Judge, are yet such as are intended to reduce the inequality to a minimum. These principles will, therefore, be here set out.

20. Commencement and suspension of imprisonment.—A sentence of imprisonment ought to commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence from some future date, as in cases covered by Secs. 46, 47 and 48 of the Code of Criminal Procedure. And if an original sentence to commence at a future period would be bad, then the suspension of a sentence to commence immediately would also be bad. Even if the imprisonment awarded is for so short a period (three days in the instant case), that it would expire before accused can obtain relief under Sec. 421, Cr. P. C. (of the Code of 1861) the Magistrate passing the sentence has no power to suspend it at the request of the accused.[1] Once the sentence has been pronounced, the Judge has no jurisdiction, in the absence of the accused, to vary the sentence even if the term of imprisonment is not altered but only distributed among the various counts, so that the maximum prescribed for some of them may not be exceeded.[2]

21. Imprisonment till the rising of the Court.—In the case of imprisonment for one day the day on which the sentence is passed counts as one day and the accused cannot be detained in jail on a warrant issued for such period. Hence rigorous imprisonment for one day and detention till the rising of the Court are not different sentences.[3] Therefore a sentence of imprisonment till the rising of the Court is one in accordance with the law. It may well be that a sentence of imprisonment until the rising of the Court should only be imposed in very exceptional cases, but where the facts warrant it the Court has power to pass it.[4]

22. Principles of punishment.—In every csiminal case, two things have to be considered : *first*, the heinousness or enormity of the crime itself ; and *secondly*, the particular circumstances under which the accused has committed it. The first is determined by the law, as will be seen from the preceding discussion, and the comparative table of offences prepared for that purpose. The second point requires further consideration, and will now be considered. Amongst the various offences treated of in the Code the first in order of importance are offences against the *person*. These are

Offences against persons.

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1. Kishen Soonper Bhattacharjee, (1869) 12 W. R. 47 (Cr.).
2. Lawrence *v.* R., (1933) A C. 699 : 149 L. T. 574 ; *see* also Sec. 370, Cr. P. C.
3. Mulluk Chand Sheikh *v.* The King, A. I. R. 1949 Cal. 104 at p. 104 : 50 Cr. L. J. 135 : 53 C. W. N. 106.
4. Muthu Nadar, *In re*, A. I. R. 1945 Mad. 313 at p. 314 : I. L. R. (1945) Mad. 529 : 47 Cr. L. J. 50 : 221 I. C. 133 : 58 L. W. 77 : 194 M. W. N. 181 : (1945) 1 M.L.J. 185, overruling Kunhi Bava *v.* Emperor, A. I. R. 1929 Mad. 226 : 56 M. L J. 550 and *In re* Thammana Ramalingayya, A. I. R. 1942 Mad. 723 : I. L. R. (1943) Mad. 230 : 204 I.C. 65 : (1942) 2 M.L.J. 723 : 55 L. W. 587 : (1942) M. W. N. 594.

properly accounted as of greater magnitude than offences against property : (*i*) because bodily injury inflicts more suffering on the party injured than loss of property ; (*ii*) it is more difficult to protect persons against personal violence ; (*iii*) personal violence spreads a feeling of insecurity and terror through the community ; and (*iv*) injury from it in serious cases is irreparable.

Personal crimes are more serious than offences against property.

As, therefore, *personal* crimes are more serious than offences against property, it is the duty of the Judge to see that the sentence in the one case is heavier than in the other. But at the same time it must not be forgotten that those are also the cases in which mitigating circumstances are often present. For they are crimes which may be committed in the supposed exercise of the right of private defence. They may be the result of a momentary impulse, or provocation, or a feeling of wrong, or they may be very technical having no criminality in them,[1] all of which are mitigating circumstances which it would be injudicious to ignore. Then, again, as regards the offenders, he may be a man of tender age or of immature understanding, an old man of senile intellect, a man given to uncontrollable fits of temper, or he may have acted under the order of a person in authority over him, or, of one who was in a situation to influence him or to dominate his will. Then, again, the offence may have been committed under a combination of circumstances and the influence of motives which are not likely to recur either with respect to the offender or to any other. Lastly, the Judge cannot ignore the state of health and sex of the accused, his position in life and the extent of deprivation of the ordinary comforts to which he was accustomed.[2]

23. Aggravating circumstances.—On the other hand, the following circumstances cannot be regarded as otherwise than aggravating : (*i*) deliberate violence—especially when it is superadded to another crime, viz. robbery and decoity, in which case, the offender justly forfeits all human sympathy ; (*ii*) use of lethal weapons ;[3] (*iii*) wanton cruelty and malignity ; (*iv*) treachery as where a man is inveigled into an ambush and then murdered ; (*v*) nature of the injury—as where man is clubbed to death, or where he is stabbed with a knitfe ; (*iv*) motives, which will, of course, play a most prominent part in determining sentences. For though the proof of motive is not necessary to establish a crime, it is an element which is very material in determining the sentence. Thefts from places of public resort, such as fairs, railway trains and the like, are justly deserving of condign severity, inasmuch as such offences are extremely

Proof of motive very material in determining sentence.

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1. Ananda Parhi, A. I. R. 1931 Pat. 342 at p. 343.
2. Bentham mentions the following nine circumstances in mitigation of punishment : (1) absence of bad intention ; (2) provocation ; (3) self-preservation ; (4) preservation of some near friend and (5) transgression of the limits of self defence; (6) submission to menaces ; (7) submission to authority ; (8) drunkenness; and (9) childhood. The published reports of cases give effect to these considerations, e.g. youth is always a ground for mitigation in a case of murder. Nga The Kin, 11 I. C. 792 ; *see* also cases under Sec. 302. So age (Muniandi, 16 M.L.T. 535) ; position (Kewala, 1913 P. L. R. 317 : 21 I C 478) ; but a Baluchi custom justifying the accused in taking the life of his sister for unchastity, is no ground, for mitigation of sentence; Rahim Khan 24 I. C. 889 ; Kaim, 28 S L. R. 279.
3. Mya Din, 10 L. C. (R.) 773.

difficult to discover, and, therefore, profitable to those engaged in committing them.[1] The same reason justifies the severity with which thefts of ornaments from infants are visited.

All criminals divided into three classes.

There is still another consideration which demands notice. All criminals may be divided into three classes, namely, (*i*) the casual, (*ii*) the habitual, and (*iii*) the professional.

(*i*) Casual criminal.

The casual criminal may be a victim of circumstances. On the other hand, he may be a professional criminal in the bud. But since the Court has no reason to suppose that it is so, all first offenders have the sympathy of the Court, provided, of course, that they have not forfeited it by their aggravating conduct. In the absence of such circumstances the case of a first offender must be viewed with commiseration and as in such a case repentance and reformation are always possible, punishment should be rather by way of warning than of penalty. Such a criminal should be given every chance to retrieve his lost reputation, and the Legislature has now provided means by which this may be done.[2] Even when warning, and recognizance are deemed insufficient the penalty inflicted should correct and not sting. It should be such as to produce contrition and not recoil.

(*ii*) Habitual criminal.

The case of a habitual offender deserves condign punishment. He is a pest on society and he has forfeited its protection. But while it is so, there may still be mitigating circumstances in his case. He may have been driven to the crime by famine and hunger, the wants of his family, or the failure of his crops. Though a habitual, he may have exercised moderation in his crime, helping himself to just what he wanted, and leaving alone what he did not. A petty plunderer like this can scarcely be treated as a habitual in the real sense of the word.

(*iii*) Professional criminal.

A habitual criminal may become a professional criminal. Educated to crime, living by crime, he commits crime as his business life, deliberately, with malice aforethought calculating carefully the proportion which the chance of profit bears to the risk of detection, capture, trial, conviction and punishment—all of which are taken into account.[3] In India, there are castes of professional criminals, the members of which follow thieving as a hereditary calling. These cut-throats and thieves were, at one time, the *thugs* and *pindarees* whose terror is at present immortalized in nursery rhymes. But, though they have passed away, there still remains a number of castes of hereditary thieves such as the *Minas*, *Baddars* and *Pasees*, who are trained to their ancestral calling from early childhood. In the Deccan there are castes of hereditary coiners. In the North there are whole villages of depredatory tribes who overrun the country after the unctuous festival of Dassehra, offering their sacrifice to their protecting deity, the Goddess Kali. They consult Brahmin astrologers as to the "auspicious" day and hours for their burglaries. They work in gangs and assume disguises through which only a skilled eye can penetrate. They are highwaymen, house-breakers by night and holy mendicants by day. Thus safely they reconnoitre the places which they plunder at night. They possess jemmies, picklocks, skeleton keys and unsuspecting long nails which

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1. Ananda, 15 I. C. (B.) 803.
2. Section 562, Cr. P. C.; *see* also the Probation of Offenders Act, 1958 (20 of 1958).
3. Cox on the *Principles of Punishments*, p. 135.

they dexterously employ in house-breaking. They can jump incredibly high, and scale over walls with nothing but a *dhoti* or rope to support them. Such criminals, whenever brought to justice, should have all the terrors of law shaken upon them. They are enemies of society upon which they prey and they should be hounded down by a remorseless sentence.

24. Offences against property.—The character of the criminal is, then, an important determining factor in the awarding of punishment. But as in the case of offences against the person, so in the case of offences against property, there are aggravating and mitigating circumstances affecting the crime apart from the criminal. These are sufficiently indicated in the sections which have accordingly provided for graduated sentences, applicable to such cases. But apart from these circumstances, there are others which aggravate or mitigate the crime, and which have to be taken into consideration in awarding sentence. An offence, for instance, committed in respect of property, of necessity exposed but yet impossible to be closely watched by the owner, is naturally visited by a severer punishment to safeguard it, than property over which closer supervision is possibie. Horses and cattle in the fields, or with travellers encamping with their belongings in the open illustrate this rule. The case with which an offence may be committed as compared with the gravity of the possible consequences is another circumstance of aggravation. Hence the severity of sentence visited on forgers, coiners and utterers of base coin ; law has no means of prevention in these, except by awarding exemplary sentence both as a deterrent to the wrong-doer as well as a warning to others similarly inclined.

25. Offences against peace.—Lastly, offences against the *peace* receive the marked disapproval of law, not only because they are offences against the person but also because they lead to widespread mischief by attracting partisans and confederates and by the recklessness which the collective courage and encouragement beget. They are also the fruitful source of *vendetta* which it is the object of law to avert. This exegesis on the measure of punishment is not intended to be complete ; because to be complete, it must pass in review all the sections of the Code which have worked out the relative gravity of the offences in the graduated sentences annexed to them. The principles hereinbefore discussed are, therefore, only supplementary and are intended to give only an indication of the trend of judicial discretion as influenced by other circumstances.

26. Fine.—It has been said in *Reg* v. *Lewis*,[1] that a fine, as opposed to costs should be within an affender's capacity to pay.[2]

27. Forfeitures.—Blackstone justified the sentence of forfeiture on an assumed original compact between the subject and the State, in which the State safeguarded civil rights of the subject so long as the subject obeyed its laws.[3] But this theory has long since become obsolete and is no longer the favoured formula of sociology. Under English law, forfeiture is now reserved for outlawry.[4]

Sentence of forfeiture when permissible.

The Code, as originally drafted, followed the English law before its amendment in 1870, and was only amended in 1921[5] by abolishing the sentence of forfeiture in the case of offences except those punishable under Secs. 126, 127 and 169 of this Code, in addition to which Sec. 517 of

1. (1965) Cr. L. R. 121 C. C. A.
2. Regina *v* Churchill, (1966) 2 W. L. R. 1116 at p. 1125.
3. 4 Black, pp 383 and 384.
4. 33 & 34 Vict., c 23, Sec. 1.
5. Act XVI of 1921.

the Code of Criminal Procedure enables the Court "to make such order as it thinks fit for the disposal of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence." But, inasmuch as this section authorises both restoration as well as confiscation of property and is limited to property used in the commission of the offence, it cannot be treated as legalizing the sentence of forfeiture.

On a conviction under Sec. 7 of the Essential Supplies (Temporary Powers) Act (24 of 1946) read with (Cl. 3), Cotton Textile (Control of Movement) Order, 1948, the Magistrate awarded in addition to the sentence of fine a sentence of forfeiture of cloth. Forfeiture of property is one of the recognised forms of punishments. Section 53, I. P. C., enumerates the different kinds of punishments which can be awarded to an accused person and forfeiture of property and fine are mentioned as two distinct kinds of punishments under clauses fifthly and sixthly. The result, therfore, is that in the instant case punishments of two different kinds were awarded to the accused and, therefore, the sentence was not of fine only within the meaning of Sec. 414. If the exception contained in Sec. 414 did not apply the case fell within the ordinary rule contained in Sec. 408, Cr. P. C., and the appeal lay. A sentence of fine has been combined with the sentence of forfeiture of property which is a punishment of a different kind. An appeal, therefore, lay to the learned Sessions Judge. The value of the cloth ordered to be forfeited was totally immaterial. No revision could be entertained at the instance of the accused.[1]

Article 20 (1) deals with conviction of persons for offences and for subjection of them to penalties. It provides, firstly, that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence". Secondly, it provides that no person shall be "subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence". Clearly, therefore, Art. 20 is dealing with punishment for offences and provides two safeguards, namely, (*i*) that no one shall be punished for an act which was not an offence under the law in force when it was committed, and (*ii*) that no one shall be subjected to a greater penalty for an offence than what was provided under the law in force when the offence was committed. The provision for forfeiture under Sec. 13 (3) of the Criminal Law Amendment Ordinance, 1944, has nothing to do with the infliction of any penalty on any person for an offence.[2]

There is no doubt that forfeiture in Sec. 53 of the Indian Penal Code is a penalty but when Sec. 13 (3) of the Criminal Law Amendment Ordinance speaks of forfeiting to His Majesty the amount of money or value of the other property procured by the accused by means of the offence, it in effect provides for recovery by the Government of the property belonging to it, which the accused might have procured by embezzlament, etc. The mere use of the word "forfeited" would not necessarily make it a penalty.

The forfeiture by the District Judge under Sec. 13 (3) cannot be equated to forfeiture of property which is provided in Sec. 53 of the Indian Penal Code.[3]

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1. Aziz Khan *v.* State, A. I. R. 1954 All. 642 at pp. 642-643 : 1954 A. L. J. 229 : 1954 A. W. R. (H. C.) 283.
2. State of West Bengal *v.* S. K. Ghosh, A. I. R. 1963 S. C. 255 at p. 263 : (1963) S. C. R. 111.
3. *Ibid*. at pp. 262, 263.

28. Pecuniary forfeiture or fine.—The sentence of fine is allied to forfeiture. It is, indeed, forfeiture of money by way of penalty.[1] It was justified by the Law Commissioners on the ground of its universality, though they admitted that its severity should be proportionate to the means of the offenders, since the sentence not only affected him but also his dependants.[2]

Four points for measure of sentence of fine.

Since fine with all its defects continues to be a sentence and the Code does not invariably prescribe the miximum it is necessary that it should conform to certain well-defined principles ensuring that its amount, in each case, is reasonable but not excessive. In order to secure this result, four points have to be kept in view : (*i*) The profit of the offence; (*ii*) the value of the thing which is the subject-matter of the offence; (*iii*) the amount of the injury; (*iv*) the fortune of the offender.[3] These reasons underlie the report of the authors of the Code and have been adopted in other systems of law.[4] In some cases, not heinous, the Legislature has fixed a limit, but, where no limit has been fixed, it does not follow that fine should be unlimited. Consequently, excessive fine is a sufficient ground for appeal or revision. Fine as an additional penalty can only be justified in special cases : (*a*) where a short term of imprisonment is considered expedient as where the offender is too old or infirm to undergo a long term of imprisonment, (*b*) where it is desirable to compensate the complainant, and (*c*) where the offence involves misappropriation of property by the offender. In other cases, it is altogether inappropriate to add fine to a substantial term of imprisonment, but in practice, it can only be in exceptional circumstances that it is suitable and appropriate to inflict a fine as well as a substantial term of imprisonment.[5]

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1. It is rightly so treated by Bentham in his *Principles of Penal Law*, Pt. 2, Bk. 3, pp. 467—470 (Vol. I, Coll. Ed.). On pp. 468, 469, Bentham classifies the superiority of fine as follows : (1) It has the striking advantage of being convertible to profit. (But then Bentham forgets that on that very account it is liable to abuse.) (2) It can be regulated according to the means of the offender. (Why should this be an advantage and why cannot other punishments be also regulated ?) (3) It implies no infamy (so far it fails to fufiil the object of punishment). (4) It is remissible so that complete reparation can be made for an unjust sentence—which is certainly its great advantage. (5) It is popular (which is the reverse of its advantage) One further advantage overlooked by Bentham is that fine has the effect of relieving the tax-payer by reducing the cost of prevention and punishment of crime. The true disadvantages of fine as a sentence are stated by Bentham to be as follows : (1) It is the family and the dependants who are innocent. (2) It is not examplary, as at its execution no spectacle is exhibited.

   The true disadvantage of fine is its inappropriateness in serious crime. Its true advantage lies in the means it affords for compensating the complainant.
2. Note A, Reprint, p. 97.
3. Note A. Reprint, p. 98.
4. This is in accordance with 4 Black., 377; view of the English Criminal Law Commissioners, (7th Ed., p. 107); and the Bill of Rights, though advisedly opposed to Livingstone's Code of Lousiana (*see* Note A, pp. 97—99).
5. Islam *v.* Emperor, A. I. R. 1931 Cal. 710 at p. 711 (2) : 134 I. C. 1136 : 33 Cr. L. J. 31 (1) : 53 C. L. J. 455 : 35 C. W. N. 519 ; Adamji Umar Dalal *v.* State, A. I. R. 1952 S. C. 14 : 54 Bom. L. R 400.

Supreme Court's observation.

The Supreme Court, after stressing the need for due proportion between an offence and the penalty for it, laid down that in imposing fine it was necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence. Where a substantial term of imprisonment had been inflicted, and excessive fine should not be added to it save in exceptional cases.[1] In *Adamji Umar Dalal* v. *State of Bombay*,[2] the Supreme Court had before them a case of black marketing where six months, imprisonment had been combined with heavy fines, in reducing the fines of Rs. 15,000 to only Rs. 1,000 their Lordships emphasized that the Court must always bear in mind the necessity or proportion between an offence and the penalty and considered that due regard had not been paid to those considerations and that the zeal to crush the evil of black marketing had perturbed the judicial mind in the determination of the measure of punishment.[3] Where the law permits a sentence of fine as an alternative there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.[4] It is quite unnecessary to impose fines on persons who have been sentenced to death or to substantial terms of imprisonment.[5]

Four categories of cases for imposition of fine.

As regards the imposition of fine as a sentence, the Code may be divided into four parts: (*i*) Offences in which fine is the sole punishment and its amount is limited ; (*ii*) offences in which fine is an alternative punishment, but its amount is limited; (*iii*) offences in which it is an additional punishment but its amount is limited; and (*iv*) cases in which it is both an additional punishment and its amount is unlimited. A classification of offences from this stand point would at once show how the Legislature has carried out its express intention in affixing that sentence.

Thus in the following cases fine is the sole punishment, and except in two cases, its amount is limited :

(1) Sec. 137. Negligently suffering a deserter to conceal in a vessel —Maximum fine Rs.500.

(2) Sec. 154. Criminal responsibility for riot held one's land—Maximum fine Rs.500.

(3) Sec. 155. Liability of persons for whose benefit riot is committed—Unlimited fine.

(4) Sec. 176. Liability of agent of such person—Unlimited fine.

The second and third classes comprise by far the largest of offences in the Code. Lastly come those heinous cases in which the fine is both additonal and unlimited such as :

(1) Sec. 123. Concealment of conspiracy to wage war against the Government.

(2) Sec. 124. Assault on President of India or Governor or Rajpramukh, etc. with intent to compel or restrain the exercise of any lawful power.

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1. Adamji Umar Dalal *v.* State, A. I. R. 1952 S. C. 14 at p. 16 : 1952 S. C. R. 172 : (1951) S. C. J. 820 : 1952 A. L. J. 94 : 1952 B. L. R. (S. C.) 43 : 54 Bom. L. R. 400 : 65 L. W. 209 : 1952 M.W.N. 147 : 54 P. L. R. 129.
2. A. I. R. 1952 S. C. 14 at p. 16 : 1952 S. C. R. 172 : 1953 Cr. L. J. 542.
3. Dulla *v.* State, A. I. R. 1958 All. 198 at p. 201.
4. Thammana Ramalingayya, *In re*, A. I. R 1942 Mad. 723 at p. 724 : (1942) 2 M. L. J. 357 : 1942 M. W. N. 592 : 204 I. C. 65 ; *see* also Dulla *v.* State, A. I. R. 1958 All. 198 : 1958 Cr. L. J. 316.
5. Shankarappa, *In re*, A. I. R. 1958 A. P. 380 at pp. 383-384 : 1958 Andh. L. T. 200 : (1958) 1 Andh. W. R. 441 : 1958 M. L. J. (Cr.) 388 : 1958 Cr. L. J. 733.

(3) Sec. 126. Depredation on an ally.
(4) Sec. 127. Taking property in such depredation.
(5) Secs. 128, 129. Public servant allowing escape of political prisoner.
(6) Sec. 130. Aiding, etc. escape of such prisoner.
(7) Secs. 131, 132. Abetment of mutiny.
(8) Sec. 133. Assault by a subordinate on a superior officer.
(9) Sec. 134. Abetment of above.
(10) Sec. 380. Theft in a dwelling-house, etc.
(11) Sec. 47. Counterfeiting device or mark for authenticating documents.
(12) Sec. 457. Lurking house-trespass by night.

Fines which can be imposed under Sec. 420 is unlimited.

Section 63 of the Indian Penal Code expressly states that where no sum is expressed to which a fine may extend the amount of fine to which the offender is liable is unlimited. Section 420 of the Indian Penal Code does not express a sum to which a fine may extend, as some of the sections of the Indian Penal Code do. As the section stands, therefore, the extent of fine which may be imposed by a court under it is unlimited. Whether a fine imposed in a particular case is excessive would be a question of fact in each case.[1] In the above-cited case the Supreme Court proceeded to state, "That consideration, however, is entirely irrelevant in considering whether Art. 20 of the Constitution has been contravened by the provisions of Sec. 10 of the Ordinance as the extent of fine which can be imposed under Sec. 420, by law, is unlimited. It cannot be said that Sec. 10 of the Ordinance in imposing the minimum fine which a court shall inflict on a convicted person was a penalty greater than that which might have been inflicted on that person under the law in force at the time of the commission of the offence, where under such law the extent of fine which could be imposed is unlimited.

Constitutional prohibition provided under Art. 20.

"In the case of *Rao Shiv Bahadur Singh*,[2] this Court held that Art. 20 of the Constitution must be taken to prohibit a conviction or subjection to penalty after the Constitution in respect of *ex post facto* law whether the same was a pre-constitutional law or a post-constitutional law. The prohibition under the Article was not confined to the passing or the validity of the law, but extended to the conviction or the sentence and was based on its character as *ex post facto* law and therefore fullest effect must be given to the actual words used in the Article. It had been urged in that case that the Vindhya Pradesh Ordinance (No. XLVIII of 1949) was an *ex post facto* law. This Court, however, held that that Ordinance was not an *ex post facto* law. The contention that the provisions of Art. 20 of the Constitution had been contravened was rejected and it was held that the criminal law relating to offences charged against the accused at the time of their commission was substantially the same as obtained at the time of the conviction and sentence under the Indian Penal Code. In *Rao Shiv Bahadur Singh's* case,[3] This Court had not to consider whether an *ex post facto* law imposing a minimum fine for an offence with respect to which an unlimited fine could be imposed by the law in existence at the time of the commission of the offence contravened the provisions of Art. 20. In *Kedar Nath Bajoria's* case,[4] in addition to the sentence imposed under the ordinary

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1. K. Satwant Singh *v* State of Punjab, A. I. R. 1960 S. C. 266 at pp. 276, 277.
2. 1953 S. C. R. 1188 : A. I. R. 1953 S. C. 394.
3. *Ibid.*
4. 1954 S.C.R. 30 : A.I.R. 1953 S. C. 404.

law, the first appellant was fined Rs. 50,000, including the sum of Rs. 47,550 received by him as required by Sec. 9 (1) of the West Bengal Criminal Law (Amendment) Act of 1949. Reference to the decision in *Rao Shiv Bahadur Singh's* case[1] was made and this Court held that in any event, the fine to the extent of Rs. 47,550 would be set aside. This Court, however, did not decide whether the total fine imposed was greater than what could be imposed under the law as it was at the commission of the offence. It assumed that *Rao Shiv Bahadur Singh's* case,[2] supported the contention of the first appellant in that case. It is significant that in directing that the appeal would be heard in due course on merits this Court stated that it would be open to the Court in case the conviction was upheld to impose such appropriate fine as it thought fit in addition to the sentence of imprisonment. In the present case even if it be assumed that Sec. 10 of the Ordinance was an *ex post facto* law in that in the matter of penalty a minimum sentence of fine was directed to be imposed by a court whereas at the time that the appellant committed the offence, Sec. 420 contained no such provision, what is prohibited under Art. 20 of the Constitution is the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The total sentence of fine—'ordinary' and 'compulsory'—in the present case cannot be said to be greater than that which might have been imposed upon the appellant under the law in force at the time of the commission of the offence, because the fine which could have been imposed upon him under Sec. 420 was unlimited. A law which provides for a minimum sentence of fine on conviction cannot be read as one which imposes a greater penalty than that which might have been inflicted under the law at the time of the commission of the offence where for such an offence there was no limit as to the extent of fine which might be imposed. Whether a fine was excessive or not would be a question of fact in each particular case but no such question can arise in a case where the law imposes a minimum sentence of fine. Under Art. 20 of the Constitution all that has to be considered is whether the *ex post facto* law imposes a penalty greater than that which might be inflicted under the law in force at the time of the commission of the offence. For the reasons already stated it cannot be said that Sec. 10 of the Ordinance imposed any such penalty and therefore was in contravention of the provisions of Art. 20."

"Certainly with respect to the punishment which each of two or more prisoners is to suffer as essential in a sentence when the punishment is a fine as it is when the punishment is a term of imprisonment."[3] The sentence of fine of a specific sum on a number of prisoners individually and collectively is, therefore, illegal.[4]

The procedure provided by the Legislature for the recovery of fine will be discussed under Sec. 64 which is the section in point.

29. Whipping.—Flogging, or whipping which is one form of flogging, is a corporal punishment abhorrent to civilisation. Whipping as a kind of punishment was abolished by the Abolition of Whipping Act, 1955 (44 of 1955), which repealed the Whipping Act, 1909 (4 of 1909). The matter that follows under this heading is only of historical or academic interest. Corporal punishment was not provided for in the Code. It was

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1. 1953 S. C. 1188 : A. I. R. 1953 S. C 394.
2. *Ibid*
3. 5 M. H. C. R. (App.) 5.
4. *Ibid.*

expressly abolished in 1834, in territories subject to the Presidency of Fort William,[1] though the same exemption was not extended to the other two Presidencies. In 1844[2] power was, however, given to Magistrates to punish offenders of tender age with stripes. It also provisionally empowered them, "until adequate improvement in prison discipline can be effected" to sentence to corporal punishment persons convicted of petty theft. By a latter Act[3] it was extended to life convicts. The sentence, however, became general in its application to certain cases by an Act of 1864[4] which was replaced by Act IV of 1909, which reduced the number of offences in which the sentence of whipping was admissible. "The principal merit of simple afflictive punishments is their exemplarity. All that is suffered by the delinquent during their infliction may be exhibited to the public, and the class of spectators which would be attracted by such exhibitions, consists for the most part of those upon whom the impression they are calculated to produce would be most salutary."[5] But the drawbacks of such a punishment are many. In the first place, the suffering it produces is momentary, and it varies with the caprice or desire of the executioner. In the second place, while it produces trivial effect upon low natures, the degradation that it involves in the case of persons of special standing is out of all proportion to their delinquencies, so much so that a respectable man would prefer death to such dishonour. In the third place, it is a sentence in which reparation is impossible.

Principal merit of whipping.

Drawbacks.

The punishment is a relic of the old form of tortures of which many forms were devised by the ingenuity of the Middle Ages, and all of which including, flogging have now been abandoned in Europe. And even as regards this country, there was a strong movement against its centinuance, but while its total abandonment has been considered inexpedient, the Legislature has modified its generality and sanctioned its application only to hardened criminals to whom the ordinary punishment may not be sufficiently deterrent. The authors had, however, condemned this punishment in the case of juvenile offender[6] (*see* para. No. 5 *ante*). The mode in which this sentence is to be executed is described in the Code of Criminal Procedure[7] (*see* also note under "Flogging" *ante*).

Old form of torture.

30. Detention cannot be regarded as punishment.—Chapter III of the Indian Penal Code deals with punishments. In Sec. 53 imprisonment mentioned is of two kinds, rigorous or simple. An under-trial does not fit in any of this category. In case of conviction the Magistrate has to pass sentence "according to law". Sentences according to law are given in Chapter III. Unless the Magistrate takes recourse to Sec. 562, Cr. P. C., or other analogous provision, he must punish "according to law". Only maximum has been prescribed. He can give the minimum, but he must

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1. Regulation II of 1834.
2. Act III of 1844.
3. Act XVIII of 1845.
4. Act VI of 1864 amended by Act II of 1895. For Upper Burma, *see* the Burma Laws Act (XIII of 1898), Sec. 3 (*b*) and Sch 2 ; for the Punjab Frontier Districts and Baluchistan, *see* the Punjab Frontier Crimes Regulation (Reg. III of 1901), Secs 6 and 12 (2) now re-enacted as Act IV of 1909.
5. *Principles of Penal Laws*, (Coll. Ed., Vol I), pp. 415, 416.
6. Note A, Reprint, pp. 104, 105.
7. Sections 390—396.

give it. As period of detention can never be taken as punishment, it is illegal to refuse to give a punishment, however nominal it may be.[1]

31. **Detention in Reformatory Schools.**—Section 8 of the Reformatory Schools Act[2] empowers the Hight Court, Court of Session, a District Magistrate and any other Magistrate specially empowered in this behalf, to direct youthful offenders, i. e. boys under the age of fifteen years, sentenced to transportation[3] or imprisonment to be sent to a Reformatory School and detained there for not less than three or more than seven years instead of undergoing the sentence.[4] Ordinarily a youthful offender convicted of murder should not be sent to a Reformatory School[5] but if the depravity in the case is not so innate the discipline of a Reformatory School may well prove salutary to such a youth.[6]

32. **Illegal orders.**—An accused cannot be punished and at the same time released on his entering into a bond with or without sureties to appear and receive the sentence when called upon and in the meantiime to keep the peace and be of good behaviour. Such an order would be illegal.[7]

It is very wrong for a court to enter into a bargain. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the Court should never be a party to a bargain by which money is recovered for the complainant through their agency.[8]

There should be an end of all temporal things and that end cannot be achieved with soft-peddling with the question of the sentence. A judge, when administering justice, is as much influenced by the tides and currents of human emotions and passions as other human beings, but yet he is enjoined by the law to restrain and control them, else he will not be qualified to try a criminal case ; but, at the same time, he is not expected to act ostrich-like and close his eyes to deliberate disregard to defiance of the law of the land. Judicial detachment is a virtue, but not judicial passivity.[9]

33. **Admonition or release on probation.**—When a person is released on probation of good conduct or after due admonition under Sec. 3 of the Probation of Offenders Act, 1958, he is convicted but he is not sentenced. Section 53 of the Indian Penal Code provides for different kinds of punishments. Admonition or release on probation of good conduct is not considered as a punishment and, therefore, it is excluded from this section.[10]

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1. State *v.* Govind Singh. A. I R. 1962 M. P. 36 at pp. 37, 38 : 1961 M. P. L. J. 416 : 1961 Jab. L. J 397.
2. VIII of 1897.
3. By Sec. 53-A (4), this must be construed as imprisonment for life.
4. The Act has been repealed in Bengal by Bengal Act III of 1927, and in Madras by Madras Act IV of 1920, and various States have their own Borstal Schools Act ; *see* Bombay Act XVIII of 1929, C. P. Act IX of 1928 and Madras Act V of 1926.
5. Rama *v.* Emperor, (1908) 4 N. L. R. 180 : 9 Cr. L. J. 99 at p 102.
6. Daljit Singh Ajallsing Sikh *v.* Emperor, A. I. R. 1937 Nag. 274 at pp. 280, 281 : 172 I. C. 204.
7. State *v.* Jagdish, A. I. R. 1971 Raj. 110 at p. 111.
8. Madanlal Ramchandra Daga *v* State of Maharashtra, A. I. R. 1968 S. C. 1267 at 1270 : (1968) 2 S. C. W. R. 598.
9. Registrar *v.* Fr. Sebastiao Francisco Xavier dos Remedios Monterio, and State, A. I. R. 1970 Goa 56 at pp. 58, 59.
10. Honorato de Souza *v.* Pedro Manuel Purificacao de Souza, A. I. R. 1966 Goa 46 at p. 47.

[1][53-A. (1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to "imprisonment for life."

Construction of reference to transportation.

(2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act [2][1955], the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.

(3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being shall be deemed to have been omitted.

(4) Any reference to "transportation" in any other law for the time being in force shall,—

(*a*) if the expression means transportation for life, be construed as reference to imprisonment for life ;

(*b*) if the expression means transportation for any shorter term, be deemed to have been omitted.]

Abolition of "transportation" as a punishment under the Code.—This section has been inserted in pursuance of the decision of the Government to abolish "transportation" as a pumishment under the Code, and substitute "imprisonment" in its place. The Indian Penal Code and the Criminal Procedure Code have been amended accordingly.

It was newly added by the Code of Criminal Procedure (Amendment) Act, 26 of 1955.

The question whether under the relevant statutory provisions an accused who was sentenced to transportation for life could legally be imprisoned in one of the jails in India, and if so what was the term for which he could be so imprisoned, has been dealt with by the Supreme Court in the well-known case of *Gopal Vinayak Godse* v. *State of Maharashtra*.[3] Subba Rao, J., said as follows :

Transportation for life—Interpretation of in the changed political conditions.

"We shall briefly notice the relevant provisions of the Indian Penal Code before it was amended by the Code of Criminal Procedure (Amendment) Act, XXVI of 1955. Section 53 of the Indian Penal Code set out six different punishments to which offenders were liable. The second of those punishments was

Supreme Court's observations.

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1. Ins. by Act 26 of 1955, Sec. 117 and Schedule (w. e. f. 1st January, 1956).
2. Subs. by Act 36 of 1957, Sec. 3 and Sch. II, for "1954".
3. A. I. R. 1961 S. C. 600 at pp. 602, 603 : (1961) 3 S. C. R. 440.

transportation and the fourth was imprisonment which was of two descriptions, namely rigorous and simple. The word 'transportation' was not defined in the Indian Penal Code, but it was for life with two exceptions. Under Sec. 55 of Indian Penal Code, 'In every case in which sentence of transportation for life shall have been passed, the Provincial Government of the Province within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years'. Under Sec. 58 thereof, in every case in which a sentence of transportation was passed, the offender, until he was transported, should be dealt with in the same manner as if sentenced to rigorous imprisonment and should be held to have been undergoing his sentence of transportation during the term of his imprisonment. It was averred on behalf of the State that the petitioner's sentence had not been commuted under Sec. 55 of the Indian Penal Code or under Sec. 402 (1) of the Code of Criminal Procedure to one of rigorous imprisonment. We have no reason for not accepting this statement. On that basis, a question arises whether the petitioner, who was sentenced to transportation, could be dealt with legally as if he were a person sentenced to rigorous imprisonment. This question was raised before the Judicial Committee of the Privy Covncil in *Kishori Lal* v. *Emperor*.[1] After considering the history of the sentence of transportation, the relevant provisions of the Indian Penal Code, the Code of Criminal Procedure and the Prisons Act, the Privy Council came to the conclusion that the said provisions made it plain that when a sentence of transportation had been passed it was no longer necessarily a sentence of transportation beyond the seas. It was observed at page 9 (of Ind. App.) : (at pp. 66,67 of A. I. R.) thus :

> 'But at the present day transportation is in truth but a name given in India to a sentence for life, and in a few special cases, for a lesser period, just as in England the term imprisonment is applied to all sentences which do not exceed two years and penal servitude to those of three years and upwards . . . . . So, in India, a prisoner sentenced to transportasion may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners, where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment.'

"In view of this weighty authority with which we agree, it is not necessary to consider the relevant provisions, particularly in view of Sec. 53-A of the Indian Penal Code which has been added by Act XXVI of 1955. Section 53-A of the said Code reads :

> '(1) ....
>
> (2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, 1955, the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.'

"Whatever justification there might have been for the contention that a pesson sentenced to transportation could not be legally made to undergo rigorous imprisonment in a jail in India except temporarily

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1. 72 I. A. 1 : A. I. R. 1945 P. C. 64

till he was so transported, subsequent to the said amendment there is none. Under that section, a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.

Whether imprisonment for life without any formal remission can automatically be treated as one for a definite period.

"If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment without any formal remission by appropriate Government can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited *supra* that, having regard to Sec. 57 of the Indian Penal Code, 20 years imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thusat page (10 of Ind. App.) : (at p. 67 of A. I. R.) :

'Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission'

Applicability of this section.

"Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes ; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must *prima facie* be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

Commutation of sentence of death.

54. In every case in which sentence of death shall have been passed, [2][the appropriate Government] may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

SYNOPSIS

1. Amendments
2. Analogous law.
3. Principle.
4. Commutation of capital sentence.

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1. Subs. by the A. O. 1950 for "the Cedtral Government or the Provincial, Government of the Prorince within the offender shall have been sentenced." The words in italics were subs. by the A. O. 1937 for "the Government of India or the Government of the place".

1. Amendments.—This section before the coming into force of Government of India (Adaptation of India Laws) Order, 1937, stood as under :

> "In every case in which sentence of death shall have been passed, the Government of India or the Government of the place, within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by the Code."

By the Adaptation Order noted above, the words "the Central Government or the Provincial Government of the Province" were substituted for the words "the Government of India or the Government of the place". Subsequently, by the Adaptation of Laws Order, 1950, the words "the appro. priate Government" were substituted for the words "the Central Government or the Provincial Government of the Province within which the offender shall have been sentenced".

But the power given by this section is not affected by Sec. 402, Cr. P.C.[1] It may be noted here that Sec. 401 (5), Cr. P. C., which preserved the Royal prerogative to grant pardons, reprieves, respites or remissions of punishments has now been omitted by the Adaptation of Laws Order, 1950.

2. Analogous law.—The power of commutation here conferred upon the executive Government follows the precedent of English law under which it is lawful for the Secretary of State to order convicts, under sentence of transportation to be confined in any place appointed for the purpose by His Majesty, in England, until, it may be, they "shall become entitled to their liberty".[2]

Ampler provisions of Cr. P. C.

The provisions of this and the next sections have, in a great measure, become unnecessary by the ampler provisions of the Code of Criminal Procedure, which empower the appropriate Government to commute, suspend or remit all judicial sentences,[3] provided that in the case of commutation, they are empowered to commute any one of the following sentences for any other mentioned after it : death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which an offender might have been sentenced, simple imprisonment for a like term, fine. In one case, however, the High Court also possesses the power of commutation, for it is provided in the Criminal Procedure Code that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.[4]

Statement by framers of the Cede.

3. Principle.—The principle of this section is thus explained by the framers of the Code : "It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances, of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest Judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote Provinces of the Empire, in which convict settlements

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1. *See* Sec. 402 (2), Cr. P. C.
2. 5 Geo. IV, c. 84, Sec. 10.
3. Chapter XXIX (Secs. 401 and 402).
4. Section 382, Cr. P. C.

are established, and the way in which the interest of those Provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide."[1]

4. Commutation of capital sentence.—The power of commutation, as here described, is not in harmony with the corresponding section of the Code of Criminal Procedure.[2] For while under this section the sentence of death may be commuted "for *any other punishment* provided by this Code," the Criminal Procedure Code only authorises the Government to "commute any one of the following sentences, for any other mentioned *after* it," i. e. in the case of death sentence the only power it possesses is of commuting it to the sentence of imprisonment for life. Under the Code, however, there is nothing to debar the same authority to commute the sentence to any sentence, though it may be the lowest sentence of fine. In any case, whatever its power, it can only commute the original sentence. It cannot commute a commuted sentence, for its power ceases the moment a commutation is made. The power of commutation is independent of the consent of the convict. He may or may not consent to suffer the commuted sentence which takes effect as a substantial sentence from the date of commutation. The power of commutation must be unconditional nor should it be made subject to its acceptance by the convict. On the other hand, the power to suspend or remit a sentence may be either unconditional or it may be made subject to "conditions which the person sentenced accepts".[3] In the latter case, the same authority may recall its clemency on breach of the condition.[4] The condition, again, may be imposed on the accused or any one else.[5]

Power of commutation is unconditional and independent of consent of convict.

The power of commutation is left advisedly unqualified by any indication of the Legislature as to the reasons for, or the circumstances under, which it will be exercised. The case of a pregnant female convict has been elsewhere provided for.[6] What remains is the case of a person in whose favour similar dictates of humanity might influence the Government to intervene. It may be that a person, too young or too old, or one whose loss to his family would mean its ruin, might be spared the extreme penalty of law. Cases of infanticide often call for the exercise of clemency. A young widow led astray, destroying her offspring, a mother unable to support her newly-born baby are not infrequently supplicants for the exercise of this power. Then, again, social and intellectual greatness, past or future services to the State, disclosure of extenuating circumstances not known to the Judge, or not sufficiently accounted for, would be considerations which the Government could not overlook. In fact, after justice has pronounced its doom, there always still remain considerations of clemency and expediency which require a wider outlook and which call for the exercise of the plenitude of power. The power of commutation or suspension is the power which the Government must, of necessity, possess, as they possess other attributes of sovereignty.

Power of commutation, etc. possessed by Government along with sovereign.

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1. Note A, Reprint, p. 95 ; Law Commissioner's 2nd Rep., Secs. 511 and 512.
2. Section 402.
3. Section 401, Cr. P. C.
4. Section 401 (3), Cr. P. C.
5. *Ibid.*, Cl. (4).
6. Section 382, Cr. P. C.

55. In every case in which sentence of [1][imprisonment] for life shall have been passed, [2][the appropriate Government] may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Commutation of sentence of imprisonment of life.

SYNOPSIS

1. Amendments.
2. Commutation.
3. Remission.
4. "Commutation" and "remissions"; distinction between.

1. Amendments.—Before the Government of India (Adaptation of Indian Laws Order), 1937, this section stood as follows :

> "In every case in which sentence of transportation of life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years."

By the Adaptation Order noted above, the words "the Provincial Government of the Province" were substituted for the words "the Government of India or the Government of the place". Subsequently, by the Adaptation of Laws Order, 1950, the words "the appropriate Government" were substituted for the words, "the Provincial Government of the Province within which the offender shall have been sentenced".

2. Commutation.—In India a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. If the latter course is adopted in the case of a convict sentenced to transportation for life the Government cannot be deemed to have thereby commuted his sentence under the present section, and the prisoner is not entitled to be discharged after a term which, aggregated with the period of remission earned, amounts to 14 years although that is the maximum term of rigorous imprisonment permitted by law.[3]

3. Remission.—Before Act XXVI of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of

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1. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "transportation" (w. e. f. 1-1-1956).
2. Subs. by the A. O. 1950 for "*the Provincial Government of the Province* within which the offender shall have been sentenced". The words in italics were subs. by the A. O. 1937 for "the Government of India or the Government of the place".
3. Kishorilal *v.* Emperor A. I. R. 1945 P. C. 64 at pp. 65, 66, 67:72 I. A. 1 : 54 Cr. L. J. 626 : 1945 A. L. J. 265 : 49 C. W. N. 389 : I. L. R. (1945) Lah. 325 : (1945) 1 M. L. J. 399 : 58 L. W. 251 : 1945 M. W. N. 188 : 219 I. C. 350.

the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions—ordinary, special and State—and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appropriate Government to remit the sentence under Sec. 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government.[1]

Definition of "appropriate Government".

4. "Commutation" and "remission"; distinction between.—A distinction is to be observed between the powers conferred by Sec. 55, Penal Code, and those conferred by Sec. 401 of the Code of Criminal Procedure, 1898. Where an accused, after being sentenced to transportation for life, has his punishment commuted under the present section to imprisonment for 14 years (the maximum term allowed by that section), he cannot upon his release whether on the expiry of that period (or even earlier on account of his having earned remissions), be regarded thereafter as "being under the sentence of transportation for life" for the purposes of Sec. 303, Penal Code. But where the sentence of transportation has been remitted under Sec. 401 of the Code of Criminal Procedure the accused must be regarded as still "being under sentence of transportation for life".[2]

[3][**55-A.** In sections fifty-four and fifty-five the expression "appropriate Government" means,—

Definition of appropriate Government.

(*a*) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(*b*) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.]

Amendment.—This section has been substitued by the Adaptation of Laws Order, 1950, for Sec. 55-A which had been inserted by the Adaptation of Laws Order, 1937.

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1. Gopal Vinayak Godse *v.* State of Maharashtra, A. I R. 1961 S. C. 600 at pp. 603, 604 : 63 Bom. L. R. 517.
2. Po Kun *v.* The King, A. I. R. 1939 Rang. 124 at p. 127 : 1939 Rang. L. R. 44 40 Cr. L. J. 490.
3. Subs. by the A. O. 1950 for Sec. 55-A which had been ins. by the A O. 1937.

Sentence of Europeans and Americans to penal servitude. Proviso as to sentence for terms but not for life.

56. [*Rep. by the Criminal Law (Removal of Racial Discriminations) Act*, 1949 (17 *of* 1949) (*with effect from 6th April*, 1949)].

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment, [1][imprisonment] for life shall be reckoned as equivalent to [1][imprisonment] for twenty years.

Imprisonment for life.—A sentence of transportation (now imprisonment) for life means a sentence of transportation (now imprisonment) for the whole of the remaining period of the convicted person's natural life.[2] Convicts serving this sentence may be granted remissions for good conduct, and for the purpose of calculating remission in the case of life sentences, it appears that they are treated as sentences of 20 years, and this is no doubt the reasons why Sec. 57 of the Code provides that for calculating a fractional part of a life sentence it should be treated as one of 20 years.[3]

Reason for the rule.

It appears that in *Sumar Khamiso's* case,[4] the Superintendent of the District Prison made a reference to the Judicial Commissioner's Court under the Jail Manual in which he treated a sentence of imprisonment for life as one for 20 years. In *Kishorilal's* case,[5] their Lordships of the Privy Council decided the case "assuming that the sentence is to be regarded as one of 20 years", but added "their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission."

The question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period, it was held that no such provision is found in the Indian Penal Code, Code of Crimianl Procedure or the Prisons Acts.

For calculating fraction of terms of punishment, the section provides that transportation for life shall be regarded as equivalent to imprison ment for 20 years. It does not say that transportation for life shall be deemed to be transportation for 20 years for all purposes; nor does the amended section which substitutes the words "imprisonment for life", for "transportation for life" enable the drawing of any such all embracing fiction. A sentence of transportation for life or imprisonment for life

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1. Subs. by Criminal Procedure (Amendment) Act, 26 of 1955, Sec. 117 and Sch. for "transportation" (w. e. f. 1st January, 1956)
2. Nga Tha Byit *v.* Queen-Empress, (1893-1900) L. B. R. 13; Po Nun *v.* The King, A. I. R. 1939 Rang. 124 at p. 126 : 1939 Rang. L. R. 44 : 40 Cr. L. J. 490.
3. Kishorilal *v.* Emperor, A. I. R. 1945 P. C. 64 at p. 65 : 72 I. A. 1 : 46 Cr. L. J. 626 : 210 I. C 350 : 1945 A. L. J. 265 : 49 C. W. N. 339 : 47 Bom. L. R. 625 : 58 L. W. 251 : 1945 M. W. N. 188 : (1945) 1 M. L. J. 399.
4. Sumar Khamiso *v.* Emperor, A. I. R. 1932 Sind 168 at p. 168 : 33 Cr. L. J. 870 : 25 S. L. R. 266.
5. A. I. R. 1945 P. C. 64 at p. 67.

must *prima facie* be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.[1]

Under Sec. 53, I. P. C., as it existed after the amendment in 1955, a punishment of "imprisonment for life" is a category by itself distinct from the category of imprisonment and is not a sub-category. The word "imprisonment" in the fourth item of Sec. 53, I. P. C., is not a general category which includes punishment of imprisonment for life as sub-category in which the term was fixed as the unexpired portion of the prisoner's life. This is also clear from the fact that in Sec. 22 of the Children Act itself, the words "imprisonment for life" (as substituted for the word "transportation" in view of Sec 53-A, I. P. C) occur in the body of the section side by side with the word "imprisonment" which word also occurs in the proviso. This position of law is also clear from the provisions of the Borstal Schools Act where Sec. 8 provides for a court having jurisdiction to pass a sentence of detention in lieu of a passing sentence of imprisonment whereas Sec. 10-A of that Act provides as to what can be done in case of a person who has been awarded a sentence of "imprisonment for life", as a result of giving effect to the words of Sec. 53-A, I. P. C., in the original wording of Sec. 10-A of the Act. Therefore, it is clear that under the proviso to Sec. 22 of the Children Act, a young person may be sentenced only to imprisonmment and not to imprisonment for life.[2]

Section 53, I. P. C., prescribes classes of punishment to which offenders are liable under the provisions of the Code. Five classes have been specified —Secondly,—Imprisonment for life, and Fourthly,—Imprisonment, which is of two descriptions, namely : (1) Rigorous, that is with hard labour ; (2) Simple. "Imprisonment for life" was substituted for the word "transportation" by Sec. 117 and Schedule of Central Act XXVI of 1955. Prior to amendment, "transportation for life" was construed to mean "rigorous imprisonment for life".

Section 60, I. P. C., could not have been and was not applied in construing the meaning of "transportation". Even after the amendment, Sec. 60 cannot be used in construing the meaning of imprisonment for life".

As per the very words of the section (Sec. 60), it applies to a case in which the offender is punishable with imprisonment of either description. "Imprisonment for life" is a class of punishment different from imprisonment which is of two descriptions. In terms, therefore, Sec. 60 cannot be invoked in support of an argument that with its aid the Court would specify "imprisonment for life" as "rigorous" or "simple".

So far as sentence of transportation for a term is concerned, it has been made clear by Sec. 53-A (2), Penal Code, that it would mean rigorous imprisonment for the same term. It would be pertinent to quote paragraph 8 of the Report of the Joint Select Committee on the Bill preceding the amendment by Central Act XXVI of 1955.

"*Section* 53-*A*, *Cl.* 2.—The question of substitution of the words "imprisonment for life" for the words "transportation for life" arose in connection with the consideration of original Cls. 113, 114 and the Schedule. The Committee note that the expression 'transportation for life' has not

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1. Gopal Vinayak God e *v.* State of Maharashtra, A. I. R. 1961 S C. 600 at pp. 602, 603 : 53 Bom. L. R. 517.

2. *In re* Kondepudi Raman, A. I. R. 1964 A. P. 350 at p. 356 : (1964) 1 Andh. W. R. 175 : (1964) 2 Cr. L. J. 176

been defined nor explained in the Criminal Procedure Code. In the Indian Penal Code in Sec. 53, 'transportation' has been prescribed as one form of punishment. But even in the Indian Penal Code the term has not been defined and there is nothing to show what is the duration of 'transportation for life'. As a matter of fact, this expression has not been defined in any Act. Transportation may be either for life or for a shorter term. Therefore, the mere substitution of the expression 'imprisonment for life' for 'transportation for life' should not change the nature of punishment. As a form of punishment, imprisonment for life must remain distinct from rigorous or simple imprisonment. Where, however, a sentence for transportation for a term only has been passed before the commencement of this Act, the offender should be dealt with in the same manner as if he was sentenced to rigorous imprisonment for the same term and all references to transportation for a term should be omitted. In the Code of Criminal Procedure the word 'transportation' as would appear from the context means in some cases transportation for life and others, transportation for a term only. The Committee, therefore, recommend that where transportation means 'transportation for life' it should be substituted by the words 'imprisonment for life', and where it means transportation for a term only it should be omitted. The intentions of the Committee have been clarified by the insertion of a new Sec. 53-A in the Indian Penal Code."

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It is clearly emphasised there that mere substitution of the expression "imprisonment for life" for "transportation for life" should not change the nature of punishment, and as a form of punishment, imprisonment for life must remain distinct from rigorous or simple imprisonment. It is manifest that "imprisonment for life" was merely substituted for transportation for life without in any way affecting the import it carried prior to the amendment, and by virtue of the Privy Council decision in *Kishori Lal* v. *Emperor*,[1] it carried the only meaning of rigorous imprisonment for life. The Legislature appears to have thought it unnecessary to clarify the position by the amending Act as there was no doubt in the meaning as it stood prior to the amendment.

The imprisonment for life will also mean rigorous imprisoment for life as would appear from the use of those expressions by the Supreme Court in some of its decisions. In *K. M. Nanavati* v. *State of Maharashtra*,[2] the Bombay High Court had sentenced the offender to undergo rigorous imprisonment for life and the appeal was dismissed in the Supreme Court with the observation that the High Court rightly passed the sentence of imprisonment for life. Their Lordships construed "imprisonment for life" as meaning "rigorous imprisonment for life", and the use of such expressions without any discrimination cannot be said to have been inadvertently done.

In *State of Madhya Pradesh* v. *Ahmadulla*,[3] their Lordships reversed an order of acquittal passed by the High Court and sentenced the accused to rigorous imprisonment for life. In some of the Supreme Court decisions their Lordships have used the expression "imprisonment for life only".[4]

"Imprisonment for life" in the Indian Penal Code means "rigorous imprisonment for life" and it can never mean "simple imprisonment for life", and Sec. 60, I. P. C., cannot be used to specify the nature of imprisonment. Section 3 (27) of the General Clauses Act, 1897, defining "imprisonment"

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1. A. I. R. 1945 P. C. 64.
2. A. I. R. 1962 S. C. 605.
3. A. I. R. 1961 S. C. 998.
4. Mizaji v. State of U. P., A. I. R. 1959 S. C. 572.

shall mean "imprisonment of either description" as defined in the Indian Penal Code, has no application to the Indian Penal Code itself. It has been made clear in the section itself that the definition would apply to Central Acts and Regulations made after the commencement of that Act. The General Clauses Act is of the year 1897 while the Indian Penal Code is of the year 1860. Section 4 of the General Clauses Act has also no application. The definition given in the General Clauses Act cannot be applied to the Indian Penal Code.[1]

58. [*Omitted by Act* 26 *of* 1955.] The section ran thus :

"58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment."

Offenders sentenced to transportation how dealt with until transported.

59. [*Omitted by Act* 26 *of* 1955.] The section ran thus :

"59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less then seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment."

Transported instead of imprisonment.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

SYNOPSIS

1. Analogous law.
2. Principles.
3. Punishment under Sec. 302 of the Code.

1. Analogous law.—The provisions of this and of Secs. 63—67 have been locally modified by the Frontier Crimes Regulation,[2] and the provisions of this and Secs. 63—65, 68—74 have been modified by the Sind Frontier Regulation.[3]

2. Principles.—This section is discretionary, and enables the Court to pass an appropriate sentence, whether rigorous or simple, or partly of one kind and partly of the other, according to the individual requirements of each case—the discretion being, of course, subject to the provisions of the Code, which has, in some places, specified the nature of imprisonment appropriate to certain cases.

3. Punishment under Sec. 302 of the Code.—Section 302 of the Code as amended by the Schedule to the Code of Criminal Procedure

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1. Urlikia Medina *v.* State, A. I. R. 1964 Orissa 149 at pp. 151, 152 : (1964) 1 Cr. L. J 685.
2. RegulationIII of 1901, Secs. 13 (2), 61.
3. RegulationIII of 1892, Sec. 28 (1).

(Amendment) Act, 1955 (26 of 1955) only states that the alternative punishment for murder shall be "imprisonment for life" without specifying whether the sentence should be rigorous or simple. The Court passing the sentence has, however, to keep in view the provisions of this section and choose one or the other form having regard to all the circumstances.[1]

61. [2][*Rep. by the Indian Penal Code (Amendment) Act*, 1921 (*XVI of* 1921) *Sec.* 4.]

Sentence of forfeiture of property.

Analogous law.—This section which has since been repealed by Act XVI of 1921 stood as under :

"In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.

Sentence of forfeiture of property.

Illustration

A, being convicted of waging war against the Government of India, is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, *A*'s father dies, leaving an estate which, but for the forfeiture, would become the property of *A*. The estate becomes the property of Government."

For a comment on this section, *see* 1 Penal Law (4th Ed.) pp. 356-58,

62. [2][*Rep. by the Indian Penal Code (Amendment) Act*, 1921 (*XVI of* 1921), *Sec.* 4.]

Forfeiture of property in respect of offenders punishable with death, transportation or imprisonment.

Analogous law.—This section which has since been repealed by Act XVI of 1921 stood as under :

"Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government ; and whenever any person shall be convicted for any offence for which he shall be transported or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rent and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment, shall be forfeited to Government subject to such provision for his family and dependants as the Government may think fit to allow during such period."

Forfeiture of property in respect of offenders punishable with death, transportation or imprisonment.

For a comment on this section, *see* 1 Penal Law (4th Ed.), pp. 358-360.

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1. Mathammal Saraswathi *v.* State of Kerala, A. I. R. 1957 Ker. 102 at p. 103: 1957 Ker. L. T. 418 : 1957 Cr. L. J. 852.
2. Repealed by the Penal Code (Amendment) Act, 1921 (Act XVI of 1921), Sec. 4 which again has been repealed by Act X of 1927 as spent ; but *see* the General Clauses Act. 1897 (X of 1957), Sec. 7.

63. Where no sum is expressed to which a fine may extend the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Amo nt of fine.

SYNOPSIS

1. Analogous law.
2. When the maximum may be fixed.
3. Principle.
4. Fair measure of fine.
5. Procedure for recovery of fine.
6. Compensation out of fine.

1. Analogous law.—Under the General Clauses Act[1] the provisions of Secs. 63—70 apply to all fines imposed under the authority of any Act, regulation, rule, or bye-law, unless the Act, regulation, rule or bye-law contains an express provision to the contrary.[2] Similarly, these sections have been also made applicable to several local Acts.[3] The policy underlying this section was the subject of much controversy at the draft stage of the Bill.

Policy of this section was hotly debated at draft stage.

The controversy arose from the fact that in some systems of law the maximum limit of fine is fixed, whereas in the Bill the authors had fixed no such limit, but had left it solely to the discretion of the Judge. In adopting this course, they justified themselves on three grounds: viz. (*i*) that the majority of the offenders being poor, it would be a hardship on the offender and entail distress on his family if a minimum is fixed; (*ii*) the incidence of penalty varies according to the pecuniary capacity of the offender and must be left to be adjusted to the circumstances of each case; (*iii*) lastly, if the measure of fine were to be proportioned to the amount of the offender's property, it would lead to endless complications.[4]

The authors, therefore, recommended adoption of the clauses as here enacted, following the authors of the Bill of Rights, who with many instances of gross abuse fresh in their recollection, could devise no other rule than that excessive fines should not be imposed. So Blackstone observed "that the *quantum* of pecuniary fines neither can nor ought to be ascertained by an invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another; statute law has not, therefore, often ascertained the quality of fines, nor the common law ever."[5]

2. When the maximum may be fixed.—This was again the view reiterated by the English Criminal Law Commissioners who remarked that "the inequality and injustice in some cases, and the inefficiency in others of resorting to *fixed and absolute* fines as a mode of penal restraint confines its operation within narrow limits, principally to instances of minor delinquencies punishable by virtue of a summary jurisdiction, and in some particular instances of higher magnitude where the condition of the class of person on whom the restraint operate is such as to remove or at least greatly to reduce, the probability that it will operate either with unequal severity, or will be ineffectual from the inability of those who offend to pay the fines, and where, in addition, such a mode of punishment is appropriate to the nature of the offence, and does not afford room for invidious comparison with other instances in which corporal punishment is inflicted in respect of less heinous transgressions.[6]

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1. Act X of 1897.
2. Section 25, Act X of 1897.
3. Bombay General Clauses Act, Sec. 26 (Bombay Act I of 1904); Madras General Clauses Act, Sec. 19 (Madras Act I of 1891); Bengal Act V of 1867, Sec. 4.
4. Note A, Reprint, pp. 97 &98.
5. Comm. p. 377.
6. 7 Rep. cited in Law Commissioners' 2nd Rep, Sec. 476.

3. **Principle.**—The great objection to limiting the amount of fine is then the danger that while it may be inconsiderable to the rich, it may be unjustly oppressive to the poor. The magnitude of a fine must, therefore, in justice, be proportioned to the offender's means. There are, however, certain cases in which the transgressions are so small, or are such as affect only a class that the limitation of fine is unobjectionable. Barring such cases the policy of the Legislature have been against limiting it. Its amount is left to the discretion of the Judge. But there are small delinquencies in which it would be unfair to leave the amount of the fine to the discretion of the Judge. In such cases, the law has to fix the maximum. In other cases, it has left the amount to the discretion of the Judge because of the objections to any other course being taken (*see* para. No. 25 of Sec. 53 and para. No. 1 of Sec. 63).

4. **Fair measure of fine.**—Fine may be limited by statute, in which case the section has no application. Where it is not so limited, the section provides that it may be "unlimited but shall not be excessive". This does not imply that any Magistrate may impose an unlimited fine, for the jurisdiction of Magistrates is in itself limited to the imposition of a limited fine[1] and where it is so, that jurisdiction cannot be exceeded by reference to this section. In other words, while this section legalizes the imposition of any fine regardless of amount, it does not confer upon all courts the power to award it. Now, as the power of the Presidency Magistrates and first class Magistrates is limited to a fine of Rs.1,000 and of the second and third class Magistrates to Rs. 200 and Rs. 50, respectively, it follows that the magisterial fine cannot exceed Rs. 1,000.[2] Only the High Court and the Court of Session are thus in a position to inflict an unlimited fine.[3] Indeed, in a large number of cases dealt with in the Code, the amount of fine is itself limited so that it is only in cases where it is not so limited, and where the offender is being tried before a Judge of the High Court or the Court of Session, that the question of unlimited fine becomes relevant.

Only the High Court and Sessions Court can inflict unlimited fine.

But the prohibition of the section against excessive fines applies equally to all cases, though the section, as worded, does not deal with excessive fines in cases in which its amount is limited. Nevertheless, it is the general principle, which the section recognises, that no Court should inflict a fine which it would be impossible or very difficult for the accused person to pay, or which is wholly disproportionate to the character of the offence[4] (*see* para. No. 25 of Sec. 53). Indeed, it is a cardinal principle of all punishments that the sentence passed must suit the crime, and in the case of fine, it should be specially so. In the first place, the fine inflicted must have reference to the nature and character of the offence. A person betrayed into crime by his cupidity is a person who should be exemplarily amerced as a deterrent check to his cupidity. "For in punishment thus, he is struck in the most sensible part, which has, so to speak, been pointed

Prohibition of excessive fine applies equally to all cases.

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1. Section 32, Cr. P.C.
2. Under Sec. 349, Cr. P. C., 2nd and 3rd class Magistrates being empowered to refer cases before them to a first class Magistrate for enhanced sentence, the latter may inflict the same fine which he could have himself inflicted if he had tried the case.
3. Abdoor Rahman, 7 W. R. 37; Mohana, (1895) P. R. No. 20, *contra* in Subhan, (1878) P. R. 18, is untenable, as the section has never intended to define jurisdiction or override that conferred by the Procedure Code. It only enunciates the principle, leaving its administration to the Procedure Code.
4. *Per* Jackson, J., in Abdoor Rahman, 7 W. R. 37.

out by himself; for it is not possible but that the mischief which he has chosen as the instrument of his vengeance, must appear hurtful to himself."[1] In this respect the policy of law is to deprive him of all his ill-gotten gains (para. 3, *ante*). For example, a person who has run away with a loaf of bread from a baker's stall, because he was hungry, cannot be treated on the same footing as a bank clerk, who misappropriates a large sum of money by falsification of accounts, or being an agent or servant, he defrauds his master by misappropriating large sums of money, out of which he has acquired property of his own. In such cases, the law is callous as to the amount of suffering that it would thereby produce among persons affected thereby. For no man has a right to keep his family in comfort by plunder. Whenever such a case is brought before a Magistrate, it is perfectly competent to him to commit a case to the Sessions, so that the offender may be properly amerced.[2] But all cases in which the love of lucre plays a part cannot be treated alike. For there is a distinction between a highway man and the father of a famishing family committing a theft for bread to support it. In the one case the offender is the object of the just vengeance of law, in the other case he is justly the object of its commiseration.

Bentham's principles. Bentham lays down the three following rules as applicable to the subject under discussion :

(1) That the greater the uncertainty, the greater should be the punishment.

(2) That it should be sufficient to turn the offender's advantage to a loss.

(3) That it should be deterrent.[3]

No invariable standard applicable to all circumstances. These principles are general but not inflexible, and, indeed, they are not intended to be so. For there can be no invariable standard applicable to all circumstances which are infinite and diverse in each case. Law has, therefore, refused to commit itself to any generalization on the subject. It has left it to the Judge to fix a fine with due regard to the circumstances of the case in which it is imposed, and the condition in life of the offender. In any case, fine must serve its own purpose; for it is not the object of fine to extend to the utmost possible limits the term of imprisonment to be awarded by the Magistrate trying the case,[4] and where a fine is not suited to the nature of the offence and is quite beyond the means of the offender to pay it, it should never be inflicted merely in order that a further term of imprisonment in default shall be suffered in addition to the substantive imprisonment which the Magistrate has inflicted to the limits of his powers. If the substantive sentence awardable by a Magistrate is in his opinion insufficient for the offence, it is a fit case, not for eking it out by the addition of a fine, but for committal or submission to a higher Magistrate for enhanced sentence.[5] It has already been remarked

Considerations which should weigh with the Court in awarding fine.

1. Bentham's *Principles of Penal Laws*, p. 400 (Coll. Ed., Vol. 1).
2. Section 206, Cr. P. C.
3. *Principles of Penal Laws*, pp. 401 and 402 (Coll. Ed., Vol. 1). The language employed by Bentham is neither perspicacious nor easily intelligible. The text lays down what he means by his rules, which having regard to the numerosn and varied circumstances of human life and not probably capable of a more general comunication.
4. Subhan, (1878) P. R No. 18; Nga Chin, 1 Bur. L. R. 483.
5. Mohana, (1925) P. R. No. 20.

before that when more than one person is fined on conviction for a joint offence, the sentence must impose a specific fine on each prisoner,[1] and realise it from him alone. Consequently a Magistrate is not justified in inflicting heavy fines on poor persons, on the mere supposition that they are backed up by influential persons who might pay for them. Such a consideration should never influence the Magistrate who could have regard only to the circumstances of the accused and not of his possible allies.[2] In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence.[3] It is sometimes also the practice to mulct offenders in prohibitive fines, the object being to convert the sentence of fine into one of imprisonment. Such a course is to be deprecated, and is opposed to the spirit of the section.[4] And as fine is a punishment for an accomplished wrong, it cannot be inflicted to prevent the commission of a possible offence.[5] Of course, there are cases in which non-compliance with a bye-law is expressly punishable with a daily fine, in which case such a fine for continued infringement is perfectly legal, but such cases do not arise under the Code, and under it, therefore, no sentence of daily fine can be legally imposed.[6]

5. **Procedure for recovery of fine.**—The question as to what is an appropriate fine in a given case is ordinarily a question of fact and of judicial discretion. But inasmuch as the exercise of sound judicial discretion is in itself a question of law is not often considered as one of law in which the High Court would properly exercise its powers of revision.

Where a conviction has been recorded under two sections of the Code, in one of which only an alternative sentence of imprisonment or fine is allowed a sentence of fine alone is illegal.[7] A fine once imposed cannot be remitted merely on the ground that the offender had already been fined departmentally for his wrong. So where a soldier was found drunk on a public road within Cantonment limits for which he was punished departmentally, as well as by the Cantonment Magistrate, it was held by the High Court that the fine judicially inflicted cannot be remitted, not having been in itself an improper one. "Departmental punishment cannot withdraw a wrong-doer from the cognizance of the ordinary courts or relieve him from the penalties provided by the law."[8]

Alternative sentence in case of default of fine.

As will be presently seen from para. 4 of Sec. 64, the Court sentencing an offender to a fine has also to sentence him to alternative sentence in case of default. In such a case, the offender has to suffer imprisonment until the fine is paid. But the sentence of imprisonment does not necessarily take effect from the moment it is pronounced, for the Court is

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1. 5 M. H. C. R. (App.) 5 ; West, J., assumed the legality of a joint fine in a case, the head-note alone of which is available, (1875) B. U. C, 90.
2. Bhilya, (1891) B. U. C. 556.
3. Adamji Umar Dalal *v.* State of Bihar, A. I. R. 1952 S. C. 14 at p. 16 : 1950 S. C. R. 172 : 55 Bom. S. R. 400
4. Nga Chin, 1 Bur. L. R. 483 ; Abdullah, 71 I C. (Lah.) 998.
5. Ngo Paw Hi, 1 Bur. L R. 421 ; Sagar Dutt, 1 B. L R. 41 ; Love, 18 W. R. 44 ; Jagannath, 5 B. H. C. R. 103 ; Kristodhone, 52 W. R. 6 ; Chairman, Municipality *v.* Anessuddin, 20 W. R. 64 ; Tarineechurn, 21 W. R. 31 ; Ramkrishna Biswas, I. L R. 27 Cal. 565.
6. Nga Paw Hi, 1 Bur. L. R. 421 ; Kristodhone, 52 W. R. 6.
7. Boobun, 11 W. R. 39.
8. Ramnaik, (1887) B. U. C 318, 319.

authorised to suspend its execution for a time in order to enable him to raise the amount.[1] It is further empowered to issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender, although the sentence directs that, in default of payment of fine, the offender shall be imprisoned.[2] Where several fines are due from an offender, it has been held that following the principle of Sec. 59 of the Indian Contract Act, the payer should have the option to determine the order in which to discharge the liability.[3]

Whether fines can be realised from legal representatives.

Ordinarily, a criminal appeal abates on the death of the appellant. Section 431, Cr. P. C. has, however, been amended so as to provide that this rule will not apply when the appeal is from a sentence of fine. The fine imposed on the deceased appellants may, if the convictions are allowed to stand, be realised from their legal representatives. It is undesirable that this should be so, as there is no more reason to maintain their convictions The proper course in such a case is to set aside the convictions and. sentences.[4]

6. Compensation out of fine.—As one object of fine is to compensate the complainant, the Code of Criminal Procedure empowers the Court to order when passing judgment, that the whole or any part of the fine recovered is to be applied (*a*) in defraying expenses, properly incurred in the prosecution; (*b*) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by a civil suit.[5] In appealable cases such payment is to be made on decision of the appeal.

Sentence of imprisonment for non-payment of fine.

64. [6][In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable [7][with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine],

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

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1. Section 338, Cr. P. C.
2. Section 386, Cr. P. C.
3. Yakoob, 24 S. L R. 437.
4. Ramdhani Gope *v.* Jagesher Mahto, A. I. R. 1941 Pat. 526 at p. 527 : 42 Cr. L. J. 653 : 195 I. C. 126 : 7 B. R. 890.
5. Section 545, Cr. P. C.
6. Subs. by Act 8 of 188', Sec 2 for "in every case in which an offender is sentenced to a fine".
7. These words were inserted by the Indian Criminal Law (Amendment) Act, 1886, (X of 1886). Sec. 21 (2).

SYNOPSIS

1. Analogous law.
2. Amendment.
3. Scope.
4. Principle.
5. Meaning of words.
6. Imprisonment in default.
7. "It shall be competent."
8. Cattle trespass and other cases.
9. Concurrent sentence of imprisonment in default of fine.
10. Effect of imprisonment for non-payment of fine.
11. Appropriation of payment tendered by offender.

1. Analogous law.—This section, the wording of which has been pronounced to be "not happy" [1] was Cl. (51) in the draft Bill, though its language was subsequently altered. Its object is to confer on the Court the general power to impose imprisonment in default of payment of fine, the subsequent section being then enacted to lay down limits to that power.[2]

The provisions of this section must be read as supplemented by the provision of Sec. 397 and Sec. 35, Cr. P. C.[3]

2. Amendment.—The first two clauses were substituted for the words "in every case in which an offender is sentenced to fine" by the Indian Penal Code Amendment Act, 1882,[4] and the words "with imprisonment or fine" in the second clause were further inserted by the Amending Act of 1886.[5] These amendments were necessitated by the view taken in several cases of the Madras High Court in which it was held that the award of imprisonment in default of payment of fine, inflicted under the provisions of special or local law, was unauthorised by law.[6] In the first case, this section was held to have no application to a conviction under the Police Act, and in the second case, a similar view was reiterated, and a dissent expressed from two other cases[7] of the same Court, in which the award of the sentence of imprisonment in default of payment of fine was held to be a mere informality. The effect of the amendment is now to legalise the sentence of imprisonment in such cases, the other cases laying down the contrary being overruled by the Legislature, which has made the rule one of general application to all special and local laws.[8]

3. Scope.—It will be observed that the section excludes cases, in which the only sentence is death or imprisonment for life. This is not because in such cases, the Code does not prescribe the sentence of fine, but because the Legislature regards in them the added sentence of imprisonment as inexpedient.

The next section prescribes the limit to imprisonment for non-payment of fine.

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1. *Per* Benson, J., in Yakoob Sahib, I. L. R. 22 Mad. 238.
2. *Ibid.*
3. State *v* Krishna Pillai Madhavan Pillai, A. I. R 1958 T.C. 233 at p. 234 : 1953 Ker. L. T. 281 54 Cr. L. J. 1265.
4. Act VIII of 1882, Sec. 2.
5. Indian Criminal Law (Amendment) Act, 1886 (X of 1886), Sec. 21 (2).
6. 3 M. H. C. R. (App.) 9 : 6 M. H. C. R. (App.) 40 : 7 M. H. C. R. (App.) 22.
7. 5 M. C. R. (App.) 21 : 5 M. H C. R. (App.) 23.
8. Mittra, I. L. R 58 Cal. 1293. But nevertheless, in a case decided since the amendment, this section has been held to Be inapplicable to more technical offences such as those created by the Municipal and other similar Acts ; Basanta *v.* Corporation, 15 C. W. N. 906 : 11 I. C. 143 ; but this section is permissive merely and not mandatory. *Cf.* Lakhmia, I. L. R 18 Bom, 400.

4. Principle.—The sentence of fine would be incapable of execution if the offender had no available means to pay up his fine, and if there were no alternative sentence to induce him to pay it up. This section, therefore, generally confers upon the Court the powers of imprisonment in default of the payment of fine, which often acts as a screw to make the offender choose the lesser of the two evils.

Careful discretion to be exercised by the Courts.

It is not proper, in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. It becomes all the more undesirable to impose such fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. Judges should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment.[1]

5. Meaning of words.—"*Of an offence*" : The word "offence" here means anything punishable under the Code or any special or local law.[2] "*Punishable with imprisonment as well as fine*" : The words "as well" are ambiguous. For they may either mean "imprisonment and fine" or "imprisonment *or* fine" though really they are intended to cover both.[3] Ordinarily, however, the phrase is used only in the first sense and not in the wider sense which has here become necessary by reference to the concluding words "in which the offender is sentenced to a fine whether *with or without* imprisonment," which refers to a case in which imprisonment is either superadded or is awarded as an alternative. "*It shall be competent*," i.e. it is permissible but not imperative.[4]

6. Imprisonment in default.—This section confers the general power on Courts to award the sentence of imprisonment in default of fine. The cases contemplated by the section are as follows :

Where the offence is punishable with—
(*a*) imprisonment *with* fine ;
or
(*b*) imprisonment *or* fine ; or *and*
(*c*) fine only

} *and* {

the offender is sentenced to—
(*i*) imprisonment ; or
(*ii*) fine ; or
(*iii*) both

the Court may sentence the offender to a term of imprisonment in default of the payment of fine. As the term "offence", as used in this section, means not only an offence punishable under the Code, but also an offence punishable under any special or local law,[5] it follows that the section is equally applicable to all offences whether committed under the Code or under any special or local law (*see* para. 2 of Sec. 64).

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1. Emperor *v.* Mendi Ali, A I. R. 1941 All. 310 at p. 311 : I. L. R. (1941) All. 608 : 195 I. C. 599 : 42 Cr. L. J. 755 : 1941 A. W. R. 238 : 1941 A. L. J. 395.
2. Section 40.
3. Yakoob Sahib, I. L. R. 22 Mad. 238 ; Darba, I. L R. 1 All 641 (F. B.) ; Tirumalai, (1894) 1 Weir 31.
4. Beni Pershad, (1878) P. R. No. 40; Anon, 1 Weir 31 ; *cf* Lakhmai, I. L. R 18 Bom. 400 ; State *v.* Krishna Pillai Madhavan Pillai, A. I. R. 1953 T.C. 293 : 1953 Cr. L. J. 1265 : I. L. R. (1952) T.C. 1006.
5. Section 40, but *see* Puna Luxmon, 6 Bom. L. R. 357 : L. B. R. (1872-1892) 473 : Vaidvalingama, B. U. C. 871 : Nga Tun Hlai, U. B. R (1897-1901), Vol. I., p. 221.

7. **"It shall be competent."**—As observed before, the provisions of this section are permissive, and it is not obligatory on the Court, in every case, to award an alternative sentence. The Courts, sometimes, consider it incumbent upon them to pass such a sentence even in view of the fine forthcoming, but this is an erroneous procedure, and one which serves no useful purpose.[1]

8. **Cattle trespass and other cases.**—A Magistrate can only award compensation for illegal seizure of cattle. A sentence of imprisonment in default of payment of compensation is illegal. A Magistrate is not competent to pass a sentence of imprisonment under Sec. 22, Cattle Trespass Act.[2]

Awarding of sentence of imprisonment in lieu of payment of fine under the provisions of special law.

As regards awarding of sentence of imprisonment in lieu of payment it was contended that the Rajasthan Municipalities Act being special law within the meaning of Sec. 41 of the Indian Penal Code, any offence committed thereunder would be an offence under Sec. 40 (2) of that Code and would attract the application of Sec. 64 which provides for awarding the sentence of imprisonment in lieu of fine. Relying on this provision of the law, the contention was that where an offence under the Rajasthan Municipalities Act is punishable with a sentence of fine only, the Magistrate can by virtue of the said provision of the Indian Penal Code impose a sentence of simple imprisonment in default of the payment of fine.

Answering the argument it was held that the Indian Penal Code has classified the offences for different purposes. In some cases offences are only offences under the Indian Penal Code, but under Sec. 40, I. P. C., the definition of the word "offence" is enlarged for the purpose of Secs. 64 to 67 of the Code and the word "offence" for that purpose includes an illegal act under the Indian Penal Code, or under any special or local law, as defined in Secs. 41 and 42 of the Indian Penal Code. According to Sec. 41 "Special law" is a law applicable to a particular subject and by virtue of Sec. 42 "Local law" is a law applicable only to a particular part of India. Undoubtedly the Rajasthan Municipalities Act, 1959, is a special law, as well as local law within the definition of Secs. 41 and 42 of the Indian Penal Code and as such the application of Sec. 64, I. P. C., cannot ordinarily be ruled out to the offences under the Rajasthan Municipalities Act, but this proposition has got to be considered in view of the special provision of Sec. 265 (2) of the Rajasthan Municipalities Act.

Supreme Court decision

In the Supreme Court case in *Basiruddin Ashraf* v. *State of Bihar*,[3] *mutawalli* was charged for the violation of the provisions of Sec. 58 of the Bihar Wakfs Act, 1948 (8 of 1948) for not discharging the obligation enjoined upon him as a *mutawalli* and, therefore, he was convicted under Sec. 65 (1) of the said Act by the Divisional Magistrate, Patna, and he was sentenced to pay a fine of Rs. 100 and in default to undergo 15 days simple imprisonment. On appeal filed by the convict an objection was raised before the Supreme Court that the Magistrate had no power to award a sentence of imprisonment,

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1. Beni Pershad, (1882) P. R. No 20; Anon, 1 Weir 31; *cf.* Lakhmia, I. L. R. 18 Bom. 400; State *v.* Krishna Pillai Madhavan Pillai, A. I. R. 1953 T.C. 283: 1953 Cr. L. J. 1562: I. L. R. (1952) T. C. 1006; 1953 Ker. L. T. 28.
2. Ram Dularey *v.* Manohar, A. I. R. 1930 Nag. 149 at p. 149: 31 Cr. L. J. 278: 26 N. L R. 158.
3. A. I. R. 1957 S. C. 645.

as the law did not prescribe any imprisonment in lieu of the fine imposed under the provisions of the said Act. Learned Judges of the Supreme Court while dealing with this question observed—

> "It was also pointed out that Sec. 65 does not provide for any imprisonment in default of payment of fine, but the appellant was sentenced to fifteen days simple imprisonment in default of payment of fine. Section 33 of the Code of Criminal Procedure read with Secs. 40 and 67 of the Indian Penal Code appears to us to be a clear answer of this contention."

Calcutta decision.

In *Sukhdeo Singh* v. *Calcutta Corporation*,[1] where the petitioner was convicted by the Municipal Magistrate for keeping buffalo within the municical limit without the permission of the Municipal Board and, therefore, he was fined Rs. 15 and in default simple imprisonment for a week. The accused raised a similar contention that in lieu of fine the learned Magistrate could not pass a sentence of imprisonment, as such a power was not given to him under the Calcutta Municipal Act, 1923 (3 of 1923). The learned Judge after considering the provision of Secs. 40, 41, 42, 64 to 67 of the Indian Penal Code came to the conclusion that the learned Magistrate could pass sentence of imprisonment in lieu of fine by virtue of Secs. 64 to 67 of the Indian Penal Code.

Distinguishing features.

In the above cases it was never urged that the law under which fine was imposed contained a specific provision for its recovery in a manner different from the procedure laid down in the Criminal Procedure Code and, therefore, the provision of Sec. 64, I. P. C., could not be attracted. This question was not considered by their Lordships of the Supreme Court, or the Calcutta High Court.

Special law and general law.

The Rajasthan Municipalities Act provides a special mode for the recovery of fine imposed under the Act and subsection (2) of Sec. 265 is as follows:

> "Section 265 (2)—Any prosecution under this Act or under any rules or bye-laws thereunder may, save as therein otherwise provided, be instituted, before any Magistrate, and every fine or penalty imposed under or by virtue of this Act or any rule or bye-law thereunder expenses for the recovery of which no special provision is otherwise made in this Act, may be recovered on application to such Magistrate by the distress and sale of any moveable property within the limits of his jurisdiction belonging to the person from whom the money is claimable."

This provision prescribes a mode for the realisation of fine by issuing distress warrant and sale of moveable property of the convict within the municipal limits. This manner of realisation is different from the procedure prescribed by the Criminal Procedure Code which shows that the Legislature intended to provide a specific mode for the recovery of fine imposed under the Rajasthan Municipalities Act, 1959, which is different from the one given in general law. Rajasthan Municipalities Act, 1959, being a special law providing a definite mode for dealing with the sentence of fine, the provision relating to it in the general law, i. e. in the Indian Penal Code and Criminal Procedure Code cannot be made applicable for the recovery of fine imposed under this special enactment. In the above referred two cases no

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1. A. I. R. 1953 Cal. 41

such plea was taken either before the Supreme Court or before the Calcutta High Court that the law under which the fine was imposed provides a special procedure for the realisation of fine which is different from the provisions contained in the Indian Penal Code and Criminal Procedure Code and, therefore, provisions of the general law would not be attracted for the recovery of fines imposed under the special law; nor did the laws under which fine was imposed in those two cases contained provisions analogous to Sec. 265 (2) of the Rajasthan Municipalities Act. The special provision in the Rajasthan Municipalities Act provides a special mode for the recovery of fine imposed under the Act by issuing a distress warrant and sale of moveable property within municipal limits. In this view of the matter provision of Sec. 64, I. P. C, which deals with the power of the Criminal Court for awarding sentence of imprisonment in lieu of fine cannot apply to the cases where fine is imposed under the Rajasthan Municipalities Act, 1959. The Legislature while enacting the Rajasthan Municipalities Act, 1959, never intended that persons disobeying the orders of the Municipal Board should be sent behind the bars and it is why special provision has been enacted to enable the Magistrate to recover the fine imposed by him, or other authorities to realise the claims of compensation or other expenses for the recovery of which no special provision has been made in the said Act.

Therefore sentence of imprisonment in lieu of fine cannot be imposed and the only way open to the Court was to follow the procedure laid down in Sec. 265, sub-section (2) for the recovery of fine imposed by him under the Municipal Act.[1]

9. Concurrent sentence of imprisonment in default of fine.—The matter is covered by Sec. 35 of the Criminal Procedure Code and Sec. 63 of the Indian Penal Code. The two sections have to be read together. The provisions for the passing of concurrent sentences can refer only to substantive sentences and not to sentences of imprisonment in default of payment of fine. Under Sec. 64, I. P. C., it shall be competent for the Court to direct in default of payment of fine, the offender shall suffer imprisonment for a certain period which imprisonment shall be in excess of any other imprisonment, to which he may have been sentenced or to which he may be liable under commutation of a sentence. "Where a court imposes two sentences of imprisonment on an accused person and orders him to pay fine on each of the two counts with imprisonment in default of payment of fine, it may order the substantive terms of imprisonment to run concurrently, but the terms of imprisonment inflicted in default of payment of fine must run consecutively.[2] The Sessions Judge has no power in law to make the various sentences of imprisonment in default of payment of fine awarded by separate trials concurrent with each other.[3] Similarly, it is not competent for the Court to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Such order, if passed, is illegal;

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1. Mst. Dhapa *v.* State, A. I. R. 1966 Raj. 238 at pp 240, 241 : 1964 R. L W. 408
2. *Vide* 27 Bom. L. R. 1351 : 27 Cr. L. J. 111 and 70 Cr. L. J. 407 ; *Law of Crimes* by Ratanlal, 21st Ed., p. 105 ; State *v.* Raman, 1970 Ker. L T. 1018 at p. 1019.
3. Emperor *v* Chanan Singh, A. I. R. 1940 Lah.388 at p. 389 : I. L. R. (1940) Lah. 143 : 42 Cr. L. J. 33 ; *see* also Brahmananda Mohanty *v.* State of Orissa, (1969) 35 Cut. L. T. 1292 at p. 1297 : Emperor *v.* Subbarao Sesharao, A. I. R. 1926 Bom. 62 : 91 I. C. 543 : 27 Bom. L. R. 1351 : 27 Cr. L. J. 111 ; Perumal Madaliar *v.* South Indian Railway Company Ltd, A.I R. 1937 Mad. 407 : 45 M.L.W. 262.

such direction can only be given in respect of sentences of imprisonment or transportations.[1] Where the learned Trial Judge ordered that all the sentences including those awarded in default of payment of fine shall run concurrently, it was held that such a direction is illegal. As provided in Sec. 64 of the Indian Penal Code any sentence of imprisonment in default of payment of fine has to be in excess and not concurrent with any other sentence of imprisonment to which the accused may have been sentenced. Where a Court imposes two sentences of imprisonment on an accused person and orders him to pay fine on each of the two counts with imprisonment in default of payment of fine, it may order the substantive terms of imprisonment to run concurrently but the terms of imprisonment inflicted in default of payment of fine must run consecutively.[2] Section 64 of the Indian Penal Code deals with sentence of imprisonment passed for non-payment of a fine, and the last paragraph of that section clearly states that a court which imposes a sentence of fine upon an offender is competent to direct that in default of payment of the fine, the offender shall suffer imprisonment for a certain term, and then come the important words, "which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence".

Accordingly, the sentence of imprisonment in default of payment of fine must be in excess of, and not concurrent with, any other sentence of imprisonment to which an accused may have been sentenced. In the above-noted case, the Trial Magistrate had committed an illegality in directing that the sentence in default of payment of the fine shall run concurrently with the substantive sentence, and the same mistake was repeated by the lerned Sessions Judge on appeal.

That illegality has to be corrected and the Court can make that correction upon this reference made by the Sessions Judge, although an application filed in the Court in its criminal revisional jurisdiction by the convicted men has been dismissed earlier.[3]

10. Effect of imprisonment for non-payment of fine.—Imprisonment in default of payment of fine does not liberate an accused person from his liability to pay the fine imposed on him. Such imprisonment does not serve as a discharge or satisfaction of the fine, but is imposed as a punishment for non-payment.[4]

11. Appropriation of payment tendered by offender.—If a person is ordered by a court to make payments in respect of two items or matters whatever the items or matters may be, then in the absence of any express provision in that regard the person who is required to pay, has the option of saying that the money tendered by him should be appropriated to a particular item or matter. Naturally a person making a payment would

1. State of U. P. *v.* Bati, A. I. R. 1950 All. 625 at p 625 : 1950 A. L. J. 447 ; *see* also *In re* Kanda Moopan, A. I. R. 1937 Mad. 406 : 38 Cr. L. J. 796 ; Emperor *v.* Subbarao Sesharao, A. I. R. 1926 Bom 62 : 91 I C. 543 ; Emperor *v.* Ghulam Ahmad, A. I. R. 1929 Sind 179 (1) : 30 Cr. L. J. 907 : 116 I. C. 224 ; Emperor *v* Mitho Maroo Machi, A. I. R. 1942 Sind 80 : I L. R.(1941) Kar. 1 ; Emperor *v.* Ebrahim, A I. R. 1931 Rang 51 (1) : 32 Cr. L J. 637 ; State *v.* Krishna Pillai, A I. R.1953 T. C 233 : I. L. R. (1952) T.C. 1006.
2. Brahamanauda Mohanty *v.* State of Orissa, (1969) 35 Cut. L T. 1292 at p. 1297.
3. Bhedu Tatma *v.* Hari Jha, A. I. R 1958 Pat. 35 at p. 36 ; *see* also (Saiyed) Anif Sahib, *In re*, A. I. R. 1925 Mad. 993.
4. Sate *v.* Krishna Pillai Madhavan Pillai, A. I. R. 1953 T. C 233 at p. 234 : 1953 Cr. L. J. 1265 : I, L. R. (1952) T. C. 1006.

desire that the appropriation should be made in the manner most beneficial or at any rate least injurious to him and in the absence of clear authority in that behalf a court has no jurisdiction to prevent him from making such an appropriation.[1] In *Yacoob Juma Khan* v. *Emperor*,[2] it was held as follows :

> "Where an accused, who is convicted under one section to a fine of Rs. 200 or in default to three months' imprisonment and also under two other sections to a fine of Rs. 15 or in default to one month's imprisonment for each offence, pays into Court Rs. 30 and thus impliedly requests that the payment should be appropriated to the two smaller offences it should be so appropriated." [3]

65. The term for which the Court directs the offenders to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Limit to imprisonment for non-payment of fine when imprisonment and fine awardable.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Fair term of imprisonment.

1. Analogous law.—This section remains exactly as it was originally drafted.[4]

The provisions of this section and those of Sec. 67 have been held to be equally applicable to punishments under special laws like the Bombay Gambling Act.[5]

2. Principle.—The principle of this section, as explained by the Law Commissioners, is that the punishment provided by it is in default of payment of fine and not in lieu thereof ; in other words, the imprisonment does not satisfy the fine, which still remains due in spite of the imprisonment. The Commissioners thought that this was not a hardship, because the prisoner had the option of averting imprisonment by satisfying the fine, and if he undergoes it, it is not more than a "reasonable punishment for his obstinate resistance to the due execution of the sentence".[6]

3. Meaning of words.—"*The Court directs*", i. e. may direct (Sec. 64). "*In default of payment af fine*" means failure to pay not that it amounts to payment (*see* para. 2 above) ; on the other hand, when a portion of the fine is paid the offender is entitled to a proportionate reduction of the imprisonment (Sec. 69). "*Which is the maximum fixed for the offence*" apart from the enhanced punishment to which the offender may be liable under Sec. 75 *post*. The word "offence" here means anything punishable under

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1. *In re* Noor Mohammad Rowther, A. I. R, 1955 Mad. 599 at p.599 : 1955 M. W. N. 344 : (1955) 2 M. L. J. 424 : 1955 M.W.N. 344 : 1955 Cr L J. 1362.
2. A. I R. 1931 Sind 73 : 32 Cr L. J. 922.
3. *See* also Noor Mohammad Rowther, *In re*, A. I. R. 1955 Mad. 599 at p. 599.
4. Clause 52, Draft Bill.
5. Emperor *v.* Radho, A. I. R. 1925 Sind 144 at p. 144 9 I. C. (Sind) 394 :
6. Note A, Reprint, pp. 98-200. These views were generally concurred in by the Law Commissioners in their 2nd Report, Secs. 489-94.

the Code or under any special of local law.[1] *"Punishable with imprisonment as well as fine"* : The sense of the phrase "as well as" has been explained under the last section (*see* para. 5 of Sec. 64). The section applies both to cases in which the sentence of imprisonment is compulsory, and where it is passed in default of fine. The only case not included in the section is the case dealt with in Sec. 67 in which the sentence passed is of fine only.[2]

4. Fair term of imprisonment.—This section prescribes the *maximum* period of sentence to which an offender may be sentenced under the section.[3] It does not prescribe any inflexible rule, nor does it even attempt to lay down any general rule which the Court may follow in awarding imprisonment for non-payment of fine. But it is clear that the terms of imprisonment in default of payment of fine should bear a reasonable proportion to the amount of the fine, regard being had to the circumstances of the convicted person.[4] The maximum is fixed so that it may not be exceeded. The proviso to Sec. 33, Criminal Procedure Code, does not extend the period of imprisonment which may be awarded under this section.[5] Where, for instance, in a case of assault under Sec. 352 the offender was fined Rs. 50, he could not be sentenced to a month's imprisonment, for that period would exceed one-fourth of the maximum period of three months, the imprisonment prescribed for the offence.[6] Now, as under the scale provided by Sec. 67, the offender would have been, in such a case, liable to undergo simple imprisonment up to two months, if the offence had been punishable with fine only, it follows that the offender may conceivably get a shorter term in a more serious offence and a longer term in a less serious one,[7] and this is an anomaly for which there is no justification. It would, therefore, be the duty of the Court to be more discriminating in its application of these sections which are not the best possible, though they are undoubtedly the best the Legislature could provide.

Term of imprisonment in default to bear reasonable proportion to fines imposed.

As the only alternative sentence that the section provides is that of imprisonment the Court cannot pass a sentence of transportation (now imprisonment for life), which the former Sec. 591 does not countenance. So for the purpose of magisterial jurisdiction the alternative sentence authorised by this section is not to be reckoned as a part of the substantive sentence. But the powers of the Magistrates in this respect are defined by the Code of Criminal Procedure, to which reference has been made elsewhere (*see* para. 3 of Sec. 64). The result of that proviso, taken with this section, is that where a Magistrate only fines a person for an offence punishable with imprisonment as well as fine, he is competent to award an alternative sentence up to the extent of his power, provided that it does not contravene the rule of this section. Thus suppose that in a case of theft under Sec. 379 of the Code convicted by a Magistrate of the first class, the offender is sentenced to mere fine. Now the utmost sentence of imprisonment which he can pass in default of payment of the fine is under this section one-fourth of the maximum term of three years provided by that

Magisterial jurisdiction in awarding alternative sentence.

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1. Section 40 *ante*.
2. Chaunder Prashad Singh, 10 W R. 30.
3. Gokul Chandra Nandi *v.* Sribodh Chandra Banerji, A. I. R. 1941 Pat. 48 at p. 48 : 1901 I. C. 598 : 41 Cr. L. J. 957 : 21 Pat L. T. 795 ; Nurudin *v.* Emperor, A. I R. 1925 Oudh 109 (1) : 25 Cr. L. J. 1161.
4. Nga Cho, (1885) S. J. L.B. 353.
5. Darba, I. L. R. 1 All. 461 (F. B.) ; Gokul Chandra Nandi *v.* Sribodh Chandra Banerji, *supra* ; Venkatesagadu, I L. R. 10 Mad. 165 (F. B.).
6. Jehan Buksh, 16 W. R. 42; Darba, 11 All. 461 (F. B.) ; Venkatesagadu, I. L. R. 10 Mad. 165 at p 167 (F. B.) ovesruling Muhammad, I. L. R. 1 Mad. 277.
7. Darba, I. L. R. 11 All. 461 (F. B.) ; Ah Hein, L. B. R. (1893-1900) 485 ; Bhiharao, B. U. C. 979.

section, i. e., nine months. Now suppose, in the same case if the sentence passed was one of imprisonment with fine, then, though *this* section would make no difference in the alternative sentence, yet the passing of that sentence would contravene. Sec. 33 of the Criminal Procedure Code under which, in a case of such combined sentences, the maximum sentence is lieu of fine, which a Magistrate is empowered to pass, is not one-fourth of the sentence prescribed by the offence, but one-fourth of the sentence which the Magistrate is empowered to pass, i. e. six months. The two sections, thus, do not always act in unison, but the Court has to see that in complying one, it does not contravene the other.

Since the offence of bribery is punishable with three years' imprisonment an offender convicted on three counts might be sentenced to 18 months' further imprisonment, i. e., six months under each count in default of payment of fine.[1]

Description of imprisonment for non-payment of fine.

66. The imprisonment which the Court imposes in default of payment of fine may be of any description to which the offender might have been sentenced for the offence.

SYNOPSIS

1. Analogous law.
2. Nature of alternative imprisonment.

1. Analogous law.—The word "offence" as used in this section denotes anything punishable under this Code or under any special or local law.[2]

2. Nature of alternative imprisonment.—This section enables the Court to award any kind of imprisonment, whether rigorous or simple in default of payment of fine, provided that such imprisonment was allowable as a substantive imprisonment under the section. Consequently, where the sentence of rigorous imprisonment is the only sentence affixed to an offence, the Court cannot award simple imprisonment in default of fine.[3] In other cases it has a discretion.

Imprisonment for non-payment of fine, when offence punishable with fine only.

67. If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Scale.
4. Application to offences under State Acts.

1. Analogous law.—This section corresponds with Sec. 54 of the draft Code, but it was modified before its enactment, and it has since been amended by the addition of the words "the imprisonment which the Court imposes in default of payment of the fine shall be simple, and".[4] This amendment was anticipated by the Bombay High Court, which commented on the ambiguity

1. Harsukh Rai, (1919) 3 P. W. R. 3.
2. Section 40.
3. Shimonto Kotal, 7 W. R. 31 ; Nga Paw, L. B. R. (1893-1900) 281.
4. Act VIII of 1182, Sec. 3.

of the section as it was then worded, and altered the sentence of imprisonment in default of fine from rigorous to simple.[1] The section has been modified as regards hill tribes affected by local Regulations.[2] This section is complementary to Sec. 65, as it deals with the cases not provided for in that section, namely, those in which the only sentence prescribed is that of fine. It lays down the equivalent maximum imprisonment that the Court is empowered to award in default of payment of fine. This power is independent of, and unlimited by, the power of the Magistrate on summary trials,[3] so that, while a Magistrate, on a summary trial, cannot sentence an offender for a term exceeding three months, still, where he merely fines him, he may exceed that limit in sentencing him to an alternative imprisonment under this section.[4] But, in awarding the sentence of imprisonment under this section in default of payment of fine, the Magistrate cannot exceed the term to which, in the exercise of his ordinary jurisdiction he is entitled to sentence an offender.[5] As the maximum term of sentence, that may be passed under this section, cannot exceed six months, a first and second class Magistrate may pass a sentence up to that limit but inasmuch as a third class Magistrate cannot pass a sentence for more than one month, he cannot pass a longer sentence, though allowable under this section, for it would be opposed to Sec. 33 of the Criminal Procedure Code. Of course, though a court may, under this section award imprisonment in default of payment of fine, it cannot be *levied* by imprisonment,[6] where imprisonment has not been awarded as an alternative sentence.

Effect of Sec. 33, Cr P. C.

2. **Principle.**—This section refers only to an offence for which fine is the only punishment. It has no reference to offences punishable either with imprisonment or with fine, the sentences in which would be regulated by Sec. 65.[7]

3. **Scale.**—The scale in Sec. 67 refers to fines imposed and not to fines which the Court might have imposed if it had so pleased.[8]

4. **Application to offences under State Acts.**—Where the case against the manager of the mills, was that he as a manager of the mills, kept or stored for sale of mustard oil which was not exclusively derived from mustard seeds and thereby contravened the provisions of Sec. 9 (2) (*e*), Bihar Prevention of Food Adulteration Act, 1947. The section which punishes such contravention, is Sec. 27 of the Act.

Now it was submitted that the sentence in default of the payment of fine is not legal and referred to Sec. 67, Indian Penal Code, and it was also contended that the imprisonment in default of the payment of fine can only be simple imprisonment under that section. It was observed by their Lordships that—

> "Section 27, Prevention of Food Adulteration Act, 1947, imposes for a first offence a fine only, as given in the table appended to the section. It is not in dispute that the offence committed by the petitioner is his first offence. That being the position, Sec. 67, Penal Code, will apply, and the imprisonment in default of the payment of fine can only be simple imprisonment.[9]

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1. Santu, (1868) 5 B. H. C. R. 45.
2. Kachin Hill Tribes Regulation (Reg. 1 of 1895), Sec. 1 (3), and 3 Chin Hills Regulation (Reg. V of 1896), Sec 3.
3. Asghar Ali, I. L. R 6 All. 61.
4. Section 262 (2), Cr. P. C.
5. Darba, I. L. R. 1 All. 461 (F. B.); Asghar Ali, *supra*; Venkatesagadu, I. L. R. 10 Mad. 165 (F. B.).
6. Prayag Rai *v.* Arjan Mian, I. L. R. 22 Cal. 130; Murad Ali, 40 P. R. 1880; Nga Kywe, 4 L. B. R. (1872-1892) 410. Sections 67, 68, 69 apply to the Madras Harbour Trust Act (Madras Act II of 1886). In the case of hill tribes, to which the Kachin Hill Tribes Regulation (I of 1895) is applied the scale of punishment is different; *see* also Chin Hills Regulation (V of 1896), Sec. 3 (*see* footnote 3, supra).
7. Yakoop Sahib, I. L. R. 23 Mad. 238.
8. *In re* Karuppannan, (1941) 2 M. L. J. 446 at p 447: 1942 M. W. N. 427: 54 L. W. (Mad.) 326.
9. Devabrata Ganguli *v.* State of Bihar, A. I. R. 1950 Pat. 301 at pp. 301, 302: 5 D L.R. (pat) 123.

Their Lordships of the Supreme Court in *Bashiruddin Ashraf* v. *State of Bihar*,[1] said :

> "that Sec. 65, Bihar Waqfs' Act, 1947 (Bihar Act VII of 1948) does not provide for any imprisonment in default of payment of fine, but the appellant was sentenced to 15 days simple imprisonment in default of payment of fine, Sec. 33 of the Code of Criminal Procedure read with Secs. 40 and 67 of the Indian Penal Code appears to us to be a clear answer to this contention."

Imprisonment to terminate on payment of fine.

68. The imprisonment, which is imposed in default of payment of a fine, shall terminate whenever that fine is either paid or levied by process of law.

SYNOPSIS

1. Analogous law. 2. Principle.

1. Analogous law.—The process of law under which fine may be levied is to be found in Secs. 386 and 389 of the Criminal Procedure Code.

2. Principle.—This section subordinates imprisonment to fine. Such, indeed, was the intention of the sentence, and so it is provided in the next section that even if the accused pays a portion of the fine, he is entitled to a remission of his proportionate imprisonment.

Termination of imprisonment on payment of proportional part of fine.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fines still unpaid, the imprisonment shall terminate.

Illustration

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, *A* will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of expiration of the first month, or at any later time, while *A* continues in imprisonment, *A* will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, *A* will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while *A* continues in imprisonment, *A* will be immediately discharged.

SYNOPSIS

1. No power to refund. 2. Procedure.

1. No power to refund.—Though this section enacts in favour of proportionate remission of imprisonment on payment of a proportionate part of fine, still it confers on the Court no power to refund the fine if the necessary remission earned has not been made owing to an

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1. A I. R. 1957 S. C 645 at p. 648 : 1957 Cr. L. J. 1023 : 1957 S. C. C. 325 : 1957 S. C. J. 714 : (1957) 1 M. L. J. (Cr.) 680.

error in not communicating the order to the jailor,[1] though in such a case, the prisoner may apply to the Government for refund of the fine so paid. It is, however, the duty of the Court to order release of the prisoner as soon as the terms of this section have been complied with.

2. Procedure.—When a fine is imposed in addition to transportation, and the whole or part of the fine is levied, it is the duty of the sentencing Judge to inform the authorities at Port Blair of the fact.[2] It should be noted that transportation as a form of punishment has been abolished by the Criminal Procedure (Amendment) Act (26 of 1955).

Fine leviable within six years, or during imprisonment. Death not to discharge property from liability.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

SYNOPSIS

1 Scope.
2. Imprisonment does not discharge liability for fine.
3. Death of offender does not discharge liability for fine.
4. Expression "levy"—Construction of.
5. Limitation.
6. Imprisonment after limitation.
7. Property liable.

1. Scope.—This section enacts a rule of limitation regarding the period within which fine may be recovered. The period of six years follows the English Law of Limitation for recovery of debts, while the provision that fine remains recoverable out of the assets of the deceased offender follows the principle of civil law applicable to debts. It will be noticed that this debt, though a Government debt, is not the first charge upon the assets of the deceased.[3] The section applies even to cases where the fine is being realised according to civil process.[4]

But for the provisions of Sec. 62 of the Army Act a court-martial would not have jurisdiction to take cognizance of and try any offence which was triable by regular Criminal Courts, and it is for this purpose that Sec. 69 has been enacted. That section also puts certain limitation in the matter of imposition of sentence. It is difficult to read anything in this section which relates to the recovery of the fine awarded by a court-martial. The opposite section which speaks about realisation of fine awarded by a court-martial is Sec. 174 of the Army Act. The section creates a fiction and that fiction is that when a copy of the sentence of fine awarded by a court-martial is sent to any Magistrate in India, he gets jurisdiction to recover the amount of fine as if the sentence of fine awarded by the court-martial is a sentence imposed

Power of Magistrate to realise fine is subject to limitations under this section.

1. Naihu Mula, 4 B. H. C. R. 37.
2. 2 M. H. C. R. (App.) 44.
3. Note A. Reprint, p. 100.
4. Mir Ahmad *v.* Collector Peshawar District, A. I. R. 1943 Pesh. 56 at p. 57 : 44 Cr. L. J 650 : 207 I. C. 414, following Collector of Broach *v.* Ochhavlal Bhikalal, A. I. R. 1941 Bom. 158 : 42 Cr. L. J. 534: 43 Bom. L. R. 122: I.L.R. (1941) Bom. 147.

by the Magistrate himself. That being the fiction created by this section, it would necessarily follow that his powers to recover the amount of fine awarded by the court-martial are co-extensive with his power to realise the fine imposed by him. There cannot be any dispute that the powers of the Magistrate to realise the fine imposed by him under Sec. 409 are subject to the limitations imposed by Sec. 70 of the Indian Penal Code.[1]

Section 70 prescribes the *terminus a quo* to be the data of "passing of the sentence" by Court which passed such order and the filing of appeal or revision does not, unless specifically ordered, arrest the operation of the order of passing of the sentence of conviction. In the above-noted case the limitation started from the date of the conviction by the *panchayati adalat* and not from the date of dismissal of revision by the High Court.[2]

The execution of warrant issued under Sec. 386 (1) (*b*) of Criminal Procedure Code for the recovery of arears of "sales-tax, fee or amount so specified" is not controlled by Sec. 70 of the Indian Penal Code.[3]

2. Imprisonment does not discharge liability for fine.—This section was framed on the analogy of the procedure adopted for the recovery of debts in civil cases. As the imprisionment of the debtor does not absolve him from the payment of his debt,[4] so, it was said, should the imprisonment of a convict, whose case is worse and not better than that of a judgment-debtor, not absolve him from the payment of the fine.[5] This section is really a proviso to Secs. 64 and 67, for while those sections provide for alternative imprisonment, this section provides that the imprisonment so awarded and suffered will not absolve the offender from payment of the fine, which still remains due, and which may be recovered within the period prescribed in the section. The fine inflicted may, therefore, be recovered even though the offender may have served out the alternative imprisonment.[6]

This section is really a proviso to Secs. 64 and 67.

The imprisonment awarded in default of payment of fine does not absolve the convict from the payment of the fine, it counts as a sentence and the Court has therefore to see that reducing the sentence of imprisonment and substituting therefor the sentence of a fine, has not the effect of enhancing the sentence as a whole. Where, for instance, the Magistrate had in a case of cheating under Sec. 420 sentenced the accused only to a sentence of six months' imprisonment, and on appeal the Sessions Judge reduced the imprisonment to four months, but added a fine of Rs. 100 or in default of effect of the payment, two months' further rigorous imprisonment, it was held that

Imprisonment in default of fine if absolves convict from payment of fine.

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1. Ramaswami Iyer Agnellus Lawrence Gopalan *v.* Union of India, A. I. R. 1963 Bom 21 at p. 23 : 64 Bom. L. R. 440 : 1962 Nag. L. J. 515.
2. Palakdhari Singh *v.* State of U. P., A. I. R. 1962 S. C. 1145 at p. 1146.
3. P. V. Muhammad *v.* Collector of Palghat, A.I.R. 1967 Ker. 254 at p. 256.
4. Section 58 (2), C. P. C.
5. Note A, Reprint, 100; Sagwa, I. L. R. 23 All. 497.
6. Fanthome, (1882) A. W. N. 85 ; Maya Dewji, B. U. C. 40 ; Collector of Broach *v.* Ochhavlal Bhikalal, A. I. R. 1941 Bom. 158 at p. 159 : 42 Cr. L. J. 534 : 43 Bom. L. R. 122 : 194 I. C. 217 : I. L. R. (1941) Bom. 147 ; State *v.* Krishna Pillai Madhavan Pillai, A. I. R. 1953 T. C. 233 at p. 234 : 1953 Cr. L. J. 1265 : I. L. R. (1952) T. C. 1006 : 1953 Ker. L T. 28 : 8 D. L. R. (T. C.) 527.

the sentence on appeal was really to enhance it, for the accused may conceivably have to remain in prison for six months, and yet remain liable to pay the fine.[1]

Reading Sec. 70, I. P. C., with the proviso to sub-section (1) of Sec. 386, Cr. P. C., it is clear that the Ligislature did not want that the offender should undergo imprisonment as well as pay the fine though it conceded the right in favour of the State that the liability of the offender is still there and that it could be enforced for special reasons to be recorded in writing. Therefore, the contention that the State is entitled to execute the decree in spite of the fact that the offender has undergone the whole of the imprisonment in default, in the absence of special reason, cannot be accepted.[2]

3. Death of offender does not discharge liability for fine.— The liability of the offender for the fine does not cease even with his death, for, on his death, the fine may still be recovered from "any property which would, after his death, be legally liable for his debts".[3] Even an appeal,[4] or revision,[5] against the sentence of fine does not abate.[6] The effect of this clause is to make the unpaid fine rank as a Government debt *pari passu* with the other debts of the deceased offender.

The section of the Penal Code bearing on the question on the liability of the property of an offender for the fine imposed upon him is Sec. 70, which provides that—

> "The death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts."

What has to be seen is whether after the death of Bakhtwar Singh the ancestral land left by him is legally liable for his debts? The answer is provided by a Full Bench decision of the Punjab Chief Court in *Jagdeep Singh* v. *Bawa Narain Singh*,[7] in which it has been held that—

> "Where a male proprietor, governed by customary rules, has contracted a just debt and dies leaving ancestral landed property, such property is not liable in the hands of the next holder in respect of such debts, unless the debts had been expressly charged on the property."

There is no question of the fine imposed upon Bakhtawar Singh deceased having been charged upon the ancestral landed property left by him. So that the ancestral landed property left by him is not liable in the hands of the plaintiffs in respect of the amount of fine imposed upon Bakhtawar Singh deceased because such property is not liable in their hands for the debts of Bakhtawar Singh deceased. It follows that in realisation of fine when the ancestral property of a convict is put to sale what is transferred to the Government, or rather to the

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1. Sagwa, I. L. R. 23 All. 497.
2. K. Vamanshenoy *v.* Collector of South Kanara, A. I. R. 1964 Mys. 64 at p 66: (1964) 1 Cr. L J. 418.
3. State *v* Krishna Pillai Madhavan Pillai, A. I. R. 1953 T. C. 233 at p. 234 : 1953 Ker L. J. 28.
4. Ramdhani Gope *v.* Jagesher Mahto, A. I. R. 1941 Pat. 526 at p. 527 : 42 Cr. L. J. 653 : 195 I. C. 126 : 7 B. R. 890.
5. Siva Ram *v.* Emperor, A I. R. 1937 Oudh 320 at p. 321 : 13 Luck. 306 : 38 Cr. L. J. 509 : 168 I C. 177.
6. Section 431, Cr. P. C.
7. 4 P. R. 1913 : 15 I. C, 866 (F. B.).

purchaser through the Government, are the personal rights of the convict in the property and nothing which he could not have assigned away.[1]

Rule under English law.

Under the English law a fine is in the nature of a monetary penalty which is due to the Crown, and when a man is sentenced to pay a fine, there at once arises a debt of record (i. e. by judgment) to the Crown. Where an accused was sentenced to imprisonment and fine and the sentence also provided for imprisonment in default of payment of fine, the accused died while serving the imprisonment without paying the fine. It was held that the fine could be recovered by the Crown from the personal representatives of the accused even after his death.[2]

4. Expression "levy"—Construction of.—Section 70 of the Indian Penal Code or any other provision of the Indian Penal Code does not prescribe the procedure by which the fine imposed has to be levied. The section only speaks of the period of limitation within which the fine imposed has to be levied. The procedure relating to the realisation of the fine is provided in Sec. 386 of the Code of Criminal Procedure and the rules framed thereunder. The procedure prescribed in Sec. 386 is twofold : viz. (1) issue of a warrant for levy of the amount of sentence by attachment and also of moveable property belonging to the accused ; and (2) issue of a warrant to the Collector of the District authorizing him to realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the accused. Sub-section (3) of Sec. 386 provides that when a criminal court issue a warrant to the Collector for realisation of the amount of fine, the warrant itself shall be deemed to be a decree, and the Collector the decree-holder within the meaning of the Code of Civil Procedure. The only limitation on the power either of the Magistrate of the Civil Court in this matter is not to execute the decree by process of arrest and detention of the accused in prison for non-payment of the fine. Sub-section (2) of the section empowers the State Government to make rules regulating the manner in which warrants for levy of the amount of fine by attachment and sale are to be executed, and for summary determination of any claims made by any person other than the offender in respect of the property attached in execution of such warrants.

The subject-matter of Sec. 70 of the Indian Penal Code is to prescribe a period of limitation for the levy of the fine imposed by Criminal Court when it remains unpaid either in part or full, there is no legislative provision which has prescribed any limit for completing the proceedings taken in Court for the purposes of realisation of money through Court. But, on the other hand, in every case the Legislature has prescribed the period within which a party seeking aid of the Court to recover money must move the Court for the purposes of the recovery of the amount through Court. There is no reason to hold that the Legislature has departed from its normal practice in case of Sec. 70 of the Penal Code to hold so, would lead to startling results.

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1. Harnam Singh *v.* Hira Singh, A. I. R. 1955 Pepsu 170 at p. 171 : (1955) Cr. L. J. 1625, relying on Jagdeep Singh *v.* Bawa Narain Singh, 4 P. R. 1913 : 15 I. C. 866 (F. B.) and Sadhu Singh *v.* Secretary of State, 18 P. R. 1908 : 156 P. R. 1908 (F. B.).
2. H. M. Treasury *Iv.* Harris, (1957) 2 All E R. 455.

It certainly is within the volition of a party that wants the aid of the Court in the matter of realisation of the money to go to the Court. But once he goes to the Court it does not depend on his volition to bring the proceedings to an end. On the other hand, as to when the proceedings would come to an end would depend on the steps taken by the party from whom the money is sought to be recovered, or steps taken at his instance, or even in certain cases steps taken by some other person who might have no concern with the persons from whom the money is sought to be recovered. The Civil Procedure Code as well as the rules framed under Sec. 386 of the Code of Criminal Procedure would show that when a property of the persons is attached for the purpose of realisation of the amount by its sale, a right is conferred on a person, who claims that property to belong to him to file an objection to the attachment. The Court or authority that attaches the property then inquires into the objection. If the objection is rejected, the party concerned has also a right to approach a civil court and establish his right in a regular civil suit. All these things are necessarily bound to take time depending on the time that remains at the disposal of the Court as well as the tactics adopted by the parties. These being the relevant provisions of law relating to recovery of an amount through a court, it is difficult to assume that the Legislature had intended to prescribe a period of limitation within which all the proceedings relating to the realisation of the amount through Court have to be concluded and the property attached converted into cash. On the other hand, having regard to the context, Legislature in using the expression "levy" in Sec. 70 of the Indian Penal Code had only intended to prescribe the period of limitation within which property of the debtor has to be seized for collecting the fine or in other words for enforcing an execution for the recovery of the amount of fine. It is difficult to accept that the Legislature prescribed an outside limit within which the entire process, commencing from attachment of the property and ending with conversion thereof in cash by sale has to be completed. To hold so may result in tempting convicts to resort to questionable methods for preventing sale of their attached properties by protracting the proceedings.

It is true that the expression "levy" in Secs. 68 and 69 of the Indian Penal Code has been used in the sense "realise". But then the subject-matter of Sec. 68 and Sec. 69 is totally different than the subject-matter of Sec. 70. Sections 68 and 69 deal with the questions as to when the imprisonment of an accused person which he is undergoing for default in the matter of payment of fine is to be terminated. Necessarily, in this context the imprisonment would terminate only when the fine would be paid or the period would expire. The subject-matter of Sec. 70 is entirely different and that is prescribing the period of limitation for taking aid of the Court in the matter of realisation of fine. It is not an invariable rule of law that the same expression must be understood in the entire legislations in the same sense. On the other hand, as Maxwell at page 322, puts : "The same word may be used in different senses in the same statute and even in the same section." It is normal rule that while ascertaining the meaning of a section of an Act the proper course is to ascertain that meaning from the consideration of the section itself. It is only if it is not possible to do so, a reference to other section need be made. For reasons stated above, the meaning of the expression "levy" in Sec. 70 of the Indian

Penal Code is to seize for the purposes of collecting the fine or to enforce an execution for a certain sum.[1]

The powers of the Magistrate to realise the fine imposed by him under Sec. 409 are subject to the limitations imposed by Sec. 70 of the Indian Penal Code.

The section only speaks of the period of limitation within which the fine imposed has to be levied. The procedure relating to the realisation of fine is provided in Sec. 386 of the Code of Criminal Procedure and the rules frames thereunder.[2]

In the case of *Palakdhari Singh* v. *State of Uttar Pradesh*,[3] their Lordships have observed as under :

> "It was argued that the final order which is the *terminus a quo* under Sec. 70 of the Indian Penal Code is the order of the High Court passed in revision on 13th May, 1953 and from the date the proceedings for recovery are within time. But the language of Sec. 70 prescribes the *terminus a quo* to be the date of 'passing of the sentence' by Court which passes such order and the filing of appeal or revision does not, unless specifically ordered, arrest the operation of the order of passing of the sentence of conviction. In the present case the limitation started from the date of conviction by the *panchayati-adalat* and not from the date of dismissal of revision by the High Court."

In *Ramaswamy Iyer Agnellus Lawrence Gopalan* v. *Union of India*,[4] it has been laid down by a Division Bench of the Bombay High Court, "that the meaning of the expression 'levy' in Sec. 70 of the Indian Penal Code is to seize for the purpose of collecting the fine or to enforce an execution for a certain sum". In this view of the matter it is not necessary that the proceedings for "levy" of fine should terminate within six years after the passing of the sentence. On the other hand, what Sec. 70 of the Indian Penal Code contemplates is that the proceedings for levy of fine should commence within that period.[5]

5. Limitation.—The fine may be recovered at any time within six years of the sentence, or thereafter before expiry of his substantive imprisonment, if the offender be sentenced to more than six years' imprisonment. Within this period it is competent to the Court to recover the fine. The fine may be recovered both out of the moveable and immoveable property of the convict.[6] In any case the limitation applicable is the same, after which the offender's property cannot be proceeded against. Even if two sentences of imprisonment in default of payment of two fines are wrongly made to run concurrently, it is the period of imprisonment to which the offender is liable under the sentence actually passed that is to be counted, and not the period to which he might have been liable had the sentence been correctly passed.

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1. Ramaswamy Iyer Agnellus Lawrence Gopalan *v.* Union of India, A. I. R. 1963 Bom. at pp. 23, 24, 25 : 64 Bom. L. R. 440 : 1962 Nag. L. J. 515.
2. *Ibid.*, at pp. 23 and 24 : 64 Bom. L. R 440 : 1962 Nag. L. J. 515.
3. A. I. R. 1962 S. C. 1145 at p 1146.
4. A. I. R. 1963 Bom. 21.
5. Keshav Datta Misra *v.* State, A.I.R. 1967 All. 276 at p. 278 : 1967 A. L. J. 207.
6. *See* Sec. 386, Cr. P. C.

In the case of *Mir Ahmad* v. *Collector, Peshawar District*,[1] their Lordships observed :

> "Section 70, Penal Code, says that the fines may be levied within the prescribed period : it does not say that action for the levying of the fine may be taken and we interpret the word 'levying' as meaning the actual realization of the fine. Although therefore the application was made within the prescribed period, as the fine was not realized within the period, further proceedings cannot be taken against the appellant."

The mere fact that the fine is written off as irrecoverable is, subject to the limitation prescribed, no bar to its subsequent recovery by coercive process of law, if it appears that the person from whom it was due has acquired means to pay it. As the section provides a special limitation for the recovery of fine, it cannot be further enlarged by acknowledgment or part-payment under the general law of limitation.[2]

6. Imprisonment after limitation.—As already observed, after the limitation the offender's property cannot be proceeded against, but, there being no limitation for his personal arrest, his liability to imprisonment awarded in default of payment of fine continues irrespective of time. Indeed, such imprisonment is not a satisfaction of the fine, but is a punishment for contempt.[3]

7. Property liable.—Section 386 of the Code of Criminal Procedure provides for the recovery of the fine both out of moveable and immoveable property of the defaulter. The fine may be recovered not only from any property he may have at the time of the sentence, but also from any property acquired by him within the period of limitation specified for the recovery of the fine.[4]

No special priority or enlarged limitation.

On the death of the offender, the fine may be recovered from any property "which would, after his death, be legally liable for his debts". The effect of this is to make the unpaid fine rank as a Government debt *pari passu* with the other debts of the deceased offender. The question as to what property of the deceased is so liable is a question the determination of which depends upon the personal law of the deceased and the civil liability of his estate to discharge debts. It may, however, be added that, but for this clause, it would not have always been possible for the Government to recover fine from the estate of the deceased offender. For instance, in the case of a Hindu convict, the sons might have repudiated the debts as illegal or immoral and, therefore, irrecoverable out of the family estate. In any other case, the liability might have been considered as only personal, ceasing with the death of the offender. The liability declared by the clause obviates such questions. It does not, however, create charge on the offender's estate. There is, therefore, no case of special priority or enlarged limitation. If a process against the property is issued and the petitioner does not wish to protect the property by paying the fine and wishes to oppose the

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1. A. I. R. 1943 Pesh. 56 at p. 57 : 1943 Pesh. L. J. 56 : 207 I. C. 441 : 44 Cr. L. J 650.
2. Latiful Hasan *v.* Mumtaz Ali Khan, 3 A. L. J. 818 : 4 Cr. L. J. 404 : (1906) 26 A. W. N. 275.
3. Ganu, (1884) 8 U. C. 207; Moolsoodun, 3 W. R. 61 ; Sagwa, I. L. R. 23 All. 497.
4. State *v.* Krishna Pillai Madhavan Pillai, A. I. R. 1953 T. C. 233 at p. 234 : 1953 Ker. L. J. 23 ; *see* Sec. 386, Cr. P. C.

recovery in that fashion he may sue the Government for a declaration that in the property, land as well as house, no right belonging to the deceased person exists. In that suit he can pray for an injunction against execution of the process. Of course, he can still press his claim on the property direct in the Court which will issue the process for recovery of the fine. If he fails there, his remedy will lie in a suit suggested above. There shall be no interference in revision with the decision of the recovering Court whether the property has ceased to be the deceased person's.[1]

Limit of punishment of offence made up of several offences.

71. Where anything which is an offence is made up of parts, any of which part is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

[2][Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.]

Illustrations

(*a*) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(*b*) But, if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*.

SYNOPSIS

1. Analogous law.
2. English practice compared.
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4. Meaning of words.
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7. Paragraph 1 :
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9. Paragraph 2.
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1. Jadeja Gajasinghji Harisinghji Lakadia v. Kutch Government, A. I. R. 1950 Kutch 20 at p. 20 : 51 Cr. L. J 643.
2. Added by Act VIII of 1882, Sec. 4.

1. Analogous law.—The last three clauses of this section are new and were added by the Penal Code Amendment Act of 1882.[1] The provisions of this section are closely analogous to those of Sec. 26 of the General Clauses Act,[2] and of Secs. 35 and 235 of the Criminal Procedure Code.

General Clauses Act.

Section 26 of the General Clauses Act, which provides for offences punishable under two or more enactments, runs as follows :

"*Section* 26.—*Provision as to offences punishable under two or more enactments.*—Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Section 35 of the Criminal Procedure Code provides for the sentence in cases of conviction of several offences at one trial. As amended in 1923 the section run as follows :

"*Section* 35.—(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Sec. 71 of the Indian Penal Code (XLV of 1860), sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict ; such punishments when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court :

Provided as follows :

(*a*) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years ;

(*b*) if the case is tried by a Magistrate (other than a Magistrate acting under Sec. 34) the agrgegate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, the aggregate of consecutive sentences passed under this section in case of conviction for several offences at one trial shall be deemed to be a single sentence."

Criminal Procedure Code.

Section 235 of the Criminal Procedure Code provides for joinder of charges in a trial for more than one offence and not for the sentence.

It runs as follows :

"*Section* 235.—(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by

1. Act VIII of 1882, Sec 4.

2. Act X of 1897.

the same person, he may be charged with, and tried at one trial for, every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offence.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code (XLV of 1860), Sec. 71.

Illustrations

To sub-section (1)

(*a*) *A* rescues *B*, a person in lawful custody, and in so doing causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be charged with, and convicted of, offences under Secs. 225 and 333 of the Indian Penal Code.

(*b*) *A* commits house-breaking by day with intent to commit adultery and commits in the house so entered adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under Secs. 454 and 497 of the Indian Penal Code.

(*c*) *A* entices *B*, the wife of *C*, away from *C*, with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under Secs. 497 and 498 of the Indian Penal Code.

(*d*) *A* has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under Sec. 466 of the Indian Penal Code. *A* may be separately charged with, and convicted of, the possession of each seal under Sec. 473 of the Indian Penal Code.

(*e*) With intent to cause injury to *B*, *A* institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses *B* of having committed an offence, knowing that there is no just or lawful ground for such charges. *A* may be separately charged with, and convicted of two offences under Sec. 211 of the Indian Penal Code.

(*f*) *A*, with intent to cause injury to *B*, falsely accuses him of having committed an offence knowing that there is no just or lawful ground for such charge. On the trial, *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of, offences under Secs. 211 and 194 of the Indian Penal Code.

(*g*) *A*, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged

with, and convicted of, offences under Secs. 147, 325 and 152 of the Indian Penal Code.

(*h*) *A* threatens *B*, *C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with, and convicted of, each of the three offences under Sec. 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (*a*) to (*h*), respectively, may be tried at the same time.

To sub-section (2)

(*i*) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Secs. 352 and 323 of the Indian Penal Code.

(*j*) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property, for the purpose of concealing them. *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with, and convicted of, offences under Secs. 411 and 414 of the Indian Penal Code.

(*k*) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of, offences under Secs. 317 and 304 of the Indian Penal Code.

(*l*) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B*, a public servant, of an offence under Sec. 167 of the Indian Penal Code. *A* may be separately charged with, and convicted of, offences under Secs. 471 (read with Sec. 466) and 196 of the same Code.

To sub-section (3)

(*m*) *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Secs. 323, 392 and 394 of the Indian Penal Code."

2. **English practice compared**.—Under English law, a person cannot be tried for two offences committed in the same transaction on the ground of unfairness to him in that it would amount to the giving of evidence of his bad character, and otherwise embarrass him in the defence.[1] This section, as well as Sec. 235 of the Criminal Procedure Code, adopts a rule more favourable to the accused, though this section merely provides for limiting the punishment in cases covered by it. As such, it provides only a penalty for a single offence under the law, and in so doing recognizes the rule of Roman law, followed in many cases decided under the English law.[2] It is a recognition of the maxim *nemo debet bis punire pro uno delicto*.[3]

The word "offence" is used in the section in its wider sense as meaning anything punishable under the Code or any special or local law.[4]

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1. Castro, 6 A. C. 229 at p. 244.
2. Moodie, 1 M. & R. 328; Berry Henderson, L.R. 5 Q.B. 296 at p. 302, followed *per* West, J., in Dod Basaya, 11 M. H. C. R. 13.
3. "No one shall be twice punished for the same offence."
4. Section 40; Mohd Ali Khan, I. L. R. 55 All. 557.

3. Principle.—The object of the section is to confine punishment within reasonable limits. It is based on the rule that where the intention was to commit an offence, the commission of which involves the perpetration of acts, by themselves punishable, the offender shall not be punished for them separately, as his object was to commit one crime and not many. Moreover, if in such a case, every criminal act, however subservient to the main design, were penal there would be no end to punishment, and the most trivial act might thus be magnified into offences, the punishment of which might be wholly disproportionate to the nature and gravity of the act accomplished. As this section and the two corresponding sections of the Criminal Procedure Code are directed to this end, and as the two Codes approach the same question from a different standpoint, it is necessary to see how far the provisions of the one Code are affected by the corresponding provisions of the other.

Object of the section.

It will be observed that the two sections of the Procedure Code do not profess to modify any part of this section. Section 35, Cr. P. C., is specifically made "subject to the provisions of Sec. 71 of the Indian Penal Code," and Sec. 235 (4) lays down that "nothing contained in this section shall affect the Indian Penal Code, Sec. 71". This section has, therefore, to be considered first, and it would prevail in case of conflict with them.

Cr. P. C. not to modify any part of this section.

4. Meaning of words.—*"Where anything. . . . is made up of parts"* : These words are general but mean where several acts constitute an offence, each one of which is by itself, an offence. *"Of any law in force"*, i. e. the same or separate laws.[1] *"The offender shall not be punished"* : Not that the offender commits no offence, but only that he cannot be so convicted, for if he is convicted, he will also have to be punished.[2] *Unless it be so expressly provided"* : This makes it subject to an express direction to the contrary. The provision for separate punishment must again be something more than a mere fact that the act is punishable in law. It must be a direction sufficiently explicit to override the rule. *'Constitute an offence,"* i. e. as defined in the Code.[3] In the words of Mahmud, J , these words must be understood to refer to the definitions of the offences as enunciated in the Code itself, irrespective of the identity or non-identity of the evidence whereby the several acts are proved.[4]

5. Scope.—The section deals with three specific cases : (*i*) where a number of acts are committed, all of which are offences, both collectively, as well as individually, in which case the offender may be punished for any one of them or all collectively, but he cannot be punished for all the acts severally ; (*ii*) where of such several acts, they not only individually constitute separately offences but also constitute a different offence, when two or more of them are combined, then the offender can only be punished

What the section provides for.

1. *Cf.* Sec. 26, General Clauses Act (X of 1897) ; Rahmatulla, 1 Pat. L. J. 373 : 38 I. C. 433 ; Kiamuddi, I. L. R. 51 Cal 79.
2. *Ubi jus ibi remedium* (where there is a right there is also a remedy)—Wazir Jan, I. L. R. 10 All. 58 : 4 M. H. C. R. (App.) 27 ; but findings should be recorded on all counts, though punishments should be awarded as here directed—6 M. H. C. R (App.) 47.
3. Section 40.
4. Wazir Jan, I. L. R. 10 All. 58 at p. 69.

for any one of such offences, and not both ;[1] (*iii*) where an act is penal under two or more Acts, the offender cannot be punished under each of them, for otherwise he would be punished several times over for the same acts.[2] The section thus provides for (*a*) the plurality of acts (Cl. 1), (*b*) the plurality of aspect (Cl. 2), and (*c*) the organic connexion of acts with a result differing from the elements (Cl. 3).

Where it was contended that the appellants having caused the evidence of the two offences under Secs. 330 and 348 to disappear, committed two separate offences under Sec. 201 and are punishable accordingly. It was held that "taking a strict view of the matter, it must be said that by the same act the appellants committed two offences under Sec. 201. The case is not covered either by Sec. 71 of the Indian Penal Code or by Sec. 26 of the General Clauses Act, and the punishment for the two offences cannot be limited under those sections.[3]

6. **Relative scope of this section and Secs. 35 and 235 of Criminal Procedure Code.**—Referring now to Sec. 35 of the Code of Criminal Procedure, it would be observed that that section was amended in 1923 (Act XVIII of 1923) and the word "distinct" deleted. The effect of the amendment is that "under the present law it is not even necessary that the offences should be distinct in order to enable a Magistrate to pass consecutive sentences. . . . subject to the provisions of Sec. 71, I. P. C.". The combined effect of these two sections would be that if a case falls under Sec. 71 of the Penal Code, the Court cannot award a severer punishment than it could, for any of the offences. constituting component parts of the main offence.[4] Now, if we turn to Sec. 235 of the Procedure Code cases occur in which the plurality of sentences, though legal under that section, would be illegal under the rule here enacted. But in such case, the Procedure Code yields to the rule of the section, which is paramount wherever its principle conflicts with the Procedure Code. Indeed the two Codes provide two different rules intended for two different purposes. As was observed by Muthuswamy Ayyar, J., Sec. 234 of the Procedure Code provides rules of criminal pleading only, the rules for assessing punishments being provided by this section supplemented by Sec. 35 of the Procedure Code.[5] In other words, the combind effect of the three sections is that while it is legal under the Code of Criminal Procedure that the accused should be tried for more than one offence whether they are parts of a greater or another offence or not, in awarding punishment the provisions of this section shall be observed. There is thus no real conflict between the three sections, and cases which note a conflict are cases in which this difference has been overlooked.

The two Codes provide two different rules for two different purposes.

It will thus be evident that while there is no objection to several such offences being charged with and tried together, the Code limits the punishment to which the offender may be sentenced on conviction.

1. Clause 3.
2. Clause 2 ; Lalamun Singh, 1 Agra 31 ; Rahmatulla, 1 Pat. L. J. 373 : 38 I. C. 433 ; Sukhanandan Das, 43 I. C. (Pat.) 445 ; Bhagat Singh *v.* Emperor, A. I. R. 1930 Lah. 266 at p. 268 ; P. S. Ananta Narayanan, A. I. R. 1933 Mad. 337 at p. 338
3. Roshan Lal *v.* State of Punjab, A. I. R. 1965 S. C. 1413 at p. 1419 : (1965) 2 S. C. A. 447 : (1965) S. C. D. 113 : (1966) 1 S. C. J. 233.
4. Emperor *v.* Hanma Timma Bhandiwaddar, A. I. R. 1928 Bom. 145 (1) at p. 145 : 30 Bom. L. R. 383 : 29 Cr. L. J. 544 : 109 I. C. 368.
5. Nirchan, I. L. R. 12 Mad. 36.

It may, however, be noted that while Sec. 235 of the Procedure Code speaks of the person accused being "charged with and tried," the illustrations all refer to cases in which the person accused may not only be charged with and tried but also *convicted* of separate offences. The conflict, if any, must then be with these illustrations and the section. But this section prohibits punishment for, and not conviction under, two offences.[1] So the conflict is more apparent than real

Sections 71, 143 and 447.

First paragraph of the section deals with a case where there are several parts to an offence of which any of the parts may itself amount to an offence. In such a case, the offender cannot be punished with the punishment of more than one of such offences. But the offences under Secs. 143 and 447, I. P. C., are not of that category. For an offence under Sec. 143, what is required is the membership of an unlawful assembly as defined under Sec. 141, I. P. C. An assembly is designated an unlawful assembly, if the persons composing the assembly had one or more of the common objects mentioned in that section.

Section 447 has no reference to any unlawful assembly. The offence under Sec. 447 is criminal trespass as defined in Sec. 441, i. e. entry into or upon property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property. Thus the criminal trespass in a case, cannot be said to be a part of the offence of being a member of the unlawful assembly. Criminal trespass need not have been committed actually, to constitute an offence under Sec. 143, even though the common object of the assembly may have been to commit criminal trespass.

One is unable to see how Sec. 71, I. P. C., would not enter into the picture at all. Thus there is nothing wrong in convicting and sentencing a person separately under Secs. 143 and 447, I. P. C.[2]

Test of criminality in complex acts.

7. **Paragraph 1.**—This section lays down the true test of criminality in complex acts resulting in complex offences, of which the constituent acts are themselves complete offences as understood in Sec. 40. The section enunciates the rule in which the Code authorizes the passing of a single sentence. But if this were all, all difficulties would have been reduced by reference to it and in cases howsoever complicated and transactions howsoever long, the sentence would be as for one offence committed. That this was not the object of the Legislature is evident from the enactment of Sec. 235 of the Procedure Code in which more than one offence is contemplated and made penal. The illustrations appended to this section then comprise cases which the Legislature had intended to exclude from the operation of the rule. These offences are ordinarily those committed in the same transaction, in which case the several offences committed are treated as independent offences.

Whether separate sentences can be awarded for the offences under Secs. 279 and 337 of the Indian Penal Code, if they are committed in the course of same transaction. It was held that "of course, if the two

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1. Wazir Jan, I. L. R 10 All. 58 at p. 67 : 1887 A. W. N. 274, *per* Mahmood, J.
2. Elangbam Chandra Singh *v.* Yensembam Maimu Singh, A. I R. 1962 Manipur 23 at pp. 23, 24 : (1962) 1 Cr. L. J. 618.

offences are committed in the same transaction, the assessment of punishment will be governed by the provisions embodied in Sec. 71 of the Indian Penal Code".

An offence under Sec. 279 is distinct from an offence under Sec. 337 or Sec. 338 and, therefore, a person convicted of an offence under Sec. 337 or Sec. 338 can also be convicted for an offence under Sec. 279. If, however, the two offences are committed in the same transaction, Sec. 71 will govern the assessment of punishment. If a person drives a vehicle or rides on a public way in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person, he commits an offence, against public safety. If, by so driving a vehicle or riding on any public way, he causes an injury to any other person he also commits an offence punishable under Sec. 337, Indian Penal Code, and if he causes grievous hurt, he commits an offence punishable under Sec. 338, Indian Penal Code. If by such rash or negligent driving the accused has caused injury to some person, offences punishable under Secs. 279 and 337, Indian Penal Code, will be committed, and acquittal of the offence under Sec. 337 or Sec. 338, Indian Penal Code, as a result of the compounding will still leave the charge under Sec. 279, Indian Penal Code, outstanding.[1]

(1) *Offences in the same transaction.*—The thirteen illustrations appended to Sec. 235 of the Procedure Code are cases in which the Legislature saw no objection to the separate conviction of the offender. These cases furnish an apt contrast to the two illustrations appended to this section.

Rescuing from lawful custody and assaulting public servant.

Take, for instance, the first illustration of the two sections: A person rescues another from lawful custody. It is an offence complete and entire by itself. He is resisted by the custodian who is thereupon grievously wounded.[2] Now, since the wounding of the custodian was not a part of the offence of rescuing a person from lawful custody, the offender may be not only tried but also punished for the two offences. But suppose that the person rescued was re-captured by the constable, and the rescuer thereupon made another effort to rescue him with success. Here, since the second rescue was a part of the same intention in pursuance of the same design, the offender could not be convicted as for two offences to rescue a person in custody.

Theft or robbery of property of different persons.

Where a person breaks into a house, and removes property which happens to belong to several persons, he is guilty of only one offence, and not of as many offences as there are owners.[3] Where a gang of dacoits, in pursuance of the common object of robbery, attacked at the same time two houses of different owners in the same village, it was held that they could only be convicted of one offence of dacoity and not of two offences because of the two houses robbed.[4] For the same reason there could be only one conviction of a guard in charge of a goods train for

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1. Nanalal Hari Shanker *v.* State of Gujarat, A. I. R. 1969 Guj. 62 at pp 63, 64, 65 : I. L. R. (1958) Guj. 338 ; State *v.* Gulam Meer, A. I R. 1956 M. B 141 at p. 144; State *v.* Kamalakar Prabhakar Juvekar, A. I. R. 1960 Bom. 269.
2. Section 235, Ill. (*a*), Cr. P. C. ; *cf.* this section, Ill. (*b*).
3. Shaikh Moneah, 11 W R. 38, followed in Krishna, (1897) B. N. J. 927 ; Nga Po, (1882) S. J. L. B 168 ; San Hla, (1889) S. J. L. B. 475.
4. Nga San Dan, (1889) S. J. L B. 444 [followed in L. B. R. (1872-92) 47].

robbery of peoples' goods from separate bags in a truck.[1] In such cases, the rule applicable appears to be this, that if the property, which it was the thief's intention to take, was lying handy so as to be available by one act of trespass, or which was so seized, then the moving of each article in the course of removal of the whole bulk of property cannot ordinarily be considered to be a distinct theft. The thieving project in such a case was single although it may have been achieved in detail, and the fact that the spoil taken consisted of several things whether belonging to the same or to different owners does not necessarily break up the unity of the transaction. If, on the other hand, the property taken consisted of a number of articles so distinctly or diversely situated as to require a distinct act of trespass or a distinct enterprise for the removal of each, the transaction must be ordinarily held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft.[2]

Criminal intimidation of several persons.

So if a person at one time criminally intimidates three persons, he has been held to commit three separate offences, and not merely one,[3] but it may not always be so.[4]

Abetment of two persons to commit criminal breaches of trust.

So where the accused had abetted criminal breach of trust by two persons he was rightly held liable to suffer the penalty for committing two offences.[5]

Illicit manufacture of liquor and possession of manufacturing materials and liquor.

When a person is found guilty of illicitly manufacturing liquor, ordinarily only one sentence (subject to the limit as regards aggregate punishment imposed by Sec. 71, Penal Code) should be passed for that offence and no separate sentence should be passed for the offences of possessing materials or apparatus for manufacturing liquor and for possessing liquor. Of course, if the accused is shown to be in possession of liquor not distilled by him, the act of possessing such liquor cannot be said to be covered by the act of manufacturing liquor, and it would not only be legal but also proper to pass separate sentences for the different offences.[6]

Where there are two criminal offences committed, more or less arising out of the same circumstances, it is a mistake to impose a double sentence.[7]

(2) *Unity of intention.*—The unity of offences thus depends upon the unity of transaction as well as upon the unity of intention.

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1. Har Dial, (1905) P. R. No. 58.
2. Ali Mahomed, 1 I. C. (Cal.) 335.
3. Goolzarkhan, 9 W. R. 30.
4. L. B. R. (1872-92) 492
5. Babujan (Sheikh), A. I. R. 1923 Cal. 403 (1) at p. 403 : 25 Cr. L. J. 219 : 76 I. C. 651.
6. Pujamal Awadayappa *v.* State of Bombay, A. I. R. 1951 Bom. 244 at pp 244, 245, 248 : I. L. R. (1950) Bom. 795 : 52 Bom. L. R. 788, relying on Mahmud Ali Khan *v.* Emperor, A. I. R. 1933 All. 438 : I. L. R. 55 All. 557 : 34 Cr. L. J. 641 ; *see* also *In re* Vyapuri Kavandan, A. I. R. 1939 Mad. 574 : 41 Cr. L.J. 92; Emperor *v.* Kisan Narayan, A. I. R. 1951 Bom. 186 : 52 Bom L. R. 280.
7. Bhagu *v.* Emperor, A. I. R. 1932 Lah. 365 at p. 366 : 33 Cr. L. J. 413.

Trespass or house-breaking and theft of different properties.

Thus, suppose a thief goes to a threshing-floor where the grain of several cultivators is stored, and steals a little from every heap. Here it is plain that there was presumably but one act of thieving accomplished through one and the same trespass, unless it appears that he had a distinct design against each of the several owners. Such, however, will be the presumption in a case where the thief picks the pockets of several persons in a crowded place,[1] or where he breaks into three houses and steals property therefrom.[2] These and similar cases are thus subject to the rule that there is a unity of intention, and the acts constituting the offence are one single continuous transaction, there should be only one conviction,[3] though the offences may be several and distinct. So where a person breaks into a house with intent to commit theft, and does commit theft, the question at one time was whether he had committed two offences, or only one, and the Courts were by no means agreed.[4] It has, however, been now settled by the Legislature that in such a case he commits only one offence.[5] And this was the view current under the Procedure Code of 1872.[6]

(3) *Proximity of time and similarity of action and result.*—The question whether certain acts are the component parts of the same offence, depends upon whether the several acts were or were not a part of the same design, which again depends no less upon the proof of circumstances evidencing intention as upon the interval of time and place by which[7] the several acts are separated. Suppose that in the above illustration of house-breaking and theft, a burglar had broken into the house but was scared to flee. He, however, returned afterwards the following night and committed the theft. Here the two offences were distinct, because they were severable and were committed after an interval of time. They would, therefore, be separately punished. So where four policemen were charged with ill-treating the complainant Hamma, his wife Mst. Rakhma, and his son-in-law Yellia, during the course of a police investigation into a case of theft the question was whether the several acts of ill-treatment, between the 5th and 18th January, 1899, constituted only one offence or several offences, and it was held that the several acts of violence between those dates could be rightly recorded as constituting only a single transaction. But the ill-treatment of Mst. Rakhma in different places was not taken in the same light, nor was her wrongful confinement and the hurt caused to her on a previous day held to be a part of the same transaction.[8] And even as regards Hamma though the several hurts could be tried together, they were held to constitute separate offences.[9]

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1. C. P. Cr. C., Pt. 2, No. 20.
2. 4 M. H. C. R. (App.) 27.
3. 6 M. H. C. R. (App.) 47.
4. The view taken in Calcutta was that in such a case there could be only one conviction—Tunaokoch, 2 W. R. 63 ; Chytun, 5 W. R. 49 ; Nobo Pullee, 6 W. R. 49 ; Mussahur Dooudh, 6 W. R. 92 ; Sahroe, 8 W. R. 31 ; Ramcharan, (1866) B. L. R. (Sup. Vol.) 488 (F. B) ; *contra* in Tincouree, (1864) W. R. 31. The other three Courts had dissented from this view—Anwarkhan, 9 B. H. C. R. 172 ; Tukaya, I. L. R. 1 Bom. 214 : 4 M. H. C. R. (App.) 37 ; Daulatya, I. L. R. 3 All. 305 ; Zor Singh, 10 All. 146 ; but the Calcutta view has since been accepted by the Legislature, Sec. 35 ill., Cr. P. C., the illustration now omitted by the Criminal Procedure (Amendment) Act, 26 of 1955.
5. Section 35 ill., Cr. P. C., the illustration now omitted by the Criminal Procedure (Amendment) Act, 26 of 1955.
6. Anwar Khan, (1872) Bom. (unrep.) Rul. 23rd May ; Govinda, (1873) B. U. C. 79 ; Noujan, 7 M. H. C. R. 375.
7. Nga Tha, 15 I C. 485.
8. Fakirappa, I. L. R. 15 Bom. 491.
9. *Ibid.*

Proximity of time combined with intention and similarity of action and results are elements for consideration whether the acts alleged form the same transaction or not.[1] The utility of this principle as a test was well brought out in a case in which the facts were these. Four robbers waylaid a party of women and their attendants on a road leading from Batesar Fair at 8 p.m. with the object of robbery. Whilst the robbery was being carried out, a Chaukidar, attracted by the noise, ran up shouting : "Take care, I am coming". Upon this the four thieves ran up and hit the Chaukidar with sticks, fracturing his skull, from which injury he died. These men had committed another robbery on the same evening between 5 and 6 o'clock on the same road, about three miles distant from the scene of the murder. They were, therefore, charged at the same trial for two robberies and murder, and the question raised on appeal was whether they could be so tried ; it was held that they could not, because the three offences were not immediately connected with each other so as to be jointly triable. In this case there was proximity of time and place, but no unity of intention, which is the reason for holding the joint trial of two riotous factions irregular though not illegal.[2] In such cases, the applicability of the section is out of question, for the three offences could not be regarded as parts of the same offence, and Illustration (*b*) of the section excludes such cases from its purview.[3]

8. Illustrative cases.—Where in a conviction under Sec. 323, I. P. C., read with Sec. 149, I. P. C., it was found that the charge really should have been under Sec. 332, I. P. C., read with Sec. 149, I. P. C., the High Court while convicting the accused under Sec. 332, I. P. C., read with Sec. 149, I. P. C., remarked that a further conviction under Sec. 323, I. P. C., read with Sec. 149, I. P. C., becomes quite unnecessary.[4]

Making false charge and giving false evidence.

Where a head constable falsely charged a person for gambling and supported his action by false evidence, the two offences were held to be distinct and by no means parts of each other.[5] This view follows an older case the facts of which are not reported, but in which Kemp and Glover, JJ., generally laid down that "the offence of making a false charge and the offence of intentionally giving false evidence in any stage of judicial proceeding are not cognate offences, nor are they parts of one and the same offence".[6] So, again, it has been laid down by the same Court that the offence of kidnapping and offence of selling for the purpose of prostitution are distinct and separate offences, for it does not follow that because a person entices away a minor girl under the age of 16 years out of the keeping of her lawful guardian it is necessarily with the intention of selling her for the purpose of prostitution.[7]

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1. *Per* Jardine, J., in Vajiram, I. L. R. 1 Bom. 414.
2. Mulua, I. L. R 14 All. 502.
3. *In re* Choragudi Rai Jagadish, 15 C. W. N. 732 : 5 I. C. 847 ; Bazu, 8 W. R. 47 ; Suroop Chander Paul, 12 W. R. 75 ; Chandra Bhuiya, I. L. R. 20 Cal. 537. In Bachu *v.* Sia Ram, I. L. R. 14 Cal. 358, the Court, however, set aside the conviction ; but this was not concurred in Chandra Bhuiya, view I. L. R. 20 Cal. 537.
4. Thokchand Bira Singh *v.* Manipur Administration, (1962) 2 Cr. L. J. 147 at p. 155.
5. Pir Mahomed, I. L. R. 10 Bom. 254 ; Balwant, 14 B. L. R. 41.
6. Abdul Azeez. 7 W. R. 59.
7. Doorga Dass, 7 W. R. 104 (Rev. p. 68).

Where an act of restraint or confinement in an attempt to kidnap has been done in furtherance of the attempt, and goes to form part of that offence and is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence, and should not form the subject of a separate conviction and senence.[1] So where certain emigration agents induced two persons to leave their home on the pretence of obtaining service in India, and go to Azamgarh and thence to Ghazipur, the real intention being to ship them off as emigrants to Demerara or Trinidad, and with that object they were confined in the two cities for a number of days, upon which the emigration agents were prosecuted for wrongful confinement and attempted kidnapping, it was held that inasmuch as the wrongful confinement was in furtherance of the attempt to kidnap, and was in fact a part of that offence, and as it was not done with any intention or object which could be separated from the general intention to kidnap, it was a part of that offence and could not be the basis of an additional conviction.[2] So where a Brahmin enticed away a girl of 11 years and sold her to one Bissessur, to be married to his son, where she remained for two days, after which she was taken to a relative, where she remained for a month, after which she was transferred to other places, till the police rescued her, and prosecuted the Brahmin and Bissessur along with others, the former for kidnapping (Sec. 363) and kidnapping a woman for forcible marriage (Sec. 366), it was held that they could not be convicted under Sec. 366,[3] but probably, it would have been more correct to say that though they were rightly convicted under Sec. 366, they could not be convicted under Sec. 363.

Wrongful restraint and kidnapping.

The same rule cannot, however, be extended to offences under Secs. 353 and 372, the latter of which is distinct from kidnapping, and is as such separately punishable.[4] On the other hand, where the prisoner, being found guilty of kidnapping a child with the intention of robbing it, was convicted both under Sec. 363 as well as Sec. 369, it was held that the conviction under Sec. 363, could not be sustained, as an offence under that section was included in that described in Sec. 369.[5] So where a Sessions Judge had directed the commitment of the accused for adultery (Sec. 497) after the accused had already been convicted on a charge of enticing away (Sec. 498), the High Court held that if the committal was considered necessary, the Judge should have annulled the accused's conviction for adultery, for there could not be two convictions on the same collection of facts, the requisite intention in the one case being the substantive delict in the other.[6]

In fact, where the offence is one, it does not matter what means are employed to commit it. Where the accused was convicted of criminal intimidation under Sec. 506, a conviction under Sec. 507 could not be superadded to the intimidation on the ground that the accused had posted up an anonymous communication against the same person.[7]

Criminal intimidation.

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1. Mangorco, 6 N. W. P. H. C. R. 293.
2. *Ibid.*
3. Isree Panday, 7 W. R. 56.
4. Doorga Dass, 7 W. R. 104 (Rev. p. 68).
5. Po Lau, 5 Bur. L. J. 77 : 19 I. C. 167 ; Shama Shaikh, 8 W. R. 35.
6. 5 M. H. C. R. (App.) 16.
7. Zora, 4 B. H. C. R. 12.

Giving false evidence.

Where person is charged with giving false evidence, a number of lies in a continuous deposition only constitute one piece of false evidence, though the same lie in two depositions would constitute, and be punishable as, two distinct offences.[1]

Trespass and rape.

The double conviction of the accused for trespass and rape has been justified on the ground that one offence was not involved in the other,[2] but presumably no rape in that case was possible without trespass.

Distinct offences.

There is, of course, nothing in this section to preclude the Court from convicting the offender for two or more offences if they are distinct, and separately punishable under the Code. Such is, for instance, the offence of kidnapping and rape,[3] house-breaking at night with intent to commit theft punishable under Sec. 457 and theft as a distinct offence punishable under Sec. 380.[4] But from the same reason a man cannot be awarded consecutive sentences under Secs. 394 and 397, though acts of preparing (Sec. 399) and assembling (Sec. 402) for the purpose of committing dacoity, constitute under the Indian Penal Code two distinct offences.[5]

Theft and mischief.

Thus, where an accused stole a bullock from the jungle where it has been put to graze by its master, a cartman and then killed it for food, it was held that he could be convicted for the offences of theft and mischief at one trial and could be sentenced separately for both the offences, as the two offences are not only distinct, but are covered by two separate definitions and were committed at different times.[6] But a contrary view was taken in *Hussain Buksh Mian* v. *Emperor*.[7]

Theft and receiving stolen property.

The offences of possessing stolen property under Sec. 411 and of voluntarily concealing the same property under Sec. 414 have be held to be identical for the purpose of punishment, the reason given being that Sec. 414 applies only when there has been no actual receipt of the stolen property and the act of concealing, or assisting in concealing stolen property, does not aggravate the offence of receiving it, the acts of the person being throughout parts of one single continuous transaction.[8] So where a person has obtained property by a criminal breach of trust, he may be convicted for that offence, but he cannot at the same time be convicted also for receiving or retaining stolen property under Sec. 411, for a person cannot be said to receive or retain stolen property which he had already stolen himself, by getting possession of it by committing a criminal breach of trust. Section 411 applies to a person who

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1. Castro *v.* Queen, 6 A. C. 229.
2. Labh Singh *v.* Emperor, A. I. R. 1923 Lah. 291 at p. 293 : 24 Cr. L. J. 877 ; but *see* Malu, I.L.R. 23 Bom. 706 (F. B.).
3. Ghulam Muhammed, I.L.R. 7 Lah. 484.
4. Mamrez, 89 I. C. (Cal.) 390 ; Sital, I. L. R. 17 Luck. 513 ; *In re* Natesa Mudaliar, A. I. R. 1945 Mad. 330 at p. 330 : 47 Cr. L. J. 157 : (1945) 1 M.L.J. 179 : 1945 M.W.N. 106 (1) : 58 L. W. 75 (1) ; Shaikh Idris *v.* Emperor, A. I. R. 1939 Pat. 349 : 40 Cr. L. J. 751 : 20 P. L. T. 736 ; Emperor *v.* Yeshaba Sakhoba Patil, A. I. R. 1938 Bom. 463 at p. 464.
5. Ghulam Rasul *v.* Emperor, A. I. R. 1925 Lah. 119 (2) at p. 120.
6. Nge Paw Din *v.* The King, A.I.R. 1938 Rang. 138 at pp. 138, 139 : 29 Cr. L. J. 607 : 175 I. C 515 ; *see* also Emperor *v.* Bhaman Surji, A. I. R. 1936 Bom. 172 : I. L. R. 60 Bom. 627 : 37 Cr. L. J. 553 : 38 Bom. L. R. 164.
7. A. I. R. 1925 Pat. 34 : 26 Cr. L. J. 277 : 3 Pat. 804.
8. 4 M. H. C. R. (App.) 13.

receives dishonestly property that has been stolen, or who after it has been stolen by some means or other, obtains control over it, as for instance if it is brought to his house, and he, knowing it to have been acquired by theft, retains it. Where, therefore, the attributes of "stolen property" only became attached to it by the fact of misappropriation it could not be said to have been stolen when it was received by him.[1] In other words, the property was not stolen property when the prisoner received it; it became so as soon as he had committed its misappropriation. As possession was necessary for misappropriation, the one was a part of the other and could not be otherwise treated. So, a person cannot be convicted of using certain forged documents under Sec. 471, and of having them in his possession with intent to use them under Sec. 474; for "he could not well have used them unless he had them in his possession".[2]

Conspiracy and offence in consequence of it.

The conviction separately under Sec. 120-B and under Sec. 295, Penal Code, is warranted by law. Section 71 of the Code does not apply.[3] Section 71, I. P. C., does not apply to conspiracy as defined in Sec. 120-B, I.P.C, i. e. in connexion with an offence committed in consequence of a conspiracy; in other words, the conspiracy to commit an offence and the actual commission of the offence are two separate and distinct transactions and an accused can be punished for both.[4]

But this reasoning would not hold good in a case where a zamindar employed one Bhagi to secrete stolen railway pins in the fields and godown of his enemy Sedari for the purpose of implicating him as the thief. Here the zamindar had (*a*) secreted stolen pins and (*b*) he had by doing so fabricated false evidence against Sedari, and as the one act was no part of the other, though the two acts were done with the same intent, the accused was held to have committed two distinct offences and not only one offence under the Code.[5] In another case, the accused had cut down and appropriated a tree standing on Government land, whereupon he was convicted of mischief (Sec. 421) as well as of theft (Sec. 379), and his conviction was upheld on the ground that the mischief was complete before the theft could have commenced.[6] But this case overlooks the fact that there could be no theft unless the tree was severed from the ground, and that as its severance was with the intention of committing theft—an act necessary for that purpose—there could be no double conviction for mischief as well as theft. This, at any rate, was the view taken in two Calcutta cases in which mischief and theft were regarded as parts of one and the same offence.[7] And it is clearly the correct view.

Rioting and hurt.

This section prescribes a rule that in an offence, the several component parts of which themselves constitute different offences, the sentence should not exceed that prescribed for any one of them. But it naturally leaves the

1. Shanker, 2 N. W. P. H. Cr. 312; Sheikh Mudun, 1 W. R. 27; Sreemunt, 2 W.R. 63; Seeb Churan, 11 W. R. 12.
2. Nuzur Ali, 6 N. W. P. H. C. R. 9.
3. Ghulam Husain *v.* Emperor, A. I. R. 1945 All. 182 at p. 184: I. L. R. (1945) All. 127: 46 Cr. L. J. 687: 220 I. C. 411: 1945 A. W. R. (H. C.) 19; *see* also Abdul Salim *v.* Emperor, I. L. R. 49 Cal. 573: A. I. R. 1922 Cal. 107: 26 C. W. N. 630.
4. Bala Huddar *v.* Emperor, A. I. R. 1933 Nag. 252 at p. 253: 148 I. C. 157: 35 Cr. L. J. 594.
5. Rameshwar Rai, I. L. R. 1 All. 379.
6. Narayan, 2 B. H. C. R. 392.
7. Bichuk *v.* Auhuck, 6 W. R. 5; Sabree, 8 W. R. 31.

question what component parts constitute distinct offences to be determined by reference to other sections of the Code. Two such sections have given rise to some judicial conflict now sought to be reconciled by amendment of Sec. 35 of the Criminal Procedure Code. The conflict relates to whether in a case of riot accompanied by the causing of hurt or grievous hurt the two constitute a single offence of riot or are a compound offence in which rioting and the causing of hurt or grievous hurt constitute distinct offences calling for separate sentences. The four sections germane to the discussion are Secs. 141, 149, 319 and Sec. 349. Section 141 "Fifth" provides that an assembly that does any of the acts mentioned in the section by means of criminal force is an unlawful assembly punishable under Sec. 143. Section 149 enacts a rule of constructive liability, and Sec. 319 includes in the definition of hurt the causing of bodily pain, while Sec. 349 defines criminal force in large terms and would include the causing of hurt, though in the punitive sections it is limited to common assaults. Now, if we take all these sections together their cumulative effect seems to be that the offence of rioting does necessarily postulate the use of some force, and that, therefore, where in such offence hurt is caused by a person or persons unknown, the rioters cannot be separately convicted of the two offences of rioting and the causing of hurt, and it has been so held in some cases.[1]

But it is, of course, clear that where any of the rioters is found to have caused hurt, he becomes personally liable for his act, since Sec. 149 has then no application, and it has been so held.[2] But on the first point the cases are, in spite of the amendment of Sec. 35 of the Criminal Procedure Code, by no means unanimous since some cases have held before the amendment and still continue to hold that since the use of criminal force does not include the causing of hurt of a dual conviction even to those cases is legal, though the sentence must not exceed that prescribed for rioting as provided in this section.[3] Thus, in *Queen-Empress* v. *Ram Pratab*,[4] Straight, J., held that a member of an unlawful assembly, some members of which have caused grievous hurt, could not lawfully be punished for the offences of rioting as well as for the offence of causing grievous hurt. This was dissented from in *Empress* v. *Bisheshar*[5] on the ground that Sec. 149, I. P. C., does not create a substantive offence but merely declares a principle of common law that an accused who comes within Sec. 149, I. P. C., cannot put forward as a defence that it was not his hand which inflicted the injury. Section 71 was, therefore, held not to come into play.

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1. Nilmony Poddar, I. L. R. 16 Cal. 442 (F. B.), overruling *contra* in Lokenath, I. L. R. 11 Cal. 349; Kiamuddi Karikar *v.* Emperor, I. L. R. 51 Cal. 79; Ponniah Lopes, I. L. R. 57 Mad. 643; Bajo Singh, I. L. R. 8 Pat. 274; Basiruddin, 101 I. C. (Cal.) 660; Amiruddin, A. I. R. 1925 Cal. 217; Harendra Barman, A. I. R. 1931 Cal. 606; Baradi, (1909) 3 S. L. R. 224; but see *In re* Mekraj Ali Sahib, A. I. R. 1939 Mad. 787 : 41 Cr. L. J. 17.
2. Mobur Mir, I. L.R. 16 Cal. 725; Ferasat, I.L R 19 Cal. 105; Ram Anguthna, I. L. R. 40 Cal. 511; Kapil *v.* Rabhani, A. I. R. 1925 Cal. 1039; Sotha Valan *v.* Rama Kone, A. I. R. 1933 Mad. 338: I. L R. 56 Mad. 481 : 34 Cr. L. J. 273.
3. Bana Punja, I. L. R. 17 Bom. 260 (F. B.); Malu, I. L. R. 23 Bom. 706 (F B.); Piru, I. L. R. 49 Bom. 916; Ram Sarup, I. L. R. 7 All. 757 (F. B.), following Dungar Singh, I. L. R. 7 All. 29; Bisheshar, 9 All. 645; Wazir Jan, I. L. R. 10 All. 58; Sotha Valan *v.* Rama Kone, I. L R. 56 Mad. 481.
4. I. L. R. (1883) 9 All. 451 : 1883 A.W.N. 241.
5. I. L. R. (1887) 9 All. 645 : 1887 A.W.N. 49.

The leading case on the subject is that of *Nilmony Poddar*[1] in which a majority of four Judges out of five approved of the view taken in *Queen-Empress* v. *Ram Pratab*[2] and held that separate sentences passed upon persons for the offences of rioting and grievous hurt were not legal where such persons individually did not commit any act which amounted to voluntarily causing hurt but were guilty of that offence under Sec. 149, I. P. C. In the majority judgment it was remarked that—

Leading case.

> "The offence of voluntarily causing hurt under under Sec. 324 coupled with Sec. 149, I.P.C., is primarily made up of two parts, viz. (1) of their (the appellants in that case) being members of an unlawful assembly, by which force and violence were used in prosecution of its common object and the members of which were armed with deadly weapons; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, viz. rioting armed with deadly weapons, under Sec. 148, I. P. C. It is now here expressly provided in a law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part separately. Therefore we find that all the conditions laid down in para. 1, Sec. 71, I, P. C., are present here. Consequently, the infliction of separate punishments for the two offences is illegal under it."

Majority view.

Tottenham, J., who dissented, expressed his willingness to adopt the view if Sec. 149, I. P. C., defined and made punishable a specific offence, which in his view it did not. But in *Barendra Kumar Ghose* v. *Emperor*,[3] their Lordships of the Privy Council said :

Minority view.

> "The other part of the appellant's argument rests on Secs. 114 and 149, and it is said that, if Sec. 34 bears the meaning adopted by the High Court, these sections are *otiose*. Section 149, however, is certainly not *otiose*, for in any case it creates a specific offence and deals with the punishment of that offence alone."

Privy Council's view.

This would appear to uphold the majority view. The learned Chief Justice in the Full Bench case of *Nilmony Poddar* v. *Queen-Empress*[4] said :

Calcutta veiw.

> "In this case the offence of voluntarily causing hurt under Sec. 324 coupled with Sec. 149 of the Indian Penal Code, of which these appellants have been found guilty, is primarily made up of two parts, viz. : (1) of their being members of an unlawful assembly by which force and violence was used in prosecution of its common object and the members of which were armed with deadly weapons ; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object.

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1. I. L. R. (1819) 16 Cal. 442 (F. B.).
2. I. L.R. (1883) 6 All. 121 : 1883 A.W.N. 241.
3. A. I. R. 1925 P. C. 1 at p. 7 : I. L. R. 52 Cal. 197 : 52 I. A. 40 : 26 Cr. L. J. 431 : 85 I C. 47.
4. (1889) 16 Cal. 442 (F. B.).

> The first of these two parts is itself an offence, viz. rioting, armed with deadly weapons, under Sec. 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the parts respectively. Therefore we find that all the conditions laid down in paragraph 1 of Sec. 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishment for the two offences is illegal under it."

Now in *Kiamuddi Karikar* v. *King-Emperor*,[1] following the decision in *Nilmony's* case,[2] it was held that—

> "In the present case the first conviction was under Sec. 147, I. P. C., instead of Sec. 148 as in the Full Bench case; and the second conviction was under Sec. 325/149 instead of Sec. 324/149 as in the Full Bench case. It being admitted that the Full Bench decision is applicable to the present case, the infliction of separate punishment for the two offences is illegal under para. 1 of Sec. 71 of the Indian Penal Code. It was suggested by the learned counsel for the Crown at one time during the course of the argument that there was a difference between the case, which we are now considering and the Full Bench case, inasmuch as the learned Judge who tried this case directed that the two sentences should run concurrently. I do not understand how that can make any difference. The provisions of para. 1 of Sec. 71 forbid the infliction of separate punishments for the two offences in a case to which those provisions apply."

Other High Courts followed the leading case.

The Full Bench decision in *Nilmony's* case has been followed not only in the cases of that Court,[3] but also by the High Courts of Madras,[4] Nagpur,[5] and Patna,[6] the Chief Court of Sind[7] and the Judicial Commissioner's Court at Bhopal.[8] The High Court of Andhra Pradesh has also held that two separate sentences cannot be awarded, one for rioting and the other for the substantive offence read with Sec. 149 of the Penal Code. The sentences would be illegal as contravening the provisions of this section.[9]

1. A. I. R. 1924 Cal. 771 at p. 773 : I.L.R. 51 Cal. 79.
2. (1889) 16 Cal. 442 (F.B.).
3. Kiamuddi Karikar *v.* King-Emperor, A. I. R. 1924 Cal. 771 at p. 773 : I.L.R. 51 Cal. 79 : 25 Cr. L. J. 945 : 81 I. C. 593; Basiruddin *v.* Emperor, A.I.R. 1927 Cal 931 at p. 931 : 31 C. W. N. 532 : 28 Cr. L. J. 484 ; Kitabdi *v.* Emperor, A. I. R. 1931 Cal. 450 : 35 C. W. N. 18[illegible] : 32 Cr. L. J. 890; Harendra Barman *v.* Emperor, A. I. R. 1931 Cal. 606 : 35 C. W. N. 345 : 33 Cr. L. J. 1.
4. Ponniah Lopes *v* Emperor, A. I. R. 1934 Mad. 388 at p. 389 : I. L. R. 57 Mad. 643 : 66 M. L. J. 572 : 35 Cr. L. J. 1226.
5. Baldeo Singh *v.* Emperor, A. I. R. 1940 Nag. 120 at p. 121 : 41 Cr. L. J. 360 : 1940 N.L.J. 46 : 186 I. C. 681.
6. Bajo Singh *v.* Emperor, A. I. R. 1929 Pat. 263 at p. 264 : I. L. R. 8 Pat. 274 : 31 Cr. L. J. 83 : 10 P. L. T. 353 ; Pesh Muhammad *v.* Emperor, A. I. R. 1942 Pat. 319 at p. 320 : 43 Cr. L. J. 742.
7. Haji *v.* Emperor, A. I. R. 1943 Sind 212 at p. 218 : I. L. R. (1943) Kar. 132 : 45 Cr. L. J. 130.
8. Moolchand *v.* State, A. I. R. 1955 Bhopal 9 at p. 14 : A.I.R. 1955 Cr. L.J. 1033.
9. Hussainappa, *In re*, 1958 Andh. L. T. 109.

Bombay and Allahabad view.

In Bombay, however, a different view was taken. Agreeing with the view taken in *Queen-Empress* v. *Bisheshar*,[1] a Full Bench of the Bombay High Court held that where a person is convicted of rioting and hurt, and the conviction for hurt depends upon the application of Sec. 149, I. P. C., it is not illegal to pass two sentences, one for rioting and one for hurt, though at the same time it was held that, whether Sec. 71 applied or not, the total punishment that could be given should not exceed the maximum that the Court might pass for any one of the offences.[2] In *Queen-Empress* v. *Malu*,[3] another Full Bench of the same High Court held that a court, in awarding punishment under the provisions of Sec. 71, should pass one sentence for either of the offences in question and not a separate sentence for each offence, though if two sentences were passed and the aggregate of this did not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, it would be only an irregularity and not an illegality. This view of Sec. 71 was with reference to Sec. 35, Cr. P. C., as it then stood, and the explanation to that section. After the amendment of Sec. 35, Cr. P. C., in 1923, it has been held in *Queen-Empress* v. *Piru Rama*,[4] that the result of the amendment has restored the previous view of the law as taken in *Queen-Empress* v. *Bana Punja*,[5] and the same view still holds good in Bombay.[6] It may be noted here that the Calcutta High Court in *Kitabi's* case,[7] and the Patna High Court in *Bajo Singh's* case,[8] have held that the decision in *Nilmony's* case[9] is in no way affected by the amendment of Sec. 35, Cr. P. C., which is still subject to Sec. 71, I. P. C.; and the Bombay view has been expressly dissented from in the Madras, Nagpur and Sind cases cited above.

Allahabad High Court preferred Bombay view.

In Allahabad also where the conflict of views first started, the trend of decisions seems to be in favour of the Bombay view. As already observed, the decision in *Ram Pratab's* case[10] which was followed in the leading case of *Nilmony*,[11] was dissented from in *Bisheshar's* case,[12] which was followed in the leading Bombay case of *Bana Punja*.[13] In the case of *Wazir Jan*,[14] Mahmud, J., said :

> "It seems to me that where certain acts constitute more than one offence, whether such offences do or do not fall under the purview of Sec. 71 of the Indian Penal Code, and the accused is charged and tried for more than one offence and the evidence establishes those offences, the Court is bound to convict him of those offences, though in awarding punishment the provisions of Sec. 71 of the Indian Penal Code, and Sec. 35 of the Code of Criminal Procedure would of course have to be duly kept in view."

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1. I. L. R. 9 All. 645.
2. Queen-Empress *v.* Bana Punja, I. L. R. 17 Bom. 260 (F. B.).
3. I. L. R. 23 Bom. 706 : 1 Bom. L. R. 142 (F. B.).
4. I.L.R. 49 Bom. 916.
5. I.L.R. 17 Bom. 260 (F B.).
6. *See* Pujamal Awadayppa *v.* State of Bombay, A. I. R. 1951 Bom. 244 at pp. 246, 247 : I. L. R. (1950) Bom. 795 : 52 Bom. L. R. 788 : 52 Cr. L. J. 437.
7. A.I.R. 1931 Cal. 450 at p. 451 : 35 C.W.N. 184 : 32 Cr. L. J. 890.
8. A. I. R 1929 Pat. 263 at p. 264.
9. I L. R. 16 Cal. 442 (F.B.).
10. I. L. R. 6 All. 121.
11. I. L. R. 16 Cal. 442 (F. B.).
12. I. L. R. 9 All. 645.
13. I. L. R. 17 Bom. 260 (F. B.).
14. I. L R. 10 All. 58 at p. 63.

In *Dharamdeo Singh* v. *Emperor*,[1] Walsh, J., observed that the decision in *Bisheshar's* case,[2] "must be taken as having settled this matter, so far as this Court is concerned, beyond controversy". In *Chhidda* v. *Emperor*,[3] Sulaiman, J., followed the above and further observed : "There can be no doubt that Sec. 149 creates no substantive offence in itself. It is merely declaratory of the law and makes a person who has been a member of an unlawful assembly liable for the offences committed by any other member of it. But Sec. 147 is a substantive offence in itself and makes a person guilty of the offences of rioting as distinct from actually causing any injury or hurt. Similarly, Sec. 323 is a distinct offence in itself. It would, therefore, seem obvious that there is nothing illegal in convicting a person of offences under both these sections." In *Sahab Raj Singh* v. *Emperor*,[4] Bajpai, J., agreeing with the above, observed : "As soon as the first injury is caused to any person force is used and the offence of rioting is complete. Subsequent injuries though inflicted in pursuance of the same common object, would be distinct injuries justifying a conviction under Sec. 323, Penal Code." Even in the recent case of *Tiny* v. *State*,[5] the decision in *Nilmony's* case[6] was dissented from and *Dharamdeo Singh's* case[7] was relied upon. In a Full Bench of the Allahabad High Court,[8] it was observed that—

> ". . . an offence under Sec. 147 need have no ingredient which is common to Sec. 323, nor for an offence under Sec. 323 there need be any ingredient which constitutes an offence under Sec. 147. There can, therefore, be no doubt that both are separate offences for which separate convictions and separate sentences can be awarded.
>
> "I do not, therefore, think that any difference can be made between a case where one blow is given by a member of an unlawful assembly and a case where more than one blow is given by a member thereof. In my view the restrictions given in Sec. 71 will not apply to such a case."

The Supreme Court in *Nanak Chand* v. *State of Punjab*,[9] disagreeing with the views taken in *In re Theethumalai Gounder*,[10] and in *Queen-Empress* v. *Bisheshar*,[11] held that "a person charged with an offence read with Sec. 149 cannot be convicted of the substantive offence without a specific charge being framed as required by Sec. 233, Cr. P. C.".

Oudh Chief Court preferred Bombay view.

The Bombay view was preferred in Oudh in the case of *Raghubar* v. *Emperor*.[12] In this case York, J., held that Sec. 149, I. P. C., "does create an offence, but only in the sense that it creates in all the persons who have taken part in a riot, the same offence as is committed by the particular individuals who cause hurt, or grievous hurt, or commit

1. 14 A. L. J. 738 at p. 740 : 17 Cr. L. J. 418 : A. I. R. 1916 All. 49.
2. I. L. R. 9 All. 645.
3. 24 A. L. J. 178 at p 180 : A. I. R. 1926 All. 225 : 27 Cr. L. J. 287.
4. A. I. R. 1933 All. 819 at p. 820 : 34 Cr. L. J. 1099 : 1933 A. L. J. 1178.
5. A. I. R. 1952 All. 92 at p. 93 : I. L. R. (1952) All. 56 : 1951 A. W. R. (H. C.) 597.
6. I. L. R. 16 Cal. 442 (F. B.).
7. 14 A. L. J. 738 at p. 740 : 17 Cr. L. J. 418 : A. I. R. 1916 All. 49.
8. Sundar Singh *v.* State, A. I. R. 1955 All. 232 at p. 234: 1955 A.L.J. 293: 1955 A. W. R. (H. C.) 316 : 1955 Cr. L. J. 671, overruling the decision in Abdur Rashid Khan *v.* State, 1952 A. L. J. 392 : 1953 Cr. L. J. 711 : A. I. R. 1953 All. 315.
9. A. I. R. 1955 S. C. 274 at pp. 278-79.
10. A. I. R. 1925 Mad. 1.
11. I. L. R. 9 All. 645.
12. A. I. R. 1939 Oudh 91 at p. 93 : 40 Cr. L. J. 217 : 193 O. W. N. 27.

murder, or commit any other crime in furtherance of the common object; but as I understand it, their Lordships[1] did not mean to say that it created a separate offence composed partly of rioting and partly of the offence constructively committed. Section 149, in fact, enlarges the area of guilt under Sec. 323 or Sec. 225 or whatever the section may be, in cases to which Sec. 147 applies. In my opinion, therefore, the dictum of their Lordships of the Privy Council does not render erroneous the dissentient view expressed by Tottenham, J., in *Nilmony Poddar* v. *Queen-Empress*,[2] or the view of the Bombay High Court in *Queen-Empress* v. *Bana Punja*."[3]

This was followed in a subsequent case[4] of the same Court in which Madeley, J., expressly dissented from the decision in the Nagpur case of *Baldeo Singh* v. *Emperor*.[5]

The Rangoon High Court also had adopted the Bombay view.[6]

Rangoon also favoured Bombay view.

In Punjab it has been held in some cases that a person may be legally convicted of both for rioting as well as for causing hurt or grievous hurt.[7] In the Full Bench case of *Bhagwan Singh*,[8] *Nilmony's* case was distinguished on the ground that there the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, the causing of the hurt was itself the form of force or violence which constituted the offence of rioting and the person was accused of causing grievous hurt by application of Sec. 149.[9] In *Manak Chand* v. *Emperor*,[10] separate sentences under Secs. 353/147, I. P. C., were held to be illegal. In subsequent cases,[11] it has been held that separate convictions are not illegal, but the convicts should be sentenced only under one or the other of the two sections or the sentence should be made to run concurrently.

Punjab view.

The difference between the two points of view depends upon the quantum of force included in Sec. 141. It is agreed on all hands that it does not imply the use of unlimited force or violence, e. g. the causing of grievous hurt or death, though some cases go to the length of including grievous hurt as comprised in Sec. 141; but in view of the amendment of Sec. 35 of the Criminal Procedure Code these should no longer be treated as authoritative.

Basis of the difference in views.

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1. Barendra Kumar Ghose *v.* Emperor, A. I. R. 1925 P. C. 1 : 52 Cal. 197 : 52 I. A. 40 : 26 Cr. L. J. 431.
2. I. L. R. 16 Cal. 442 (F. B.).
3. I. L. R. 17 Bom. 260 (F. B.).
4. Dulan Dayal Singh *v.* Emperor, A. I. R. 1945 Oudh 102 : 46 Cr. L. J. 587.
5. A. I. R. 1940 Nag. 120
6. Nga Son Min *v.* Emperor, A. I. R. 1924 Rang. 291: 25 Cr. L. J. 1305.
7. Jafar Khan, (1885) P. R. No. 32; Tokha, (1895) P. R. No. 8; Bhagwan Singh, (1901) P. R. No. 4 (F. B.); *contra* Manga Singh, (1916) P. R. No. 31.
8. (1901) P. R. No. 4 (F. B.).
9. *See* also Nur Khan, (1894) P. R. No. 31.
10. A. I. R. 1926 Lah. 581 at p. 581 : 27 Cr. L. J. 834.
11. Ali Akbar *v.* Emperor, A. I. R. 1929 Lah. 670 at p. 672 : 30 Cr. L. J 575; Kehar Singh *v.* Emperor, A. I. R. 1934 Lah. 614 at p. 614 : 36 Cr. L. J. 294 : 35 P. L. R. 587.

Turning now to the amendment of Sec. 35 of the Criminal Procedure Code its effect is to emphasise the control of this section in a conviction for two or more offences, not necessarily "distinct" as under the unamended section. This still leaves the main question undecided.

There can be no doubt that the use of some force or violence is necessary to constitute rioting, and so long as it is limited to the extent the rioters had decided to use it or its members had anticipated that it would be used, the offence is a single one, and all would be equally liable for it.[1] But if the force or violence used is such as would have been never anticipated by the rioters, then they could not be convicted of the offences so committed though they may be all guilty of rioting.[2]

The question then depends upon two other questions, namely, (*a*) what was the amount of force or violence used, and (*b*) could the rioters have foreseen it—both of which are questions of fact and not of law. In case (*a*) the actual assailant may be convicted of a specified offence, committed on individual responsibility if its commission could not have been foreseen by the rest. If it could have been, they may be equally convicted with the actual offenders. In this view the construction of this section presents no difficulty. For the use of some force being a part of the offence of rioting, it cannot be separately punished ; but as "the causing of grievous hurt or murder cannot be merely described as the use of force or violence," it is a distinct crime and, as such, separately punishable. And as the liability of aiders and abettors is, in this respect, subject to Sec. 149, co-extensive with that of the principal offenders, it follows that if the knowledge of the commission of that offence could have been foreseen by the other rioters, they would then be equally guilty of it.

Murder and causing destruction of evidence of offence.

There is no legal bar to a person being convicted both of murder and of the offence of causing destruction of evidence of the offence under Sec. 201 and the proper course for the Court in a case where the evidence warrants it will be to enter a conviction for both the offences but not to award any sentence for the accessory offence.[3]

Same facts constituting different offences.

9. **Paragraph 2.**—The second paragraph deals with cases in which the same facts constitute different offences either under the Code or different laws. Offences under Secs. 143 and 146, 152 and 353[4] or under Secs. 182 and 211 or under Secs. 417 and 420,[5] 323 and 324, 325 and 327, 394 and 397.[6] Sections 435 and 436[7] are examples of such offences under the Code. In such cases the offence is one, though it is differently described, and consequently there cannot be a double penalty for one act.[8]

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1. Ferrasat, I.L.R. 19 Cal 105; Ramdarsan Mahton *v.* Emperor, A. I. R. 1929 Pat. 206 at p. 206.
2. Sotha Valan *v.* Rama Kone, A.I.R. 1933 Mad. 338 at p. 339 : 56 Mad. 481 : 34 Cr. L. J. 273.
3. K. N. Vijayan *v.* State, 1953 Ker. L. T. 403 at p. 407: A.I.R. 1953 T. C. 402; *see* also Nebti Mandal *v.* Emperor, A. I. R. 1940 Pat. 289 : I. L. R. 19 Pat. 369 : 41 Cr. L. J. 910.
4. Ferrasat, I. L. R. 19 Cal. 105.
5. Francis Xavier, (1890) B. U. C. 506.
6. Mamrez Emperor, A. I. R. 1926 Lah. 47 (2).
7. Dod Basaya, 11 B. H. C. R. 13.
8. *Per* Lush, J., Berry *v.* Henderson, L. R. 5 Q. B. 296 at p. 302.

Where facts in a given case constitute an offence falling under one section or another and charges are framed against the accused for both the offences, separate sentences cannot be awarded as it falls under this section.[1] Where facts in a given case constitute different offences, and charges are framed against the accused for different offences, the accused cannot be inflicted with more severe punishment than could be awarded for any one of such offences.[2] There is a large number of offences described in the Code in which the principal offence is the same, but the presence of aggravating or extenuating circumstances requires enhanced or reduced punishment, which has led to the numerical multiplication of offences, but which are all related to principal offences as genus and species. In all such cases, there cannot be two convictions but only one under the more appropriate of the two sections.[3]

Robbery and theft.

Conviction for robbery and theft on the same facts is illegal, for robbery is an aggravated form of theft.[4] For when one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act unless there be in the mind of the offender a wholly separate intention. In some English cases, one act or set of acts of the accused person has been held punishable under two different statutes and a double conviction and sentence have been sustained.

In such cases the intention of the Legislature is to guard two interests of different species, and to prevent the person, who has offended against both, from escaping with a penalty provided for the defence of one interest only.

Wrong confinement and assault.

Where the accused were convicted of wrongful confinement and assault, the facts proved being that they had seized, dragged and pushed the complainant to a certain place in order to punish him, it was held that all the acts of the accused fell within the definition of wrongful confinement and assault and that, therefore, the case fell within the second paragraph of this section.[5]

Thus, where the evidence did not establish that the wrongful confinement was committed in the course of the dacoity, and even if it was committed in the course of the dacoity there was nothing in the Indian Penal Code or in the Criminal Procedure Code which says that no separate sentences would be necessary for the separate offences found to have been committed by them. Section 71, I. P. C., will not apply to the case as the offence under Sec. 342, I. P. C., has no connexion at all with the offence under Sec. 395, I. P. C. Section 258 (2), Cr. P. C., provides that the Criminal Court shall pass sentence upon the accused according to law, if it finds the accused guilty.[6]

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1. Malakondayya Reddy *v.* K. R. Venka Reddy, 1955 Andh. W. R. 868.
2. Virabhadrappa *v.* State of Mysore, 1962 M.L.J. (Cr.) 41.
3. Dharmdeo Singh, 35 I. C. (A.) 978.
4. Govinda Reddy, *In re*, A. I. R. 1958 Mys. 150 at p. 183 : I. L. R. (1957) Mys. 177: 1958 M. L. J. (Cr.) 341 : 1958 Cr. L. J. 1489.
5. Fakira Khan, 19 Cr. W. N. 181.
6. Atam Lengmei *v.* Manipur Administration, (1962)11 Cr. L. J. 168 at p. 172.

So where the accused were convicted for having climbed on to the foot of a warehouse, and set fire to it with the intention of destroying it and its contents, the Court held that they could not be convicted on two counts, first under Sec. 436 of mischief in destroying a building used for the custody of property, and secondly under Sec. 435 of mischief by causing damage to property, to the amount of Rs. 100 or upwards, and it, therefore, set aside the conviction for the minor offence under Sec. 435.[1]

Mischief.

In another case, where the accused had been convicted of cheating both under Secs. 417 and 420, the Court set aside the cumulative sentence under Sec. 420, holding that as the act was the same, the accused could not be subjected to a double penalty.[2]

Cheating.

Where a mother killed her child by criminal negligence she was held liable only under Sec. 304 and not both under Secs. 304 and 317,[3] though in such a case a charge under both the sections would seem to be an appropriate one. As Straight, J., remarked: "The criminal exposure under Sec. 317 was the direct cause of the death of the child and therefore the crime instead of stopping at Sec. 317, death being caused, took the more serious shape under Sec. 304. It was, of course, perfectly proper to frame a charge under Sec. 317, because had any question arisen about the cause of death being the exposure, the transaction would have resumed its character under Sec. 317."[4] So as the offence of unlawful assembly is included in the offence of rioting, there cannot be a conviction both under Sec. 143 and Sec. 146.[5]

Exposure of child and its death.

Counterfeiting a trade-mark is not an offence which is made up of parts of possessing the mould for conterfeiting and of the act of counterfeiting so as to come under the first portion of Sec. 71. Such a case comes under the latter portion of the section, namely, where several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence.[6] So there cannot be a double conviction for being in possession of implements and materials for the purpose of using the same for counterfeiting Indian coin (Sec. 235) as well as for performing a part in the process of counterfeiting Indian coin (Sec. 233),[7] or for counterfeiting Indian coin,[8] or culpable homicide (Sec. 304) as well as for being a member of an unlawful assembly armed with deadly weapons,[9] for dishonestly receiving property (Sec. 411) as well as for assisting in concealment of stolen property (Sec. 414),[10] for abduction with intent to rob (Sec. 369) as well as theft from the person of a child so abducted,[11] for house trespass and an attempt to murder by the trespasser,[12] grievous hurt (Sec. 326)

Counterfeiting and other cases.

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1. Dod Basaya, 11 B. H. C. R. 13.
2. Francis Xavier, (1890) B. U. C. 506.
3. Banni, I. L. R. 2 All. 349.
4. *Ibid*.
5. Meelan *v* Dwarka Nath, (1864) W. R. 7.
6. Sheikh Abdus Sovan *v.* Jitendra Nath Dutt, A. I. R. 1931 Cal 445 at p. 446 : 134 I. C. 446 : 32 Cr. L. J. 1171.
7. Hayat, (1905) P. R. No. 14.
8. Bishandas, 71 I. C. (Lah.) 700.
9. Rubbeeoolah, 7 W. R. 13.
10. 4 M. H. C. R. (App.) 13.
11. Naujan, 7 M. H. C. R. 375.
12. Barkat, 60 I. C. (Lah.) 54.

and dacoity with grievous hurt (Sec. 397) ;[1] of adultery (Sec. 497) as well as for enticing away for the purpose of illicit intercourse (Sec. 498);[2] for abetment of abduction of a woman (Secs. 109 and 498) and for her wrongful confinement (Sec. 343).[3] For the same reason the Court quashed the double conviction for offences under Secs. 354 and 506, holding that the intimidation by throwing a knife was a part of the assault complained of.[4]

Maximum punishment under any one definition of law in force.

Section 71 of the Penal Code is not applicable to a case where the charge is only under one offence. It also does not restrict the extent of punishment to the lower limit provided for either of the two offences. It merely protects an accused against the multiplicity of punishment and if his act falls within two or more separate definitions of any law in force, it limits the punishment to the maximum term which could be awarded to him for any single offence. This means that if his conduct amount to an offence within the meaning of two different penal laws, one of which is punishable up to five years and the other is punishable up to seven years, he cannot be awarded a punishment of more than seven years, for then it would amount to punishing him twice over for the same offence. This section is not a bar to punishing a public servant under Sec. 409 of the Penal Code to more than seven years on the ground that for such conduct which could lead to a charge both under Sec. 409 of the Penal Code and under Sec. 5 (1) (*c*) of the Prevention of Corruption Act, 1947 (II of 1947), the offender will be punished within the lower limit provided for either of the two offences.[5] This is clear from the conoluding words of the section prescribing the limit of punishment.[6]

Unlawful act and consequences, offences under separate laws.

When an unlawful act is committed and certain consequences follow from it in the usual course and the person concerned is punished in respect of such consequences he cannot be punished again, additionally, for the act which produced those consequences. Accordingly, where the accused caused the death of an old man which was a direct, natural and probable consequence of the act of the accused in driving along the highway a lorry which had practically no brakes, and was punished under Sec. 304-A of the Penal Code for a rash and negligent act causing death, he cannot be punished again for the act of driving a defective motor lorry under Sec. 121 of the Motor Vehicles Act, 1939.[7]

The Indian Penal Code and the Motor Vehicles Act are two separate enactments and therefore Sec. 26 of the General Clauses Act would apply. Where the applicant was prosecuted for an act, under Secs. 279 and 138, I. P. C.

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1. Kottaigadu, 30 I. C. (Mad.) 439 ; Mabi, I. L. R. 25 Bom. 70, distinguished in Labh Singh *v.* Emperor, A. I. R. 1923 Lah. 291.
2. Pochun Chung, 2 W. R. 35.
3. Ishwar Chandra Jogee, (1864) W. R. 221.
4. Nga Lu Nyun, 4 Bur. L. J. 67 : 10 I. C. 771.
5. Om Prakash *v.* State, A. I. R. 1955 All. 275 at p. 283 (F. B.) : 1955 A. L. J. 224 : 1955 Cr. L. J. 754, overruling Gopal Das *v.* State, A. I. R. 1954 All. 80 : 1953 A. L. J. 534 : 55 Cr. L. J. 96.
6. *See* also Sundar Singh *v.* State, A. I. R. 1955 All. 232 (F. B.): I.L.R.(1955) 1 All. 472 : 1955 A. L. J. 295: 1955 All. W. R. (H. C.) 316.
7. *In re* Sahadevan, A. I. R. 1955 Mad. 548 at pp. 548, 549 : (1954) 2 M. L. J. 765.

and Sec. 116 of the Motor Vehicles Act. In view Sec. 26 of the General Clauses Act, the applicant could not be punished both under the Penal Code and under the Motor Vehicles Act, but he could be punished only under either or any of then in respect of the same act. Section 71 of the Penal Code applies where an act is an offence falling within two or more separate definitions of any specific enactment. That does not apply where an act constitutes an offence under two or more enactments. Section 71 of the Penal Code applies where the act is an offence under two or more separate definitions of any particular enactment. For example, an act may be an offence both under Sec. 323, I.P.C. and Sec. 324, I.P.C. To convict a person both under the Indian Penal Code and under the Motor Vehicles Act and to give him two separate sentences would be to punish him twice in respect of the same act, which is contrary to Sec. 26 of the General Clauses Act.

Transporting and possessing opium.

The offences under Sec. 9 (*a*) and (*b*), Opium Act, are such that the offence of transporting opium in a case would involve the offence of possessing the same. Under these circumstances this section would be applicable and the awarding of single sentence therefore cannot be objected to.[1]

Compound offences.

10. Paragraph 3.—The third paragraph deals with the plurality of acts, one or more of which are themselves criminal and which when combined, give rise to a different offence, in which case also the law limits the punishment to any one of such offences. So interpreting a similar clause in the old Procedure Code of 1872,[2] the Madras High Court remarked: "Where several facts aggregated or form one offence, and is severed, constitutes several, the offender may be charged with every offence committed, but the utmost punishment awardable is the extreme punishment for the concrete or for one of the separate offences."[3] There are many such offences in the Code. The case presented in the illustration to Sec. 35 of the Criminal Procedure Code, upon which the Courts at one time were divided, is an offence in point. There it is enacted that house-breaking with intent to commit theft (Sec. 457) and theft (Sec. 380) are two acts constituting one offence under Sec. 457,[4] but the two acts of house-breaking (Sec. 453) and theft (Sec. 380) are by themselves criminal though their combination produces an offence of a different kind (Sec. 457), which is distinct from the two offences of which it is made up. In such a case, the section declares that the punishment shall be in accordance with the last paragraph to be presently considered.

Cases.

The same rule applies to cases in which the same person is charged for abetment as well as attempt. So is a case where the accused was convicted of attempt to commit house-breaking by night (Secs. 457 and 514), of receiving stolen property (Sec. 411), of abetment of his confederates in house-breaking by night (Sec. 109), and of being a member of an unlawful assembly (Sec. 143), the Court upheld the conviction only for attempted house-breaking, quashing the convictions under the other section.[5] So a gang of dacoits cannot be convicted of dacoity as well as of abetment of it, in so far as they

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1. State *v.* Monthier, A.I.R. 1955 M.B. 80 at p. 80: M.B.L.R. (1954) Cr. 166: Madh. B.L.J. 1954 H.C R. 1168 ; 1955 Cr. L. J. 815.
2. Act X of 1872, Secs. 452, 456.
3. Naujan, 7 M.H.C.R. 375.
4. Mahabir, 1 Bom. L. R. 69; Nag Plu, (1886) S.J.L.B. 300. It was so held in the older case; Tunaokoch, 2 W.R. 63; Chytu n Bowara, 5 W.R. 49; Nobo Pullee, 6 W.R. 49; Mussahur, 6 W.R. 92; Sahroe, 8 W.R. 31; Ramcharan, 6 W.R. 39 (F.B.); Naujan, 7 M.H.C.R. 375.
5. Fateh Khan, 8 Bom. L.R. 835.

assist one another. An offence under Sec. 459 causing grievous hurt whilst commiting house-trespass or house-breaking, is a composite offence of which the elements are (*a*) house-trespass (Sec. 48) or (*b*) house-breaking (Sec.453) and (*c*) causing of grievous hurt (Sec. 325 or Sec. 326). So Sec. 460 is made up of offences punishable under Secs. 304, 325 and 456. Other illustrations could be easily multiplied were it necessary. But they all refer to offences in which the presence of some additional circumstance constitutes either a graver offence of the same kind, or a different offence altogether.

11. "Constitute an offence".—The words "constitute an offence" as used in this paragraph refer to the definition of offences ontained in the Code irrespective of the identity or non-identity of the evidence whereby several acts are proved.[1] So where a person falsely personated a public servant (Sec. 170), and using his position as such, committed extortion (Sec. 383 or Sec. 384), it was held that as the two acts constituted distinct offences, and as their combination did not constitute a different offence, the section offered no bar to his conviction under both the sections. As Mahmud, J., remarked: "It is not to the identity or non-identity of the evidence nor merely to the individual facts of each case as to the practicability of the offence, but to the definitions of offences as to the elements of the *corpus delicti* that we must look for deciding the question as to the applicability of the latter part of Sec. 71 of the Indian Penal Code for purposes of assessing punishments.[2]

12. Conviction, punishment and sentence.—The Bombay High Court[3] took the view that Sec. 71, Penal Code, relates not to sentences but to punishment, but, with respect, the view taken by Calcutta and Madras High Courts is preferred, is that as the punishment is the sentence, no distinction can be drawn between the two.[4]

Ar already observed, this section prohibits punishment for, and not conviction for, two offences.[5]

An act may be an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined and punished. In such event the law is that the offender shall not be punished with a more severe punishment than the Court which tries him could award for any of such offences.[6] But there is no illegality if the accused is convicted under more than one section, provided only one sentence is passed,[7] or if two sentences are passed, they are made to run concurrently.[8]

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1. Wazir Jan, I.L R. 10 All. 58.
2. *Ibid.*
3. Queen-Empress *v.* Bana Punja, I.L.R. 17 Bom. 260 (F.B.); Queen-Empress *v.* Piru Rama Halder, A.I.R. 1926 Bom. 64; I.L.R. 49 Bom. 916: 27 Cr. L.J. 113.
4. Haji *v.* Emperor, A.I.R. 1943 Sind 212 at p. 218 : I.L.R. (1943) Kar. 132, following Nilmony Poddar, 16 Cal. 442; I.L.R. 51 Cal. 79; *In re* Ponniah Lopes *v.* Emperor, A.I.R. 1934 Mad. 388: I.L.R 57 Mad. 643: 35 Cr. L.J. 1226: 66 M.L.J. 572.
5. Wazir Jan, I.L.R. 10 All. 58 at p. 76: 1887 A.W.N. 274, *per* Mahmud, J.
6. Jethamal Parsram *v.* Emperor, A.I.R. 1932 Sind 107 at p. 109: 33 Cr. L.J. 902; 139 I.C. 777; *see* also Soloman Ezekiel *v.* Emperor, A.I.R. 1939 Cal. 376: 41 Cr. L. J. 255: 186 I.C. 171: 69 C.L. J. 298; Maiku *v.* State, A.I.R. 1953 All. 749: 1953 A.W.R. (H.C.) 389; P. S. Ananta Narayana, *In ree*, A.I.R. 1933 Mad. 337: 34 Cr. L. J. 277: 64 M.L.J. 351: 142 I. C. 21: 37 L.W. 476: 1933 M.W.N. 546; Emperor *v.* Dharamdas Lilaram, A.I.R. 1933 Sind 9: 141 I.C. 280: 34 Cr. L.J. 143.
7. Emperor *v.* Lavji Mandan, A.I.R. 1939 Bom. 452: 41 Cr. L. J. 183: 41 Bom. L.R. 980: 185 I.C. 483; Bhagat Singh *v.* Emperor, A.I.R. 1930 Lah. 266: 31 Cr. L.J. 290: 31 P.L.R. 73; Maiku, *supra*; Thimmappa, 7 Cr. L. J. 181.
8. Maiku *v.* State, A.I.R. 1953 All. 749 at p. 750.

As held by the Rangoon High Court[1] in a case where Sec. 71 does not come into play the Court has no discretion whatever to pass only one sentence for one offence and to decline to pass other sentences for other offences of which the accused is found guilty. Where an accused is convicted and sentenced under Sec. 302 for causing death of a pregnant woman, it has been held that "even if a separate conviction is not open to exception separate punishment would seem to offend Sec. 71, I. P. C.". If the case is governed by the first paragraph of the section, sentence can be awarded in respect of one offence only. But if the case falls under paragraph 2 or 3 of the section, the limitation is that "the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences". In other words, sentences may be awarded in respect of both offences, but the aggregate of such sentences should not be more than what could be awarded under any one of the two offences.[2] A person who actually causes hurt and is also a member of an unlawful assembly can be convicted of committing riot under Sec. 47, I. P. C. and of causing hurt under Sec. 323, I. P. C. The Full Bench case of *Queen-Empress* v. *Ram Sarup*,[3] is an authority for the proposition that persons who commit individual acts of violence with their own hands can be convicted of rioting as well as of hurt.[4]

Where eight persons were convicted and sentenced by the Trial Court under Secs. 147, 426/149, 452/149 and 325/149, Penal Code and separate sentences of fine and imprisonment were inflicted. The sentences of imprisonment under Secs. 452 and 325 read with Sec. 149 were to run concurrently. They appealed to the Additional Sessions Judge who dismissed the appeal in every respect except that he reduced the sentence of one accused, the ziledar of the Ajodhiya estate, to nine months' rigorous imprisonment from one year under Sec. 325, Penal Code. All the convicted persons, except one had gone in revision to the Oudh Chief Court.

It was argued in that case that the infliction of separate sentences under each of the sections charged offends against the provision of Sec. 71, Penal Code, but it was held by their Lordships that—

> "This argument is based upon *Baldeo Singh* v. *Emperor*,[5] which interprets some remarks made in *Barendra Kumar Ghosh* v. *Emperor*,[6] and comes to the conclusion that separate sentences in such cases as the present are illegal. The opposite conclusion has, however, been adopted in *Raghubar* v. *Emperor*.[7] The question depends upon the interpretation put upon the remarks of their Lordships of the Privy Council in *Barendra Kumar Ghosh* v. *Emperor*.[8] I am in entire agreement with the interpretation already put upon that decision by this Court."[9]

When two distinct offences are committed sentences passed under both offences cannot be said to be contrary to the provisions of Sec. 71. But the measure of punishment would be as is prescribed under Sec. 71.[10]

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1. Emperor *v.* Mihlwa, A.I.R. 1943 Rang. 338 : I. L. R. 12 Rang. 419: 36 Cr. L.J. 460: 154 I.C. 75.
2. Tiny *v.* State, A.I. R. 1952 All. 92 at p. 93: I.L.R. (1952) All. 56.
3. I.L.R. 7 All. 757.
4. Tiny *v.* State, A.I.R. 1952 All. 92 at p. 92: I.L.R. (1952) All. 56.
5. A.I.R. 1940 Nag. 120: 186 I. C. 681.
6. A.I.R. 1925 P.C. 1 : 52 Cal. 197 : 52 I.A. 40: 85 I. C. 47 (P. C.).
7. A.I.R. 1939 Oudh 91 : 179 I. C. 461: 1939 O.W.N. 27.
8. A.I.R. 1925 P. C. 1: 52 Cal. 197 : 52 I.A. 40: 85 I.C. 47 (P.C.).
9. Dulan Dayal Singh *v.* Emperor, A.I.R. 1945 Oudh 102 at pp. 102, 103: 1944 O.W.N. 275: 219 I. C. 304.
10. Madhosingh *v.* State, 1961 Raj. L.W. 404.

Section 457 makes punishable lurking house-trespass by night or house-breaking by night in order to the committing of any offence punishable with imprisonment and if the offence intended to be committed is theft, the punishment is higher. Section 380 makes punishable a theft committed in a dwelling-house. The two offences do not fall under Sec. 71 and, therefore, the conviction under both the sections is not illegal.[1]

The Court has to exercise its discretion properly, fairly, reasonably and judiciously taking into consideratton the facts and circumstances of each case.[2]

13. Paragraph 4.—The last clause lays down the *quantum* of punishment in the three classes of cases previously dealt with. Its wording has to be noted, for it has given rise to some controversy. It will be observed that all that the clause enacts is that maximum punishment in cases covered by the section shall be the maximum punishment fixed for any one of such offences. The words "the Court which tries him could award" do not refer to the jurisdiction of the Court but to the penalties affixed to offences, the object of the rule being to limit the offender's punishment in such cases to the maximum sentence for the gravest offence that his acts may disclose. So far the clause appears to be clear. But subject to that maximum, the sentence should be passed in respect of only the gravest offence, or it should be distributed over the different offences of which a person may have been found guilty. The clause only prohibits the passing of severer sentence than is the maximum provided for any one offence. It does not prohibit multifarious sentences following upon multifarious convictions. In other words, *prima facie* the section regulates punishment and procedure. It only lays down the principle without affecting any rules of procedure not inconsistent with it.

Quantum of punishment.

The question, therefore, whether on conviction at one trial of a person for offences comprised in the section, it is permissible to pass only one or more sentences, is then a question which has nothing to do with the Code. It is a question of mere procedure, for which reference must be made to the Criminal Procedure Code for guidance. Now, if we turn to Sec. 35 of that Code,[3] we find it laying down the following rules :

Rules laid down under Sec. 35, Cr. P. C.

(*a*) On conviction for several offences—the Court *may* sentence for all of them.

(*b*) Such sentences may be either concurrent or consecutive.

(*c*) But the maximum consecutive sentence shall in no case exceed imprisonment for more than 14 years ; or twice the amount of punishment which a Magistrate is ordinarily empowered to inflict, whichever is less.

(*d*) Reservation (*c*) does not apply to *concurrent* sentences.

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1. Udai Bhan *v.* State of Uttar Pradesh, A. I. R. 1962 S. C. 1116 at pp. 1118-19; (1962) 2 Andh. L. T. 502.
2. Public Prosecutor *v.* Avvaru Annappa, A.I.R. 1969 A. P. 278 at p. 281.
3. Act V of 1898.

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of those offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Conviction for doubtful offence.

1. Analogous law.—This section was Cl. (61) in the Bill and its object as explained by the codifiers, was to provide against the offender's escape from punishment for any offence when it was certain that he had committed one or the other of two or more offences for which he was tried, though it could not be held with certainty that he had committed one of them to the exclusion of the other. Take, for example, the case of theft and criminal breach of trust. The offender is found to have fraudulently misappropriated property, but it is not certain whether his act amounts to theft or criminal breach of trust. He cannot escape punishment for both, consequently, this section provides for his conviction in the alternative.[1]

Criminal Procedure Code.

The provisions of Secs. 236 and 367 (3) of the Code of Criminal Procedure supplement the provisions here enacted. They run as follows :

"236. *Where it is doubtful what offence has been committed.*—If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts of which can be proved will constitute, the accused may be charged with having committed all or any of such offences and . . , any number of such charges may be tried at once ; or he may be charged in the alternative with having committed some one of the said offences.

Illustrations

(*a*) *A* is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property or criminal breach of trust, or cheating.

(*b*) *A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false.

"367 (3). *Judgment in alternative.*—When the conviction is under the Indian Penal Code (XLV of 1860) and it is doubtful under which of two sections or under which of two parts of the same section, of that Code, the offence falls the Court shall distinctly express the same and pass judgment in the alternative."

2. Principle.—The section only applies when the Court has no doubt about the facts, nor of the offender's criminality, being only doubtful about the specific offence his act amounts to. In such a case, this section enables it to convict the offender in the alternative. (*See* para. 1 above.)

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1. *Vide* Note A, Reprint, pp. 105, 106

3. Meaning of words.—*It is doubtful of which of these offences he is guilty*": The doubt exists not as to the accused's guilt but as to the nature of his guilt. "*The offender shall be punished*": The Court has to give him the benefit of doubt as regards the sentence, but he cannot escape scot-free.

4. Conviction for doubtful offences.—This section and the cognate sections of the Criminal Procedure Code [Secs. 236 and 367 (3)] deal with a case in which the facts are certain and they amount to an offence, but it is not certain which offence. In such a case, the Court being in doubt as to the offence, gives him the benefit of its doubt in the sentence which it passes in view of the lesser of the two or more offences, of any one of which he is found guilty. It will be observed that the language of the section would seem to suggest that in such a case, the offender is to be punished "*for the offence* for which the lowest punishment is provided," and from which it might be argued that the offender is entitled to an acquittal for the graver of the two offences. But this is not its meaning, though its language is defective. As is clearly expressed in the Code of Criminal Procedure, in such a case the proper course is to convict in the alternative,[1] only the sentence being regulated in view of the minor offence. So, where a person is convicted of two offences in the alternative, one of which is murder, the section is an authority for punishing him with only imprisonment, though that would not have been the sentence admissible if the offender had been only guilty of murder.[2] Where the charge is framed in the alternative in respect of offences under Secs. 302 and 201, the position may arise as contemplated by the present section. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of those offences he is guilty. Such a finding is in accordance with Sec. 367 (3), Cr. P. C., and will have the consequence that under the present section, the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.[3] Of course, judgment in the alernative cannot be passed in cases in which it is doubtful whether the accused person is guilty of any one of the several offences charged.[4] In such a case the accused is entitled to be discharged, for it is not a case of doubtful offence but of doubtful criminality.[5] The section applies only to cases of certain criminality but uncertain offence.

Distinction between doubtful offence and doubtful criminality.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say—

Solitary confinement.

a time not exceeding one month if the term of imprisonment shall not exceed six months;

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1. Tarinee, 7 W. R. 13.
2. Sahee Singh, (1906) A. W. N. 93.
3. Nebti Mandal *v.* Emperor, A. I. R. 1940 Pat. 289 at p. 290: I. L. R. 19 Pat. 369: 22 P.L.T. 98: 41 Cr. L. J. 910.
4. Partappa, (1913) 11 P. R. No. 11: 21 I.C. 904.
5. Jamurha, 7 N. W. P. H. C. R. 137; Khan Muhammad, (1887) P. R. No. 11.

a time not exceeding two months if the term of imprisonment shall exceed six months and [1][shall not exceed one] year;

a time not exceeding three months if the term of imprisonment shall exceed one year.

SYNOPSIS

1. Amendment
2. Analogous law.
3. Principle.
4. Meaning of words.
5. Solitary confinement when can be ordered.
6. Summary trial.
7. Offences under special or local laws.
8. When rigorous imprisonment is no substantive sentence.
9. Duration of solitary confinement.

1. Amendment.—The words "shall not exceed one" in para. 3 were substituted for the words "by less than a" by Sec. 5 of the Indian Penal Code Amendment Act, 1882 (VIII of 1882).

2. Analogous law.—Under English law, solitary confinement, though at one time legal, was rarely awarded[2] and was finally abolished by the Statute Law Revision Act, 1893.[3] This section prescribes the limit within which solitary confinement may be awarded. It repeats an old English rule,[4] now obsolete as a form of torture which fails in its effect on the public. When unduly prolonged it leads to mental derangement.

3. Principle.—Solitary confinement is isolation of the prisoner from human intercourse and society. It causes a feeling of oppression due to the gregarious instincts of man. Prolonged isolation from human communion becomes intolerable and often leads to mental derangement. When not unduly prolonged, it gives him time to reflect upon the utility of society which his acts were calculated to destroy. The feeling of loneliness has often a chastening influence upon man. On debased natures it has no influence at all. Indeed, the pangs of solitary confinement are felt most unequally by different prisoners. To some the solitary cell is a hermitage,[5] to others it is an infernal dungeon. To minds blank and unthinking it offers a salutary lesson. The sentence has been, therefore, reserved for hardened criminals, and as punishment for atrocity or brutality.[6]

Jusification for solitary confinement.

Solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence. The only reason given by the Magistrate is that the "sanctity of home life has become to him (the appellant) a mere mockery and the desire to take what he wants regardless of ownership is not in him." This can be said of every person convicted under Sec. 379, Penal Code and it was not considered to be a circumstance justifying the passing of an order of solitary confinement.[7]

4. Meaning of words.—"*Solitary confinement for any portion*," which implies that "solitary confinement cannot extend to the *whole* term of

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1. Subs. by Act 8 of 1882, Sec. 5, for "be less than a".
2. 7 & 8 Geo. IV, cc. 29, 30; 9 Geo. IV, cc. 55, 56; 11 & 12 Vict., c. 159; 14 & 15 Vict., c. 92; Larceny Act, 1861 (24 & 52 Vict., c. 96).
3. 56 & 57 Vict., c. 54.
4. Bentham, IV, p. 49; X, p. 530.
5. "Stone walls do not a prison make
   nor iron bars a cage;
   Minds innocent and quiet take
   That for a hermitage."
   To Altanae from Prison—Richard Lovelace (1618—1653).
6. *In re* Muruswamy, A.I.R. 1947 Mad. 386 (1) at p. 386: (1947) 1 M L.J. 336: 1947 M. W. N. 609: 60 M. L. W. 333.
7. *In re* Ramanjulu Naidu, A. I. R. 1947 Mad. 381 (1) at p. 381 : (1947) 1 M. L. J. 410.

imprisonment".[1] "*Not exceed three months*," i.e. out of any *one* punishment. There may then be solitary confinement of as many three months as there are conviction[2] whether simultaneously or successively, but this is never done.[3] "*Not exceeding one month*". *See* Sec. 49 for the definition of a "month". For the purpose of solitary confinement a month signifies a period equal to the average duration of a calendar month, that is (disregarding fractions) 30 days.[4]

5. Solitary confinement when can be ordered.—The sentence of solitary confinement is a mode of undergoing the sentence of rigorous imprisonment. It is not a substantive sentence by itself. As such, an order that a portion of a sentence shall be suffered in solitary confinement is not a judgment against which there can be appeal. It is an order which must be, however, passed and propounced with the sentence. And as the only restriction made in the section is that it may be added only in cases in which the Court awards the sentence of *rigorous* imprisonment it follows that it cannot be ordered in offences which are either not punishable with rigorous imprisonment or in which the offender is not so punished.

6. Summary trial.—Solitary confinement may be ordered even in a case tried summarily provided the offender is sentenced to rigorous imprisonment.[5]

7. Offences under special or local laws.—Since it is a sentence which is reserved only for an offence "*for which under this Code*" the Court has power to pass a sentence of rigorous imprisonment, it follows that solitary confinement cannot be awarded for offences under special or local Acts.[6]

8. When rigorous imprisonment is not substantive sentence.—Since solitary confinement "is to be ordered for any portion or portions of the imprisonment to which he is sentenced" it follows that where a rigorous imprisonment is no part of the substantive sentence, solitary confinement cannot be awarded.[7] It is, therefore, illegal in a case in which the offender has been sentenced to imprisonment in default of payment of fine,[8] or in default of furnishing security for good behaviour.[9]

9. Duration of solitary confinement.—Solitary confinement is then a sentence reserved only for cases in which a person is sentenced to rigorous imprisonment or in a case in which rigorous imprisonment is the sentence prescribed by the Code. In that case, the section empowers the Court to direct that a portion of the imprisonment up to the limit of three months shall be suffered in solitary confinement. As, however, this is a period fixed for any one sentence, the accused may be sentenced to as many

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1. Nyan Sukh Mether, 3 B. L. R. 49.
2. Nihala, (1877) P. R. No. 11; Khushal, (1877) P. R. No. 13.
3. Fatta, (1878) P.R. No. 16.
4. *Ibid.*
5. Anna Khan, I. L. R. 6 All. 83.
6. King-Emperor *v.* Nazir, A. I. R. 1924 Lah. 667 (1) at p. 667 (Arms Act); Gholam Hussain, (1866) P. R. No. 120; Hurnarain, (1870) P. R. No. 20; Manawar, (1875) P. R. No. 4; Mukh Ram, (1879) P.R. No. 24; Jammu, (1889) P. R. No. 17; Gurdit Singh, (1889) P. R. No. 17; Nga Kun Ba, (1889) P. J. L. B. 554; Bidha, 21 A. L. J. 914 : I. L. R. 46 All. 114 (Cattle Trespass Act).
7. Umar Singh, (1869) P. R. No. 20; Bunsi, (1882) P. R. No. 9.
8. Jita, (1873) P. R. No. 26; Jamdad, (1887) P. R. No. 58.
9. Kundan, I. L. R. 36 All. 495; King-Emperor *v.* Phakar, A. I. R. 1927 All. 472 at p. 473 : 28 Cr. L. J. 534; Sundar Lal *v.* Emperor, A. I. R. 1933 All. 676 at p. 678 : 35 Cr. L. J. 218.

three months of solitary confinements as there are convictions, though it is the most unusual course (*see* para. No. 3 above) and one which is only barely legal.[1] In fact, it would be as wrong to accumulate sentences of solitary confinement, as it would be wrong to pass several sentences of whipping amounting to 30 stripes each on different simultaneous occasions.[2] It may be noted that whipping as a form of punishment has been abolished by the Abolition of Whipping Act, 14 of 1955.

Caution.

Whenever the Court sentences a person to solitary confinement, it must specify the exact period for which that sentence is passed.[3] Being a highly penal sentence, the Court must not overstep the strict limits provided by the section. It has, for instance, no power to direct that the sentence of solitary confinement shall be executed in the first week of every month.[4]

Limit of solitary confinement.

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

SYNOPSIS

1. Analogous law.
2. Limit of solitary confinement—"Fourteen days at a time".
3. "Shall not exceed seven days in any one month."

1. Analogous law.—This section has been enacted on medical grounds. Continuous solitary confinement is conducive to physical deterioration and mental derangement. It has, therefore, been decided that it shall be at least regularly intermittent.

2. Limit of solitary confinement.—"Fourteen days at a time".—This section regulates the execution of sentence of solitary confinement, as the last section limits its duration. According to the rule here prescribed, the mode of execution depends upon the term of the substantive imprisonment. If it exceeds three months, then solitary confinement must be worked out in smaller instalments. For the term being long, the prisoner can serve out his sentence in shorter spells. On the other hand, where the substantive sentence is itself short, that is, where it does not exceed three months, then the longest period of solitary confinement at any one time may extend to a fortnight, but it shall not be more. This is, of course, the maximum term of solitary confinement which the prisoner may be subject to at a time. But where the whole term of imprisonment to which the prisoner was sentenced was only a fortnight,

Whole period of sentence not to be passed for solitary confinement.

1. Ibrahim *v.* Queen-Empress, (1897) P. R. No. 7 ; Abdulla Jan, (1905) P. R. No. 37 ; Nga Po Thain, (1897) P. J. L. B. 596 ; Nga Kaing, (1898) 1 U. B. R. 247 ; U. B. C. M. S. 100 : (1892) 1 U. B. R. 146 ; Emperor *v.* Ratiram, 5 C. P. L. R. 23 ; Dangar Khan *v.* Emperor, A. I. R. 1923 Lah. 104 at p. 105 : 68 I. C. 817 ; in U. B. C. M. S. 10, Naga Sein Po, I. L. R. 1 Rang. 306, cumulative sentence of solitary confinement is said to be *illegal*.
2. Ratiram, 5 C. P. L. R. 23.
3. Rajada, (1869) P. R. No. 33.
4. Jimna, 5 C. P. L. R. 17 ; Duni Chand, 3 P. W. R. 1913.

he could not be condemned to pass the whole of that term in solitary confinement.[1] Indeed, as the last section contemplates, only a *portion* of a sentence can be ordered to be passed in solitary confinement.

3. "Shall not exceed seven days in any one month."—In the case of longer sentences, no single period of solitary confinement shall exceed seven days in any one month. If, therefore, the sentence was for a term of one year and one day out of which three months were to be passed in solitary confinement the order as to solitary confinement, though legal under the last section,[2] would be illegal under this, for three months not be passed in solitary confinement within a year and a day, having regard to the rule enacted in the section. The Court accordingly reduced the period of solitary confinement to 84 days.[3] But this does not appear to be the view in the Punjab where in a case of four months' rigorous imprisonment, of which one month was ordered to be passed in solitary confinement the Court upheld the sentence as legal though its execution for more than 28 days was admitted to be not possible.[4]

Punjab view.

[5][**75.** Whoever, having been convicted—

Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.

(*a*) by a court in [6][India], of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards. [7][* * *]

[7][* * *]

shall be guilty of any offence punishable under either of those chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to [8][imprisonment for life], or to imprisonment of either description for a term which may extend to ten years.]

SYNOPSIS

1. Amendment.
2. Scope and object.
3. Principle.
4. Meaning of words.
5. Condition for enhanced punishment.
6. "Having been convicted."
7. Previous conviction.
8. Conviction outside India.
9. Conviction by court-martial.
10. Conviction under other laws.
11. Conviction for offence under Chapter XII or Chapter XVII.
12. Summary trial.
13. Magistrate's duties and powers.
14. Procedure for enhanced punishment.
15. Charge, form of.
16. Charge—Particulars of.
17. Proof of previous convictions.
18. Jurisdiction.
19. Sentence.
20. Nature of enhanced sentence.

1. Amendment.—The concluding words of the section "or to imprisonment of either description for a term which may extend to ten years" were subtituted for "or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not, in any case, be liable to imprisonment for a term exceeding ten years" by the Amending Act of 1886 (Act X of 1886).

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1. Nyan Sukh Mether, 3 B. L. R. A. 49 (A. Cr.).
2. *See* Sec. 73, last clause.
3. Anon, (1879) 1 Weir 15.
4. Fatta, (1878) P. R. No. 7.
5. Subs. by Act 3 of 1910, Sec. 2, for the original section.
6. The words "British India" have successively been subs. by the A. O. 1948, the A. O. 1950 and Act 3 of 1951, Sec. 3 and Schedule, to read as above.
7. The word "or" at the end of Cl. (*a*) and Cl. (*b*) omitted by Act 3 of 1951, Sec. 3 and Schedule.
8. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "transportation for life" (w.e.f. 1st January, 1956).

The present Sec. 75 was substituted for the original by the Indian Penal Code Amendment Act (III of 1910) which came into force on 18th February, 1910.

The words "in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative" replaced the words "in the territories of any Native Prince or State in India acting under the general or special authority of the Governor-General-in-Council or of any Local Government" by virtue of the Government of India (Adaptation of Indian Laws) Order, 1937.

The words "British India" in Cl. (*a*) were replaced by the words "the Provinces," by the Adaptation of Laws Order, 1948. The words "the States" subsequently replaced the words "the Province" by virtue of the Adaptation of Laws Order, 1950. Lastly, the word "India" was substituted for the words "the States" by Act III of 1951 and the same Act omitted the word "or" at the end of Cl. (*a*) and Cl. (*b*).

2. Scope and object.—This section provides that persons previously convicted of certain offences will be liable to higher punishment than what they otherwise would be. As was observed by Prinsep, J., in a case, the object of the section being to provide for additional sentence, not for a less severe sentence on a second conviction, recourse should not be had to it if the punishment for the offence committed is itself suffiicent.[1] Nor was it the intention of the Legislature enormously to enhance the heinousness of petty offences. Where, for instance, a person convicted of receipt of property acquired by dacoity had undergone a sentence of seven years' imprisonment and he was afterwards convicted of theft of articles of trifling value, the High Court considered the application of this section inappropriate.[2] But the value of property is often the result of accident. The important question is the intention of the man and his character and attitude towards society,[3] the nature of the offence committed and the gravity of the risk involved. So, where the appellant after four previous convictions for theft had been for the fifth time convicted of the theft of property of no great value, the Court considered the sentence of seven years' transportation by no means excessive.[4] Hence while there is no limitation against the applicability of the section, still, as a matter of judicial discretion, the Court is loth to take up an old conviction only for the purpose of awarding enhanced sentence.[5] The section should not be applied mechanically in all cases in which there has been a previous conviction. The interval of time that may have since elapsed, the age and character of the accused during this interval and the necessity of enhanced sentence should all be considered. So, where a man, 55 years old, was convicted of pick-pocketing by making a snatch at a purse in a travellers' hand, dropping it at once when the ower called out, and it appeared that he had been previously convicted of pick-pocketing in a crowd or a fair 10 years earlier, the Court considered that

Object of the section.

Important considerations under the section.

1. Haramohan Deb Nath *v.* Jaha Baksha Patwari, A. I. R. 1943 Cal. 25 at pp. 25, 26 : 46 C. W. N. 846; Sheo Saran, I. L. R. 9 Cal. 877; Jawahir Singh, 22 I. C. (L.) 759; Ishar Singh *v.* Emperor, A. I.R. 1926 Lah. 617.
2. Shamjee, 1 C. L. R. 481.
3. Nur Din, (1903) P. R. No. 28.
4. Nga Kan Tha, (1895) 1 U. B. R. 147.
5. Nga Lu Gui, (1884) S. J. L. B. 291; Alladin, 29 P. L. R. 59; *see* Ishar Singh, *v.* Emperor, A. I. R. 1926 Lah. 617; Karuppa Tevan *v.* Emperor, A.I.R. 1929 Mad. 841 (2); Murido, A. I. R. 1930 Sind 58; Ishar Singh *v.* Shama Dusadh, A. I. R. 1957 Pat. 131 : 38 Cr. L. J. 484; Muniswami, 1936 M. W. N. 1091, Jumo Indris *v.* Emperor, A.I. R. 1934 Sind 195: 36 Cr. L. J. 326; Kunj Lal *v.* Emperor, A. I. R. 1929 Lah. 278: 30 P. L. R. 50: 30 Cr. L. J 376; Khushdil *v.* Emperor, A. I. R 1927 Lah. 647: 28 Cr. L. J. 160.

having regard to his old age, his good character during the interval since his last conviction, the fact that he had probably yielded to a sudden temptation, that he was not a skilled thief, and that he had a large family dependent on him for support, his previous conviction might be disregarded, and it accordingly reduced his sentence of transportation for seven years to rigorous imprisonment for one year, though he had been previously sentenced to four years' rigorous imprisonment for the same offence.[1] The section undoubtedly provides for a special maximum sentence. The Court below has assumed that it also provides for a minimum. There is nothing in the terms of the section to justify any such inference. It would be ridiculous to suggest that in assessing the punishment the previous convictions should be taken into consideration.[2] There is no rule of law that a conviction under Sec. 75 must be followed by a heavier sentence than the one preceding it.[3]

Section provides for a maximum sentence and not a minimum.

The section enables a court to pass a sentence commensurate with the nature of the offence or the accused persons.[4] The section provides for enhanced sentence and not for a separate sentence.[5] Section 75, Indian Penal Code, should not be applied mechanically where the appellant seems to have yielded to sudden temptation having tried his hand at pocket-picking, a heavy sentence of transportation is not justifiable.[6] It goes without saying that the highly penal provisions of the section are not retrospective and have no application to an offence committed before the passing of the Code.[7]

Section empowers enhanced punishments and not separate sentence.

It should be noted that though no conviction can be legally had under this section without a specific charge, it does not follow that an enhanced sentence passed under this section constitutes an independent conviction. Consequently, a person is not convicted of, say robbery and sentenced to enhanced punishment under this section is not convicted of separate offences within the meaning of Sec. 35 of the Code of Criminal Procedure, so as to justify the awarding of two separate sentences.[8] As this section makes a previous conviction relevant, Sec. 54 of the Indian Evidence Act is no obstacle to proof of a previous character, which must, however, be adduced only after the accused is found guilty.[9]

It is wrong to say that even though an offence under Sec. 379, I. P. C., is compoundable, it cannot be so compounded when Sec. 379 is read with Sec. 75 because conviction under Sec. 379 read with Sec. 75 is not a conviction for two "distinct offences". The conviction is all the same, only under Sec. 379. Section 75 is invoked for enhancement of the sentence and that can come only at the time the sentence is to be imposed. The fact that the accused is an old offender is not to be taken note of by the Court at the trial. Only at the conclusion of the trial after entering the conviction, that question can be taken up for

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1. Kasim Ali, 6 W.R. 28; Ishar Singh *v.* Emperor, A.I.R. 1926 Lah. 617; Labh Singh, 94 I. C. (Lah.) 365.
2. Haramohan Deb Nath *v.* Jaha Baksha Patwari, A. I. R. 1943 Cal. 25 at p. 26: 46 C. W. N. 846.
3. Kamsala Admoorthy, 1937 M.W.N. 737 (1).
4. Sheikh Chamman *v.* Emperor, A. I. R. 1920 Pat. 526 at p. 527: 21 Cr. L. J. 143.
5. Pano Diyalo, 1936 M. W.N. 752 (1).
6. Kasim Ali *v.* Emperor, 7 Cr. L. J. 293 at pp. 294 and 295; *see* also Daya Ram *v.* Emperor, A. I. R 1929 Lah. 768 : 30 Cr. L. J. 1082 ; Maulu *v.* Emperor, A. I. R. 1929 Lah. 787: 11 Lah. 115 ; Jowahir Singh *v.* Emperor, A. I. R. 1914 Lah. 476: 15 Cr. L. J. 183; Harnam Das, 31 P. L. R. 333; Kuppuswami Chetty, 1933 M. W. N. 1259.
7. Kaushya Yeshu, 4 B. H. C. R. 11 ; Moluckchand, 3 W. R. 17; Hurpaul, 4 W. R. 9; Pubom, 5 W. R. 66.
8. Muthuakka, 30 I.C. (Mad.) 435; Khalak, I. L. R. 11 All. 393.
9. Ismail Ali Bhai, I. L. R. 39 Bom. 326, followed in Suban Sahib, I. L. R. 52 Mad. 358; Duming, 5 Bom. L. R. 1034.

imposing the sentence. So Sec. 75 cannot give a different colour to the offence under Sec. 379, I. P.C. This is the view taken in *Queen-Empress* v. *Khalak*,[1] and *In re Muthurakka Thevan*.[2] In the case first cited it was held:

> "A person convicted under Secs. 411-75 of the Penal Code is not convicted of 'distinct offences' within the meaing of Sec. 35 of the Criminal Procedure Code".

And in the second case it was held:

> "A person convicted under Secs. 392 and 75 of the Penal Code is not convicted of distinct offences within the meaning of Sec. 35 of the Code of Criminal Procedure."[3]

The section applies only when a person is sought to be punished with imprisonment exceeding the maximum imprisonment provided for the offence.[4]

Previous convictions are not relevant except in cases where the prosecution seek the application of this section.[5]

Full Bench view.

What Sec. 75, I. P. C., contemplates is that, where a person who has been previously convicted of an offence punishable under Chapter XII (which deals with offences relating to coin and Government stamps) or Chapter XVII (which relates to offences against property) with imprisonment of either description for a term of three years or upwards, is once again found guilty of a similar offence, he shall be liable to enhanced punishment which may extend to imprisonment for life or to imprisonment of either description for a term which may extend to ten years. The section is concerned with a previous *conviction* for a similar offence but it does not postulate that in respect of the previous conviction, the *punishment* imposed should have been one of not less than three years. All that it posits is that the previous conviction should have been in respect of an offence *punishable* with a term of imprisonment for a term of three years or upwards, but it does not lay down that the offender should have been actually *punished* with such a term of imprisonment. It would seem, therefore, that the observation of the Division Bench of the Andhra Pradesh High Court in *Kamya* v. *State*,[6] which suggests that Sec. 75, I. P. C., would come into play only if the sentence awarded to the accused for the previous conviction was not less than three years, is not warranted by the language of the section.[7]

Under Sec. 75 of the Indian Indian Penal Code, there is a provision for enhanced punishment for previous convictions. But Sec. 75, I. P. C., is restricted to offences under Chapter XII and Chapter XVII of the Code. It does not apply to offences under other Acts. The Madhya Pradesh Gambling Act provides punishment for the offences mentioned therein. There is no provision for enhanced punishment on a previous conviction except Sec. 15 of the Act. This section does not apply to all offences. It reads as follows:

> "Whovever having been convicted of an offence punishable under Sec. 4 of this Act, shall again be guilty of any offence punishable under either of such sections shall be subject for every such subsequent offence to double the amount of punishment to which he

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1. I. L. R. 11 All. 393.
2. 30 I. C. 435.
3. State *v.* Thampikannu Mytheen Picha, 1969 Ker. L. T. 838 at p. 839: A.I. R. 1970 Ker. 251.
4. Mohammadi *v.* State, 1957 Cr. L. J. 275 at p. 276: 1956 A. L. J. 611 : 1956 A. W. R. (H. C.) 735.
5. Fatima Bee, *In re*, 1954 M. W. N. 318: (1954) 2 M. L. J. 190.
6. A. I. R. 1960 A. P. 490: 1959 A. L. T. 851.
7. Sugali Nage Naik, *In re*, (1963) 2 Andh. W. R. 361 at pp. 362, 363.

would have been liable for the first commission of an offence of the same description."

In order to apply this section conviction must be under Sec. 4 of the Act.[1]

It is a matter for regret that, in spite of several reported precedents all in the same trend there prevails a serious misunderstanding as to the scope and meaning of Sec. 75, I. P. C., among certain Magistrates and Sessions Judges, who seem to assume that the section is a mandate to inflict an enhanced or severe sentence on an offender who had previous convictions, irrespective of the nature and gravity of the offence concerned. It is pertinent to remember that the scheme of the Indian Penal Code is to fix a measure of punishment for every kind of offence; and ordinarily the fact of previous convictions is not to be taken into account either in judging the guilty evidence of bad character of the accused is tabooed under Sec. 54 of the Evidence Act or in fixing the punishment. Section 75, I. P. C., is an exception to that rule. It singles out offences under Chapter XII (relating to offences against coinage and stamp law) and Chapter XVII (relating to offences against property), and empowers the Court to award a greater measure of punishment for a repetition of the crime. Apart from the indication in Sec. 348, Cr. P. C., as to when the extraordinary powers under Sec. 75, I. P. C., are to be invoked, it is pertinent for those who deal with the life and liberty of fellow citizens in a free country to remember that abhorrence of a criminal is not an unmixed virtue, that the human frame invariably contains some finer tissues and it does no good to any body to devitalize those tissues rather than revitalize them and that therefore punishments should not be more severe than is strictly warranted by the circumstances of the case at hand. Section 348 (1) of the Criminal Procedure Code lays down the procedure to be followed by Magistrates in cases coming under the scope of Sec. 75, I. P. C.

Section 75, I. P. C., does not prescribe that a severe sentence should be imposed for a repetition of any crime by an offender. It does not prescribe a minimum sentence for any event. It does not say that a convict of a petty theft committed without any violence should be given a severe sentence if he had half a dozen previous convictions for like offences to his credit. As early as 1878, Jackson and Cunningham, JJ., pointed out in *In re Shamjee Nashyo*[2] that "it was not the intention of the Legislature and is not in accordance with reason, that a previous conviction should so enormously enhance the heinousness of petty offences".

In 1908, in *Kasim Ali* v. *Emperor*,[3] Kensington, J., cautioned that Sec. 75, I. P. C., should not be applied mechanically and in 1914 in *Jowahir Singh* v. *Emperor*,[4] where the offender committed a "technical theft" by annexing the complainant's ornaments and refusing to return them, though he returned them the next morning after the complaint was liad before the police, the same learned Judge held:

> "In the case of Jowahir Singh, I think it absurd to treat the offence more seriously with reference to Sec. 75, I. P. C., or to make his connection for a trifling offence of the kind the occasion for a long period of police supervision. His appeal is so far allowed that his sentence of imprisonment is reduced from seven years to six months and the further order under Sec. 565, Cr. P. C., is also set aside as

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1. Manaklal Jhamaklal *v.* State, A. I. R. 1966 M. P. 281 at p. 281.
2. 1 C. L. R. 481.
3. 7 Cr. L. J. 293.
4. 15 Cr. L. J. 183.

not justified by the facts of the case. The man may be a bad character, but he did not in this affair commit a serious crime."

The principle appears well explained by P. R. Das, J., in *Sheikh Chamman* v. *Emperor*.[1] The appellant had been convicted of cheating to the extent of Rs. 2, and sentenced to transportation for nine years on the ground that he was "liable to receive enhanced sentence inasmuch as there are previous convictionst agains him". The learned Judge observed:

"In my opinion there is much misapprehension as to the scope and meaning of Sec. 75, I. P. C. The view which seems to have found favour with the Courts is that as soon as it can be shown that there is a previous conviction within the terms of Sec. 75, against the accused person the Court is bound to pass an enhanced sentence on him, that is to say, a sentence wholly disproportionate to the actual offence under investigation. In my judgment, there is no justification for this view in the section itself. The words 'enhanced sentence' find no place in the section, though they do occur in the marginal note to the section. But the marginal note forms no part of the statute itself and is not binding as an explanation or construction of the section.[2] I must be guided by the section itself, and in my judgment, the section does not empower a court to pass 'an enhanced sentence' (to adopt the expression commonly used by the criminal courts) merely because there are previous convictions against the accused person, although it enables the Court to sentence a person to transportation for life or to imprisonment up to ten years. The distinction, in my view, is important. In the one case, the Court would be at liberty to inflict a punishment out of all proportion to the offence committed. In the other case the Court would be able to pass a sentence commensurate with the gravity of the offence, a power which but for Sec. 75, I. P. C., the Court would be powerless to exercise. It is the experience of most criminal courts that they have at times felt handicapped by the sections of the Code providing for the punishment, with the result that they have been at times unable to pass adequate sentences on accused persons. Section 75 removes that disability, but it imposes as an essential condition for the exercise of the power that there must be previous conviction against the accused person. I will illustrate my meaning at once. Take, for instance, a case of theft. The maximum punishment which a court is empowered to inflict on a person convicted of theft is three years' rigorous imprisonment. Now I do not think that a court is at liberty to pass a sentence of seven years' imprisonment on a person convicted of theft, merely because there are previous convictions against him, if the offence itself does not call for a severe punishment. But the offence may be of sufficient gravity calling for a severe punishment than that permitted by Sec. 379. If there are no previous convictions, the Court is helpless in the matter. If there are previous convictions, the Court is able to pass an appropriate sentence on the accused person. In other words, Sec. 75 enables a court to pass a sentence commensurate with the nature of the offence on the accused person; it does not empower a court to pass a sentence disproportionate to the nature of the actual offence. This view is considerably strengthened by the decision of the Calcutta High Court in the case of *Sheo Saran Tato* v. *Empress*,[3] where the learned Judges said that recourse should not be had to Sec. 75, if the punishment provided for the offence is sufficient."

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1. A. I. R. 1920 Pat. 526.
2. Claydon *v.* Green, (1868) 3 C. P. 511.
3. I L. R. 9 Cal. 877.

Fforde, J., in *Ishar Singh* v. *Emperor*,[1] and Dalip Singh, J., in *Khushdil* v. *Emperor*,[2] held that a previous conviction had a long time before the subsequent offence does not warrant the application of Sec. 75, I. P. C.

In *Kunj Lal* v. *Emperor*,[3] the accused was sentenced to three years' rigorous imprisonment to be followed by one year's police surveillance, for stealing a pair of shoes which had been left outside a shop by a customer, Fforde, J., observed:

> "I have repeatedly had occasion to point out that a previous conviction which took place a considerable time before a subsequent offence does not warrant the application of Sec. 75. A man who has committed two offences at a long interval of time cannot be held to be an habitual offender, and Sec. 75, I.P.C., is directed against habitual offenders. In the present case the petitioner has, so far as the evidence on the record goes, been leading a blameless life for some nine years since he first came in conflict with the criminal law. The present offence is a petty one and in itself hardly deserved more than, at the most, a sentence of six months. In my opinion, the provisions of Sec. 75, should not have been applied in the circumstances of this case. I would accordingly set aside the sentence of three years' rigorous imprisonment and police surveillance and reduce the penalty to the period of imprisonment already undergone by the petitioner, which I understand is some seven months."

Though in this judgment his Lordship has observed that Sec. 75 should not be applied except to habitual offenders, the principle really is that the lapse of an interval of good conduct after expiry of the sentence given for the previous offence would be a relevant fact against the invocation of Sec. 75.

In *Harnam Das* v. *Emperor*,[4] the accused was convicted of stealing a *khes* costing Rs. 4 and sentenced to five years' rigorous imprisonment on the strength of two previous convictions—one under Sec. 411, I. P. C., for 10 days' imprisonment, and the other under Sec. 379, I. P. C., for three months' imprisonment. Fforde, J., held:

> "I have repeatedly pointed out that for an offence trivial in itself, as is the present one, greatly enhanced punishment should not be inflicted merely because there have been previous convictions against the offender. In my judgment a sentence of six months' imprisonment would meet the ends of justice, and I, accordingly, accept this appeal to the extent of reducing the punishment from five years' rigorous imprisonment to six months' rigorous imprisonment."

In *Maulu* v. *Emperor*,[5] Fforde, J., with the concurrence of Dalip Singh, J., observed:

> "....The appellant, who appeals through jail, has been convicted of stealing a sum of Rs. 10-2-6 by picking a pocket in a crowd.... The learned Sessions Judge, who tried the case has sentenced the appellant to transportation for life invoking the provisions of Sec. 75, I.P. C., for the purpose of enabling him to impose that sentence. ... In 1909 there is no doubt the appellant engaged in a crime of a much more serious nature and was rightly awarded an appropriate sentence for that offence. The next offence if one assumes that the

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1. A. I. R. 1926 Lah. 617.
2. A. I. R. 1927 Lah. 647 (1).
3. A. I. R. 1929 Lah. 278.
4. A. I. R. 1930 Lah. 100 (1).
5. A. I. R. 1929 Lah. 787.

appellant served his full term of imprisonment was committed some 12 years after his release, and he must be deemed for those 12 years to have led a blameless life. Therefore, when he again committed an offence on 31st August, 1925, he could not then said to be a habitual offender. Moreover, it is now over three years since the last offence was committed. Under these circumstances it seems to me wrong to treat the appellant as a habitual perpetrator of serious crimes and to sentence him to transportation for life for an offence of a somewhat trivial nature. The appellant cannot be said to be irreclaimably addicted to serious crime and though the learned Sessions Judge was entitled to take into consideration his previous career for the purpose of gauging the amount of punishment which he deserves for this offence, I do not think he is justified in invoking the provisions of Sec. 75, I. P. C., to give him the sentence which he has now imposed.

"The English Courts of Criminal Appeal have frequently pointed out that it is not proper for a court to impose a heavy sentence for trivial offence even in the case of a habitual offender. In *R.* v. *Oliver Taylor*,[1] the Lord Chief Justice in delivering the judgment of the Court observed:

> 'The appellant pleaded guilty to the charge of stealing a woman's coat from a lobby leading to the office where she was employed. He is 35 years old and he had previously been convicted on 20 occasions. The last sentence he served was one of 18 months' imprisonment, from which he was released in October, 1923. He was out of prison for nine months before the commission of the present crime. It has been said over and over again in this Court that the mere fact that a man has been convicted many times is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself. The Court is satisfied that the proper sentence here is one of 12 months' imprisonment with hard labour.'
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> "In my judgment the present offence must be dealt with on its merits, bearing in mind, of course, the previous career of the appellant. I am of opinion that, in view of all the circumstances of the case, 12 months' rigorous imprisonment is sufficient to meet the ends of justice."

In *In re Munuswamy*,[2] Yahya Ali, J., has laid down the rule succinctly in these words:

> "It has been held in a number of decisions by this Court that although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case."

Kamsala Adimoorthy v. *Emperor*,[3] exposes another line of misunderstanding on the scope of Sec. 75, I. P. C., and it is that the sentence for a subsequent offence of the kind mentioned in the section should not be less

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1. 18 Cr. App. Rep. 143.
2. A. I. R. 1947 Mad. 386 (1).
3. 1937 M. W. N. 737 (1).

than that imposed for a previous conviction, irrespective of the nature and gravity of the later offence. King, J., observed:

> "The sentence is very heavy and is very possibly due to an impression in the mind of the learned Judge that he ought to award a longer sentence than that awarded in the appellant's last previous conviction. Of course, there is no rule of law that a conviction under Sec. 75, I. P. C., must invariably be followed by a heavier sentence than the one immediately preceding it. It is difficult in individual cases to dccide between the ordinary principle of passing a sentence appropriate to the nature and circumstances of the crime and the principle which is at the back of Sec. 75 of preventing a habitual offender from further depredations upon the property of his fellowmen for a lengthy period, but to sentence a man of 35 to ten years rigorous imprisonment in a case of this kind where the property stolen was not very valuable and no violence was resorted to is, I think, to apply Sec. 75 much too harshly."

In *In re Abdulgani Sahib*,[1] Pandurang Row, J., reduced the sentence of six years for a theft of property worth Rs. 50, observing:

> "There seems to be an idea prevalent in the minds of some Judges that there is a rule that the sentence on an old offender should always be at least a little more severe than the sentence just previous. This so-called rule cannot be supported by any good reason.
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> "It may be an excellent rule of thumb, but I do not think in imposing sentences, such a rule can be safely followed, in the interest of the proper administration of criminal justice. While the sentences imposed on criminals should be adequate to the offence, there is every reason why they should not be excessive. Apart from the injustice to the offender which an excessive sentence entails, such a sentence tends to undermine public confidence in the administration of criminal justice."

Section 348, Cr. P. C., lays down the procedure to be followed by the Magistrates in cases coming under Sec. 75, I. P. C. It does not say that all cases which may come within the scope of Sec. 75, I. P. C., should be committed to the Court of Session. It requires the Magistrate before whom the case is pending, to commit the accused to the Court of Session or the High Court, as the case may be, if he "is satisfied that there are sufficient grounds for committing the accused", and forbids committal if the Magistrate "is of opinion that he can himself pass an adequate sentence if the accused is convicted". The inclusion of Sec. 75, I. P. C., in the charge does not, by itself, necessitate a committal to the Court of Session.

In *Public Prosecuter* v. *Palapati Ramakrishnaiah*,[2] it was urged by the Public Prosecutor that in view of Sec. 348, Cr. P. C., read with Sec. 75, I. P. C., the Magistrate ought to have committed the accused to Sessions, as the accused had a number of convictions and the Second Class Magistrate was not competent to punish him adequately. Chandra Reddi, J. (as he was then) observed:

> "Now the question for consideration is whether in every case falling under Sec. 75, Penal Code, a Magistrate is bound to commit the accused to Sessions, in other words, has he no discretion to consider whether it is a fit case for committing the accused to Sessions? It looks to me that it is not obligatory on the Magistrate to commit the accused to Sessions in all cases under all circumstances

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1. A. I. R. 1937 Mad. 231.
2. A. I. R. 1955 A. P. 190.

without any regard to the nature and the gravity of the offence. In fact, the section directs him to commit the accused to Sessions only if he is satisfied that there are sufficient grounds for doing so.

"When once he feels that there are grounds for committing the accused to Sessions, then he is under a duty to do it unless he is competent to try the case and comes to the conclusion that he can himself pass an adequate sentence. It is true that the latter part of Sec. 348 is mandatory but that would come into play only when the Magistrate feels that the circumstances of the case warrant the committal of the accused to the Sessions.

"It does not contain any invariable rule that in all cases governed by Sec. 75, Penal Code, a committal to the Sessions should follow. In such case, the Magistrate has to apply his mind to the circumstances and decide whether it is a fit case for committing the accused to Sessions. The construction sought to be placed by the learned Public Prosecutor, in my opinion, is opposed to the plain meaning of the section....

"It is now fairly settled that it is not absolutely necessary that in every case, irrespective of the nature of the offence, an enhanced punishment should be awarded. It is a well understood principle of administration of criminal justice that the punishment should be commensurate with the gravity of the offencc. It should neither be too lenient nor very excessive being disproportionate to the nature of the crime committed. The circumstances of each case have to be considered by the Magistrate before awarding a particular sentence....

"It is certainly open, in my opinion, to a Magistrate to award a sentence less than that given on a previous occasion if the circumstances of the case warrant it. So, in deciding whether a Magistrate should himself try the case or should commit the accused to Sessions he should bear in mind the surrounding circumstances...."

In *Mohammadi* v. *State*,[1] M. C. Desai, J., reiterated the same principle as he observed:

"There is no minimum imprisonment prescribed for a previous convict. A previous convict can be given imprisonment for a term of one year or even less. Section 75, I. P. C., comes into application only when a person is sought to be punished with imprisonment exceeding the maximum imprisonment provided for the offence. So long as the maximum punishment provided for the offence is not to be exceeded there is no need to resort to its provisions and any reference to them would be irrelevant....For the purpose of the sentence the learned Magistrate could take the previous conviction into consideration even though it was not mentioned in the charge."

In *State of Kerala* v. *Krishnankutty*,[2] a Bench of the Kerala High Court (Anna Chandy and Govinda Menon, JJ.) has approved the dictum in the above case.

It is thus not obligatory in all cases coming under the scope of Sec. 75, I. P. C., to commit the accused to Sessions. Considering the nature and gravity of the offence and the cicumstances in which it is committed the Magistrate has first to judge whether a sentence more severe than that prescribed for the offence as such *de hors* Sec. 75, I. P. C., is necessary in

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1. 1967 Cr. L. J. 275.
2. 1965 Ker. L. T. 1043.

the case. If only he is satisfied that a severe sentence than the maximum provided for the offence is called for he need invoke Sec. 75, I. P. C., and consider the need for a committal of the accused to the Court of Session under Sec. 348, Cr. P. C. In other cases, particularly where the offence charged is a trivial one, the Magistrate has to deal with the case himself and mete out justice. As pointed out in *Mohammadi* v. *State*,[1] in fixing the punishment it is open to him to take the previous convictions also into consideration. If the offence is a petty one—as is and therefore does not call for a severe sentence even the committal to Sessions would be unwarranted but that would not affect the jurisdiction of the Sessions Judge to try the case.[2]

3. Principle.—This section was no part of the original Bill, as it left the hands of Lord Macaulay and his colleagues. It was, however, added before the Bill was passed into law, and it was justified on the ground that repeated attacks on property merited more deterrent treatment than the Code had made provision for. In the unsettled state of society at the time the Bill was under discussion, and to check the frequent organized plundering then going on, the ordinary penalties of the Code were considered to be inadequate. But, as observed before, the section confers a power, recourse to which need not be had in every case. It is a reserve armoury of the Criminal Court which should be drawn upon only in case of exceptional urgency (*see* para. No. 2 above).

Justification for the section.

The principle of this section is that if the previous sentence borne by the accused had had no effect on him, a more severe sentence should be awarded. But it does not follow as a rigid and inflexible rule that in all cases of previous convictions, an enhanced sentence should be awarded. As pointed out by Pandurang Rao, J., in *In re Abdul Ghani Sahib*,[3] it is good as a rule of thumb but the cricumstances of each case should be taken into account in inflicting punishment.[4]

No hard and fast rule.

4. Meaning of words.—"*Having been convicted*": This means a conviction for an offence and does not include imprisonment awarded for failure to give security under Sec. 108 or Sec. 110 of the Code of Criminal Procedure.[5] "*Punishable with imprisonment*," that is, the penalty affixed to the offence must be three years or over, though the offender may have been punished with a lesser sentence. "*Shall be subject*," i. e. is liable to. It does not mean that the Court shall be competent to pass such a sentence. Its competency depends upon its jurisdiction. "*Subsequent offence*" implies that the subsequent offence was *committed* after the previous conviction.[6]

5. Condition for enhanced punishment.—Five conditions must be fulfilled before a person can be awarded enahanced punishment under this section:

(i) He must have been previously convicted in India[7] of an offence which is punishable with imprisonment for at least three years.[8]

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1. 1957 Cr. L. J. 275.
2. *In re* Narayana Panicker, 1967 Ker. L. T. 298 at pp. 299, 304.
3. A. I. R. 1937 Mad. 231.
4. Public Prosecutor, Andhra *v.* Palapathi Ramakrishnaiah, A. I. R. 1955 Andh. 190 at p. 192: 1955 Andh. W. R. 265 : 1955 Cr. L. J. 1235.
5. Murido *v.* Emperor, A. I. R. 1930 Sind 58 at p. 59; Khanu, 110 I. C. (Lah.) 814 ; Jaimal Singh *v.* Crown, A. I. R. 1923 Lah. 294 at p. 295.
6. Emperor *v.* Johnson, A. I. R. 1933 Pesh. 6 at p. 9: 1933 Cr. C. 148: 141 I. C. 445.
7. Muthuswami, I. L. R. 58 Mad. 707 (conviction out of British India is of no account).
8. Bhanwar, I.L.R. 42 All. 136; Bahawal, 21 I. C. 904: (1913) P. R. No. 11 (Cr.).

(*ii*) The offence of which he had been convicted, and of which he is subsequently charged, must be one included in Chapter XII or Chapter XVII of the Code.[1]

(*iii*) It must have been committed in India.

(*iv*) He must be subsequently charged with an offence punishable with imprisonment for at least three years.[2]

(*v*) He must have committed it since his previous conviction.[3]

6. "Having been convicted."—For the application of this section it is necessary that the offender should have been previously "convicted". An order under Sec.110, Cr. P. C., is not correctly described as a conviction. Hence, such an order cannot be used in order to bring an offender within the ambit of the present section.[4] Section 39 of the Madras Children Act saysthat the conviction of a child or young person shall not be regarded as a conviction for the purpose of any disqualification attaching to a conviction for any offence, but it has been held that that section does not prohibit the taking into account of a previous conviction under Sec. 75, Penal Code.[5]

7. Previous conviction.—The previous conviction referred to in the section naturally assumes and implies the commission of, and the conviction for, an offence in point of time prior to the commission of the subsequent offence.[6] This section will apply only (1) where the second or subsequent offence was committed *after the conviction* for the earlier offence and (2) then too only if it is shown that either offence falls under Chapter XII or Chapter XVII of the Code and is punishable with imprisonment for at least three years. Where it was shown that the appellant had, a few days before the trial of one offence, been convicted of another offence but it was not shown that he had been convicted of one of the offences mentioned in this section nor that he had been convicted of any offence *before* the commission of the offence for which he had received enhanced sentence under this section, the enhanced sentence must be quashed as it cannot be supported under Sec. 75 of the Penal Code.[7] So the section is inapplicable where the two offences were committed at one and the same time,[8] though in such a case one conviction may have been made previously. In one case the section was held to apply only to an offence committed by a person *after his release from prison* "on the ground that the sentence already borne has had no effect in preventing a repetition of his crime, and has been, therefore, insufficient as a warning. But where the prisoner's conviction has taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of showing what the effect of the first sentence

Applicability of the section.

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1. Fattu *v.* Crown, A. I. R. 1923 Lah. 286 at p. 286.
2. Chandaria, 11 I. C. (Lah.) 623 : 12 P. L. R. 1911 at p. 879; 24 Cr. L. J. 944; Thakur Prasad Singh *v.* Emperor, A. I. R. 1924 Pat. 665: 26 Cr. L. J. 282.
3. Sayad Abdul Sayad Imam *v.* Emperor, A I. R. 1926 Bom. 305; Reg. *v.* Sakyavalad Kaviji, 5 B. H. C. R. (Cr.) 36; Megha, I. L. R. 1 All. 637; Po So *v.* Emperor, A. I. R. 1918 L. B. 121 at p. 121: 9 L. B. R. 1007.
4. Jumo Indris *v.* Emperor, A. I. R, 1934 Sind 195 at p. 196 : 36 Cr. L. J. 326.
5. Public Prosecutor *v.* Rajam Ammal, A.I.R. 1942 Mad. 674 at p. 674: I.L.R. (1942) Mad. 674: 43 Cr. L. J. 924 : 203 I. C. 177: (1942) 2 M. L. J. 132: 55 M. L. W. 457 (2) : 1942 M. W. N. 442.
6. Po So *v.* Emperor, A. I. R. 1918 L.B. 121 at p. 121.
7. Megha, I. L. R. 1. All. 637; Emperor *v.* Chuttal Imam Baksh, A. I. R. 1941 Sind 207 at pp. 207, 208 I. L. R. (1941) Kar. 450; Beni Chamar, 8 C. P. L. R. (Cr.) 17; Gobind, 39 P. R. 1882 (Cr.); Sayad Abdul Sayad Imam *v.* Emperor, A. I. R. 1926 Bom. 305.
8. Jhoomuck, 6 W. R. 90.

would have been upon him, and it would not be just to punish him as though he were an incorrigible offender whom no comparatively light punishment could wean from evil courses."[1] This is the doctrine of *locus paenitentiae* which, however human and commendable, appears to find no place in the section. It is no doubt just that a criminal should have time to reflect before the vengeance of law is visited upon him but this is a matter for the consideration of the Court. It is not a necessary corollary of law.[2] So much, however, is clear that where a person is convicted at one trial of two or more offences, one conviction cannot be used as a previous conviction for the purpose of enhanced punishment.

Docrtine of *locus paenitentiae*.

8. Conviction outside India.—As the section is a part of a Code, which has of its own force no operation beyond India, a conviction in a foreign State, even if it has adopted the Code, is clearly beyond its comprehension, and cannot be taken into consideration for awarding enhanced sentence under it.[3] Such a conviction may be admissible as evidence of bad character, but a Magistrate is not bound to consider it in determining the sentence.[4] When, however, the District Magistrate who passed sentence after receipt of the *jirga's* finding acted as a court in India, and that in awarding sentence he was acting in a judicial and not merely a ministerial capacity, and that, therefore, when he punished under some section of the Code which came within Chapter XII or Chapter XVII, this punishment could be taken into consideration for the purposes of Sec. 75.[5]

9. Conviction by court-martial.—The word "punishable" used in this section should be read as if it was followed by the words "by a court administering the Indian Penal Code". Hence, for the purpose of awarding enhanced punishment under this section, it is not permissible to rely upon a previous conviction before a court-martial even if the conviction were in respect of an offence falling under Chapter XII or Chapter XVII of the Penal Code.[6]

10. Conviction under other laws.—Section 75, I. P. C., deals only with previous convictions under specified chapters of the Code, and a conviction under some other law would not attract the operation of the section.[7]

11. Conviction for offence under Chapter XII or Chapter XVII.—A reference to Sec. 75 clearly shows that only when an accused is convicted of an offence under Chapter XII or Chapter XVII of the India Penal Code, that he is liable under the circumstances set out in that section to enhanced punishment. Now as the accused has been convicted not under Chapter XVII but under Chapter XXIII, in which Sec. 511 is to be found, the accused cannot be punished for any thing more than what the law provides for, namely, half of the maximum term provided by Sec. 379, and he is not liable to enhanced punishment under Sec. 75.[8]

1. *Per* Seten-Karr and Glover, JJ., in Pubon, 5 W. R. 66.
2. 2 C. P. Cr. C. No. 19.
3. Bahawal, 21 I. C. 904: (1913) P.R. No. 11 Cr.; Muhammad Yar, 1904 P. R. No. 2; Venkata Setti, 1 Weir 40; Lal Singh, 7 C. P. L. R. 24.
4. Crown Prosecutor *v.* Muthuswamy, A. I. R. 1935 Mad. 198 : 58 Mad. 707: 155 I. C. 438: 36 Cr. L. J. 793: 68 M. L. J. 176: 41 M. L. W. 184: 1934 M. W. N. 1355.
5. Emperor *v.* T.B.A.W. Johnson, A. I. R. 1933 Pesh. 6 at p. 8.
6. *Ibid.* at p. 9.
7. Emperor *v.* Chhotan Hasmat Ali, A.I.R. 1935 Bom. 188 at p. 189: I. L. R. 59 Bom. 514; *see* also Maluch Chand, 3 W. R. 17; Hur Paul, 4 W. R. 9; Budhun, 10 C.L.R. 392; Khan Mohammad, (1904) P. R. No. 17; Emperor *v.* Private Johnson, A. I. R. 1933 Pesh. 6: 141 I. C. 445.
8. Brij Behari Lal *v.* Emperor, A. I. R. 1926 All. 44 at p. 44: 23 A. L. J. 926; *see* also Banne, 24 O. C. 260: 64 I. C. 142; Mohammad Hussain, 20 P. L. R. 34; Emperor *v.* Yasin, A. I. R. 1943 Sind 172.

Section, 75, Penal Code, does not apply to an offence punishable under Sec. 511, Penal Code.[1]

The Lahore High Court[2] took the same view as regards Sec. 369 and observed: "The Trial Magistrate was not justified in relying upon the previous conviction of the prisoner under Sec. 369, I. P. C., because it is not an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code."

Section 75, Penal Code, does not apply to an offence punishable under Sec. 511, Penal Code, read with Sec. 379, Penal Code. Section 75, Penal Code, can be applied to offences punishable under Chapters XII and XVII, Penal Code, Sec. 511, Penal Code is neither in Chapter XII nor in Chapter XVII, but in Chapter XXIII.[3]

But, as it was held by the Sind Chief Court in *Emperor* v. *Yasin*[4] that "though we do not take the previous convictions into consideration by reason of the application of Sec. 75, Penal Code, we can, nevertheless, take them into consideration when considering the sentence to be imposed under the ordinary provisions of the law."[5]

12. Summary trial.—Section 75 is an enabling section and merely applies a principle. It does not create separate offence or indeed an offence at all. Therefore, the question whether or not Sec. 260 of the Code of Criminal Procedure which relates to summary trials applies to offences under Sec. 75 does not arise at all.[6] A trial in a summary way is not an appropriate procedure when Sec. 75 is to be applied. Nor indeed, would it be an appropriate procedure when Sec. 75 is to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of the sentence which may be passed under Sec. 262, Cr. P. C.[7] While the circumstances of a case where Sec. 75 can be applied make it desirable that the offence should not be tried in a summary way and that in such cases if the trial has started in a summary way the provisions of sub-section (2) of Sec. 260 of the Code of Criminal Procedure should be followed, nevertheless, it cannot be said that a trial in which a charge under Sec. 75 would be framed is necessarily bad in law because the offence is tried summarily.[8]

Appropriate proceedings for a trial under this section.

13. Magistrate's duties and powers.—Whether in every case falling under Sec. 75, Penal Code, a Magistrate is bound to commit the accused to Sessions, in other words, has he no discretion to consider whether it is a fit case for committing the accused to Sessions? It is not

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1. *In re* Duraiswamy Mudali, A. I. R. 1942 Mad. 521 at p. 521: 1942 M. W. N. 326.
2. Fattu *alias* Badra *v.* Crown, A. I. R. 1923 Lah. 286 at p. 286: 75 I. C. 368.
3. *In re* Tamalapudi Veeranna, A. I. R. 1942 Mad. 440 at p. 441 ; *see* also Damu Haree, 21 W. R. 3[5]; Sri Charan, I. L. R. 14 Cal. 357; Nana Rahim, I. L. R. 5 Bom. 140; Kashia, 10 Bom. L. R. 26; Ram Dayal, I. L. R. 3 All. 773; Ajudhia, I. L. R. 17 All. 120; Bharosa, 17 All. 123; King-Emperor *v.* Banne, A. I. R. 192[1] Oudh 156 (1): 64 I. C. (O.) 142; Mahomed Pakuran, 1 Weir 37; Deva Singh, (1872) P. R. No. 27; Nihal Singh, (1882) P. R. No. 37; Jattu, (1884) P. R. No. 34; Chandaria, 11 I. C. (Lah.) 623; Mohammad Hussain *v.* Emperor, 22 Cr. L. J. 4; Brij Behari Lal *v.* Emperor, A. I. R. 1926 All. 44: 26 Cr. L. J. 1204; Chhedi *v.* Emperor, A. I. R. 1942 All. 337: 43 Cr. L. J. 858: 1942 A. L. J. 324: 202 I. C. 569; Nanhun *v.* Emperor, A. I. R. 1933 Lah. 433: 34 Cr. L. J. 1181.
4. A. I. R. 1943 Sind 172 at p. 173.
5. *See* also Emperor *v.* Shiv Bux Amro, A. I. R. 1941 Sind 107: I. L. R. (1941) Kar. 305: 194 I. C. 819.
6. Emperor *v.* Shiv Bux Amro, A. I. R. 1941 Sind 107 at p. 108.
7. *Ibid.*
8. *Ibid.*

obligatory on the Magistrate to commit the accused to Sessions in all cases under all circumstances without any regard to the nature and the gravity of the offence. In fact, the section directs him to commit the accused to Sessions only if he is satisfied that there are sufficient grounds for doing so. When once he feels that there are grounds for committing the accused to Sessions, then he is under a duty to do it unless he is competent to try the case and comes to the conclusion that he can himseif pass an adequate sentence. It is true that the latter part of Sec. 348 is mandatory but that would come into play only when the Magistrate feels that the circumstances of the case warrant the committal of the accused to Sessions. It does not contain any invariable rule that in all cases governed by Sec. 75, Penal Code, a committal to the Sessions should follow. In such case the Magistrate has to apply his mind to the circumstances and decide whether it is a fit case for committing the accused to Sessions. The principle of Sec. 75 is that if the previous sentence borne by the accused had had no effect on him a more severe sentence should be awarded. But it does not follow as rigid and inflexible rule that in all cases of previous convictions, an enhanced sentence should be awarded. As pointed out by Pandurang Row, J. In *Re Abdul Gani Sahib*,[1] it is good as a rule of thumb but the circumstances of each case should be taken into account in inflicting punishment.

Then their Lordships further observed: "It is certainly open in my opinion to a Magistrate to award a sentence less than that given on a previous occasion if the circumstances of the case warrant it. So in deciding whether a Magistrate should himself try the case or should commit the accused to Sessions, he should bear in mind surrounding circumstances."[2] The number of previous convictions is a circumstance to be taken into consideration in determining the sentence. The Criminal Rules of Practice require that Magistrates and Judges should append to their judgements, a list of previous convictions.[3] If a Magistrate does not wish to use the powers under this section, that is, does not intend to inflict more than the maximum punishment provided for the offence, he is not required to state the particulars in the charge.[4]

Criminal Rules of practice.

Section 511, Cr. P. C., is quite explicit and clear on the point and says that for the purpose of Sec. 75, I. P. C., a previous conviction must be proved in accordance with law. The Trial Magistrate was clearly not justified in questioning the accused under Sec. 342, Cr. P. C., about the previous conviction, when there was no evidence against him on that point.[5]

14. Procedure for enhanced punishment.—The provisions of Secs. 221 (7), 255-A, 310, 311 and 315 of the Code of Criminal Procedure, 1898, should be read as supplementing the law as set out in this section. Those sections run as follows :

Section 221, Cr. P. C.

"221 (7). *Previous conviction when to be set out.*—If the accused having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind,

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1. A. I. R. 1937 Mad. 231.
2. Public Prosecutor *v.* Palapathi Ramakrishnaiah, A. I. R. 1955 A. P 190 at pp. 191-92: 1955 Andh. W.R. 265.
3. *In re* Pasupuleti Venkata Subbayya, A. I. R. 1943 Mad. 418 at p. 419 : (1943) M. W. N. 126: 44 Cr. L.J. 585; Public Pvosecutor *v.* Palapathi Ramakrishnaiah, A. I. R. 1955 Andh. 190: 1955 Andh. W. R. 265: 1956 Cr. L. J. 1235.
4. Mohammadi *v.* State, 1957 Cr. L. J. 275 at p. 276: 1956 A. L. J. 611: 1956 A. W. R. (H. C.) 735.
5. State *v.* Govinddas, (1957) 58 Cr. L. J. 448 at p. 449; *see* also Yasin *v.* Emperor, I. L. R. 28 Cal. 689; Sardar Ahmad *v.* Emperor, A. I. R. 1934 Lah. 693: 36 Cr. L. J. 778.

for a subequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed.

"255-A. *Procedure in case of previous conviction.*—In a case where a previous conviction is charged under the provisions of Sec. 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under Sec. 255, sub-section (2) or Sec. 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.

Section 255-A, Cr. P. C.

"310. *Procedure in case of previous conviction.*—In the case of a trial by jury or by the Judge himself when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely:

Section 310, Cr. P. C.

(*a*) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution or any evidence adduced thereon unless and until,

(*i*) he has been convicted of the subsequent offence, or

(*ii*) in the case of a trial by a jury, the jury have delivered their verdict on the charge of the subsequent offence.

(*b*) In the case of a trial held by the Judge himself, the Court may in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.

"311. *When evidence of previous conviction may be given.*—Nothwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

Section 311, Cr. P. C.

"315. *Number of jurors to be summoned.*—(1) Out of the persons named in the revised list aforesaid, there shall be summoned for each sessions in the town which is the usual place of sitting of each High Court, as many of those who are liable to serve as special or common jurors respectively as the Clerk of the State considers necessary.

Section 315, Cr. P. C.

"(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

"*Supplementary summons.*—(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions."

Reference to these statutory provisions will show that three elements are necessary to prove a previous conviction against an accused :

(*i*) It must form the subject-matter of a charge.
(*ii*) It must be proved.
(*iii*) The enhanced sentence must be within the jurisdiction of the Magistrate.

Procedure summed up.

Briefly stated, the procedure is this : Where it is proposed to charge an accused person with previous convictions under Sec. 75, no evidence on the point should be led before the charge is framed. The accused should not be questioned about his previous convictions when examined under Sec. 342, as clearly that is only for the purpose of enabling him to explain matters appearing in evidence against him and his previous convictions should not have appeared in evidence against him at this stage. When, however, the Magistrate considers it fit to frame a charge under Sec. 254, in respect of the substantive offence, he should then have recourse to Sec. 221 (7) and in that charge should include the previous convictions. He should then ask the accused to plead to that charge making it clear to him that he is pleading to the previous convictions distinctly from the original offence. Then comes Sec. 255-A and it seems that under that section if the accused admits his previous conviction or convictions, they do not have to be proved separately, and the Magistrate can take them into consideration in convicting and sentencing him for the main offence. If, however, the accused does not admit the previous convictions, the Magistrate has to proceed to judgment on the substantive charge and if that is a judgment of conviction, he has then to take evidence according to law, i. e. under Sec. 511 of the Code as to the previous convictions and come to a separate finding upon them after which he will pass the proper sentence under the substantive section read with Sec. 75, Penal Code.[1]

In the case of a trial before the Court of Session, the procedure is modified as indicated in Sec. 310, Cr. P. C.[2] In *In re Pasupuleti Venkata Subbayya*,[3] their Lordships said : "The learned Sessions Judge should have included those previous convictions in his charge under Sec. 75, Penal Code, and got the accused to plead to them, and should then have set them out in a tabular form at the end of his judgment."

The above procedure has to be followed only where the provisions of Sec. 75, Penal Code, are brought into action. They are not brought into action where the sentence intended to be awarded is within the competence of the Court to award under the ordinary provisions of the Code, and, in such a case, the fact that previous convictions were not stated in the charge does not render the conviction illegal.[4]

Previous imprisonment.

15. Charge, form of.—For the form of charge for theft after previous conviction, *see* Criminal Procedure Code, Schedule V, Form No. XXVIII (III). In all other cases the charge may thus be worded :

"I (*name and office of the Magistrate or Judge*) do hereby charge you—— as follows : That you, on or about the———day of———, at———

1. Emperor *v.* Dalip Singh, A. I. R. 1944 Lah. 25 at p. 26 : I. L. R. (1943) Lah. 447 : 45 Cr. L. J. 364 : 211 I. C. 283 : 45 P. L. R. 414 (F. B.).
2. *Vide* Sec. 310, Cr. P. C.
3. A. I. R. 1943 Mad. 418 at p. 419: (1943) 1 M. L. J. 192.
4. Abdul Karim *v.* Emperor, A. I. R. 1933 Nag. 315 at p. 316 : 34 Cr. L. J. 1166 : 146 I. C. 15 : 29 N. L. R. 309.

committed———and thereby committed an offence punishable under Sec.———(or Sec.———*where charge is in the alternative*) of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session *or* High Court). And you the said———stand further charged that you, before the committing of the said offence, had been convicted on the———day of———of an offence punishable under Chapter XII (or Chapter XVII) of the Indian Penal Code with imprisonment for a term of three years, to wit, the offence———, which conviction is still in force and effect and that you are thereby liable to enhanced punishment under Sec. 75 of the Indian Penal Code.

And I hereby direct that you be tried (by the said Court of Session, or High Court) on the said charge."

In a Lahore High Court case, *Said Ali* v. *Emperor*,[1] dealing with framing of the charge, there was not an iota of evidence on the record to justify their inclusion in the charge and after the framing of the charge and at the time of explaining it to the accused be questioned him as to whether he had those convictions against him which had already been mentioned in the charge. This is not the procedure which is sanctioned by law. In order to prove the previous convictions standing against an accused person for the purposes of Sec. 75 of the Indian Penal Code, it is necessary that the provisions of law as contained in Sec. 511 of the Code of Criminal Procedure should be observed.

And in *Pokar Chuharmal* v. *Emperor*,[2] Davis, C. J., observed : "It may be considered by the prosecution a troublesome matter to put upon the record, before committal, evidence of identity and of the previous convictions to establish a *prima facie* case such as would be required if the charge were under a section other than Sec. 75, Penal Code, but this Court has held that the prosecution should call all relevant witnesses and produce all material evidence in the committing Magistrate's Court so that the accused should know what evidence he has to meet."

16. Charge—Particulars of.—As regards the charge, the Code of Criminal Procedure provides that, if it is intended to prove a previous conviction for the purpose of awarding enhanced punishment, the fact, date and place of the previous conviction should be stated in the charge. If such a statement is omitted the Court may add it at any time before sentence is passed.[3] The object of this statement in the charge is to give notice to the accused of his liability to enhanced punishment, and to give him an opportunity of correcting error, if any, prejudicial to him. In order, therefore, to put the accused upon enquiry, mention of the fact, date and place of the previous conviction is essential ; otherwise, the accused cannot be legally sentenced to enhanced punishment.[4] The mere mention of the fact that the accused had been previously convicted of offences under the Indian Penal Code,[5] or that he "is an old offender" is obviously insufficient.[6] Any defect or omission in this respect may be made good by an addition

Object of requirement of statements in the charge regarding previous convictions.

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1. 35 Cr. L. J. 1387 at p. 1388.
2. A.I.R. 1941 Sind 173 at p. 175.
3. Abdulla, (1909) 7 M. L. T. 77 ; Sec. 221 (7), Cr. P. C. ; *see* also Pokur Chuharmal *v.* Emperor, A. I. R. 1941 Sind 173 ; Said Ali, 35 Cr. L. J. 1387.
4. Dungri, 10 I.C. (Lah.) 241 ; Haridas, I. L. R. 5 All. 500 ; Raghibali, I.L.R. 3 All. 633 (F. B.), the facts were peculiar, and the accused was, therefore, held not to have been misled by *vagueness of the charge*.
5. Sheikh Jakar, 22 W. R. 39.
6. Yippika, (1881) Weir 885.

made *before* the sentence is pronounced ; but it cannot be made good afterwards.[1] Nor can there be sufficient compliance with law unless a separate charge under the section is framed and recorded.[2] A previous conviction duly proved entitles the Court to award enhanced sentence for the offence for which the accused is on trial before it. It cannot sentence the accused as if he had been convicted of two distinct offences—the one being the previous conviction.[3] Reference to previous conviction in the charge is not an indictment, but a reference necessary to inform the accused that his offence presents circumstances of aggravation which, though not affecting his present criminality, will call for condign punishment, if the offence is otherwise adequately proved. It is, therefore, laid down that in a case tried by jury or with the aid of assessors, reference to the previous conviction must not be made till after the close of the trial. Reading the previous conviction before its close, is calculated to bias the jury or the assessors, and it is, therefore, sufficient to vitiate the trial.[4] It should be noted that the Criminal Procedure Code (Amendment) Act, 26 of 1955, has abolished trial with the aid of assessors.

Desirability of reference to previous conviction in trial before jury.

17. Proof of previous convictions.—In order to determine the proper sentence, it is necessary for the Magistrate to know all the previous convictions of the accused.[5] It is primarily the duty of the prosecution to see that matters, such as the existence of previous convictions, are brought definitely to the notice of the Court at the proper time.[6] As the sole object of proving a previous conviction is not to take out weak evidence against the accused but to help the Court to determine the measure of punishmnet,[7] the Magistrate should try to ignore that fact in considering his judgment. And it is only at the close of the trial that evidence of previous conviction should be admitted.[8] Such evidence must be clear and precise,[9] and whenever it is intended to prove it in accordance with Sec. 511 of the Criminal Procedure Code, it must strictly conform to the requirements of that section.[10] An examination of the accused for the purpose is not "proof" of a previous conviction, unless it be an "admission" upon which the Court is authorised to act.[11]

Sole object of proving previous conviction.

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1. Raj Coomar, 19 W. R. 41; Annoji, B. H. C. Cr. Rule, 27th April, 1873; Mangloo *v.* Emperor, A. I. R. 1930 Lah. 544 at p. 544.
2. Esan Chandra Dey, 21 W. R. 40; Dorasamy, I. L. R. 9 Mad. 284; Dungri, (1911) P. W. R. No. 40: 10 I. C. 341; *In re* Ismail, I. L. R. 39 Cal. 326, followed in *In re* Subramanian, (1916) M. W. N. 327, a previous conviction not charged induced enhanced sentence; but the judgment is (it is submitted) unsound. In *In re* Subramanian, (1916) M. W. N. 327, the Sessions Judge who tried the appellant failed to charge him under this section, but before sentencing him questioned him about his previous conviction. The High Court thereupou refused to quash the enhanced sentence, though it pointed out the desirability of separately charging prisoners under this section.
3. Khalak, I. L. R. 11 All. 393.
4. Kulum, 10 W. R. 39; Roshun, I. L. R. 5 Cal. 668; Jhinguri, (1890) A. W. N. 12; but *see* Nazim, 5 C. W. N. 670 at p. 672.
5. *In re* Duraiswami Mudali, A. I. R. 1942 Mad. 521 at p. 521: 44 Cr. L. J. 501: 206 I.C. 246: (1942) 1 M.L.J. 591: 55 M. L. W. 297 (1): 1942 M. W. N. 376.
6. King-Emperor *v.* Prem *alias* Pamun, 1929 A. L. J. 397.
7. Gulab Hamir, (1894) B. U. J. 688: 6 M. H. C. R. (App.) 2: 1 Weir 36 and 37.
8. Shiboo Mundal, 3 W. R. 38; Jehan Mullick, 5 W. R. 67; Kristo Behari Day, 21 C. L. R. 555; Bepin Behari, 13 C. L. R. 110.
9. Naimuddi, 14 W. R. 7; Abdul Malik, I. L. R. 52 Mad. 795 (Police Certificate insufficient).
10. Said Ali *v.* Emperor, 35 Cr. L. J. 1387: 151 I. C. 719.
11. Section 310, Cr. P. C; Nazim, 5 C.W. N. 670 at p. 672.

Section 511, Cr. P. C., provides as follows :

"511. *Previous conviction or acquittal how proved.*—In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force—

Section 511, Cr. P. C.

(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held to be a copy of the sentence or order, or

(*b*) in a case of a conviction, either by a certificate signed by the officer-in-charge of the jail in which the punishment or any part thereof was inflicted or by production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted."

Modes of proof.

The modes of proof provided in the section are "in addition to any other mode provided by any other law for the time being in force".[1] Where the whole record had been destroyed it was held by the Sind Chief Court that—"But there is nothing in the case in *Ghous Bakhsh* v. *Emperor*,[2] which suggests that in such a case Sec. 65 (*c*), Evidence Act, does not apply, and that secondary evidence would not be admissible. Indeed, that judgment would appear to stress the fact that the Evidence Act applies as much to a case of previous convictions as to any other. Furthermore the provisions of Sec. 511, Cr. P. C., are extremely wide. In addition to the simple ways in which previous convictions can be proved coupled with proof of identity, Sec. 511, Cr. P. C., contains the words '....in addition to any other mode provided by any law for the time being in force....' But no authority has been cited to us to show that one of these other modes is the mere production of a conviction slip. But the real difficulty of the learned Judge appears to us to arise from the local custom or practice or belief that not only can an accused person be committed to the Court of Session under Sec. 75, Penal Code, on the mere production of what is known as a conviction slip, but that he can be convicted on the evidence of this conviction slip alone, even if the accused does not admit his previous convictions. Now there is not, as far as we know, any law which provides that what is commonly called a conviction slip is proof of previous convictions at all. This question was considered in *Emperor* v. *Sheikh Abdul*.[3] It was pointed out in that case that it was not sufficient for an expert in finger-prints to produce a record of finger-prints alleged to be those of the accused from the Central Bureau or for a clerk in the common prison at Bombay to produce extracts from the jail register signed by the Superintendent showing previous convictions and certified copies of the judgments in the cases when the accused was previously convicted, when it was not proved that the man convicted in Bombay was the man before the Court or was the man convicted in the Howrah Court in which, in that case, it was alleged that the accused had been convicted. What in fact this conviction slip appears to be is merely the criminal record of convicts kept by the authorities."[4] And though under Sec. 511 of the Criminal Procedure Code a certified copy of the record of the Court or of the sentence or order is sufficient, it must be a copy "certified under the hand of

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1. *Vide* Sec. 511, Cr P. C.
2. I. L R. (1939) Kar. 677: A.I.R. 1939 Sind 203: 183 I. C. 219: 40 Cr. L. J. 770.
3. A. I. R. 1916 Cal. 344: 33 I. C. 825: 17 Cr. L.J 185: I.L.R. 43 Cal. 1128: 20 C W.N. 725.
4. Pokar Chubarmal *v.* Emperor, A. I. R. 1941 Sind 173 at p. 174: I. L. R. (1941) Kar. 308; *see* also Emperor *v.* Sheikh Abdul, A. I. R. 1916 Cal. 344: I.L.R. 43 Cal. 1128: 20 C.W.N. 725.

the officer having the custody of the records of the Court in which such conviction was had."[1] A mere *kaifiat* or report from the record office is not sufficient.[2] But a certificate under the hand of the officer-in-charge of the jail in which the punishment, or any part thereof, was undergone, has been held sufficient proof of conviction. So also it is held proved by the actual warrant of commitment under which punishment was suffered. In every case, of course, the identity of the accused with the person previously convicted must be cleary established.[3]

18. Jurisdiction.—The power of enhanced punishment does not carry with it enhanced power to award it. The jurisdiction of the Magistrate was neither created by the Code, nor is it enlarged or curtailed by it. The fact that enhanced punishment is legal, does not, therefore, imply that it is legal even though inflicted by a Magistrate not possessing the power to inflict it.[4] Whenever a Magistrate considers the infliction of a sentence beyond his competency essential, he should commit the case to the Court of Session.[5]

19. Sentence.—A judgment awarding enhanced sentence must contain the date of the previous conviction and the sentence passed as well as the particular offence for which it was had. This section does not empower the Sessions Judge to amalgamate a sentence which he is competent to pass upon a prisoner with a sentence under which he is already undergoing imprisonment, and then commute the amalgamated sentence, condemning the prisoner to a longer period of imprisonment than he is liable to suffer for the offence of which he had been last convicted.[6]

20. Nature of enhanced sentence.—It will be observed that the section provides for the enhanced sentence as comprising only of imprisonment for life, or imprisonment up to 10 years. In other words, the Court, if it awards a sentence of imprisonment for life, must sentence the convict to imprisonment for life. In lieu, however, of such sentence it may sentence the convict to imprisonment of either description for a term which may extend to 10 years, and under the provisions of Sec. 59, it may in every case in which the offender is punishable with imprisonment for a term of seven years or upwards, instead of awarding sentence of imprisonment, sentence the offender to imprisonment for a term not less than seven years, and not exceeding the term for which under the Code such offender is liable to imprisonment.[7] The section as to enhanced sentence is not to be pressed into service in every case of a previous conviction satisfying its condition.

Enhanced punishment not in all cases of previous conviction but only where justice of case requires.

The enhanced sentence must be called for by the justice of the case. Where, for instance, the subsequent offence was a petty one,[8] or a technical theft, the Court should not be justified in passing more than a nominal sentence.[9] Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment

1. Section 511, Cr. P. C,
2. Sheikh Ramzan, 15 W. R. 53.
3. Feroze Khan *v.* Emperor, A.I. R. 1928 Lah. 107 at p. 108.
4. Vithaya, (1817) B. U. C. 49; David Narsu, 6 Bom. L. R. 548; Gulab Hamir, (1894) B. U. C. 688; Bahadur, (1872) P. R. No. 41; Nga Yun Tha, (1894) P. J. L. R. 78.
5. Sections 347 and 548, Cr. P. C.; Ganu Ladu, 2 B. H. C. R. 126; Khalak, I.L. R. 11 All. 393.
6. Sakya, 5 B. H. C. R. 36.
7. Muhammand Sharif, (1915) P. R. No. 14 : 29 I. C. 826.
8. Nga Po Hunin, 10 I. C (Rang.) 772 ; Harnam Das *v.* Emperor, 1930 Lah. 100 (1) at p. 100; Maulu *v.* Emperor A. I. R 1929 Lah. 787 ; Ujagar Singh *v.* Emperor, A. I. R. 1933 Lah. 147 ; Kuppuswamy Chetty, 1933 M. W. N. 1259.
9. Jawahir Singh, 22 I. C. (Lal.) 759.

and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case.[1] In any case, the provisions of the section are merely permissive and not obligatory,[2] and are not to be resorted to without due regard to the character of the accused since his previous conviction, the nature and gravity of the crime and its other attendant circumstances justifying the imposition of a deterrent sentence.[3]

No minimum imprisonment is prescribed for a previous convict. He can be given imprisonment for a period of one year or less.[4]

CHAPTER IV
GENERAL EXCEPTIONS

Topical Introduction.

"This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions. Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters. Such are the exceptions in favour of infants, lunatics, idiots, persons under the influence of delirium, the exeeptions in favour of facts done by the direction of the law, of acts done in the exercise of the right of self-defence, of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter."[5]

Principles.

It will be seen that the chapter dealing with exceptions or criminal responsibility contains 32 sections, but the main principles which they illustrate are only seven. They are:

(1) Where there is an absence of criminal intent (Secs. 81—86 and 92—94).
(2) Cases of accident (Sec. 79).
(3) Mistake of fact (Secs. 76, 79).
(4) Acts done by consent (Secs. 87—90).
(5) Triviality (Sec. 95).
(6) Act done in exercise of the right of private defence (Secs. 95—106).
(7) Privileged acts (Secs. 77 and 78).

All these cases, though variously classified and described, are really cases in which there is absence of criminal intent. There is only one case dealt with in Sec. 95, in which provision is made for exemption in spite of the presence of criminal intent, the act committed being so inconsiderable as to be negligible.

Applicability to offences under special or local laws.

The general exceptions in Chapter IV of the Penal Code are applicable not only to offences under the Penal Code but also to offences under special or local laws.[6] For further discussion on the point, *see*, notes under Sec. 79.

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1. *In re* Munuswamy A.I.R. 1947 Mad. 386 (1) at p. 386 : (1947) 1 M. L. J. 336: 60 M.L.W. 333 : 1947 M.W.N. 609.
2. Chamman. 54 I. C. (Pat.) 623.
3. Po Nyein, 9 L.B.R. 167: 45 I. C. 847.
4. Mohammadi *v.* State, 1956 A. L. J. 611 : 1956 A. W. R. (H. C.) 735 : 1957 Cr. L. J. 275.
5. Note B, Reprint, p. 106.
6. King *v.* Tustipada Mandal, A. I. R. 1951 Orissa 284 at p. 288 : I. L. R. (1950) Cut. 75 : 52 Cr. L. J. 837.

Burden of proving exception.

It is a general rule of criminal jurisprudence, that unless otherwise directed by the statute, the presumption of innocence in favour of the accused casts on the prosecution the burden of proving every ingredient of the offence even though negative averments be involved therein.[1] Before the enactment of the Indian Evidence Act in 1872, it was for the prosecution to show the absence of all circumstances which might bring into play any of the exceptions in the Indian Penal Code.[2] After the passing of the Evidence Act, the position is changed. By virtue of Secs. 103 and 105 of that Act, the burden of proving the absence of circumstances attracting the application of the general or special exceptions recognised by the Penal Code has been taken away from the prosecution, and now it is for the accused to show that his case falls within one of those exceptions. Thus, Sec. 105 of the Evidence Act lays down that—

Burden of proving that case of accused comes within exceptions.

"105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(*a*) *A*, accused of murder, alleges that, by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on *A*.

(*b*) *A*, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(*c*) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by Sec. 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under Sec. 325.

The burden of proving the circumstances bringing the case under Sec. 335 lies on *A*."

Presumption and burden of proof.

The section involves (1) a presumption, and (2) a rule as to the burden of proof. Under the section, the Court shall *presume* the absence of circumstances bringing the case within an exception.[3] There is no doubt that the law requires, as laid down in Sec. 105 of the Indian Evidence Act that the onus of proving circumstances which give the benefit of the general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception.[4] The burden cast by that section upon the accused can be discharged by the evidence of witnesses for the prosecution as well as by

1. Phipson on *Evidence* (8th Ed.), p. 31.
2. *Cf.* Queen-Empress *v.* Sohun, (1865) 2 W. R. 59.
3. *Vide* Sec. 105, Evidence Act.
4. Mst. Anandi *v.* Emperor, 24 Cr. L. J. 225 at pp. 225-26: I.L.R. 45 All. 329.

the evidence for the defence and the accused is entitled to claim an acquittal if, on the evidence for the prosecution, it is shown that he has committed no offence.[1] Again the burden of proving an exception that lies on accused is not as heavy as the burden on the prosecution to prove its case. Where the burden of the issue is on the prosecution, the case must be proved *beyond a reasonable* doubt, though a *prima facie* case made by the prosecution may amount to this and suffice for conviction.[2] Where, however, the burden of an issue is upon the accused, he is not in general called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a *prima facie* case, for then the burden is shifted to the prosecution which has still to discharge its original onus that never shifts, i. e. that of establishing, on the whole case, guilt beyond a reasonable doubt.[3] The burden of proving the existence of circumstances bringing the case within the exception pleaded is no dobut cast on the accused by Sec. 105, but this does not in a .y way absolve the prosecution of the burden laid on it by Sec. 102, Evidence Act. So, even where the evidence adduced by the accused fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused person is entitled to be acquitted if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception), a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception.[4] This principle, however, has absolutely no application to a case where an accused person sets up a plea of self-defence, but completely fails to establish it or fails to adduce any evidence in support of it.[5]

Burden of proving exception lying on accused does not absolve the burden of issue on prosecution for conviction.

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Act done by a person bound, or by mistake of fact believing himself bound, by law.

Illustrations

(*a*) *A*, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. *A* has committed no offence.

(*b*) *A*, an officer of a Court of Justice, being ordered by that Court to arrest *Y*, and, after due enquiry, believing *Z* to be *Y* arrests *Z*. *A* has committed no offence.

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1. Kalicharan Mukerjee *v.* Emperor, 11 C.L.R. 232; Mangal Ganda *v.* Emperor, A. I. R. 1925 Nag. 37 : 25 Cr. L. J. 1077; Mir Alam, 69 I. C. 464 (Pesh.).
2. R. *v.* Fuschillo, (1940) 2 All E. R. 489.
3. Phipson on *Evidence* (8th Ed.), p. 31; *see* Woolmington *v.* Director of Public Prosecutions, (1935) A.C. 462.
4. Parbhoo *v.* Emperor, A. I. R. 1941 All. 402 at p. 406: I. L. R. (1941) All. 843: 1941 A. L. J. 619: 43 Cr. L. J. 177: 197 I. C. 525 (F. B.); Robert *v.* Emperor, I. L. R. 61 Cal. 168; Pir Hasan Din *v.* Emperor, A. I. R. 1943 Lah. 56: 44 Cr. L. J. 397; Narayan Raut *v.* Emperor, A. I.R. 1948 Pat. 294: I.L.R. 27 Pat. 35: 49 Cr. L.J. 406; Emperor *v.* U. Damapala, A. I. R. 1937 Rang. 83 (F.B.) : I. L. R. 14 Rang. 666; Gopi Krishna *v.* Emperor, A.I.R. 1943 Oudh 272: 44 Cr. L.J. 625, *contra* Government of Bombay *v.* Sakur, A. I. R. 1947 Bom. 38: 48 Bom. L. R. 746 (S. B.): 48 Cr. L. J. 168; *see* also Yusuf Sk. *v.* State, A. I. R. 1954 Cal. 258: 58 C. W.N. 279: 55 Cr.L. J. 774.
5. Bodhan *v.* Emperor, A. I. R. 1948 All. 223 at p. 225: 49 Cr. L. J. 436.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Mistake of law—Meaning of "law".
4. *Mens rea* —No intention, no crime.
5. *Mens rea*—Test to ascertain intention whether subjective or objective.
6. Ignorance of law as extenuating circumstance.
7. Presumption of *mena rea* being essential ingredient of offence.
8. Absence of specific intention.
9. Mistake of fact.
10. Natural consequence.
11. Mistake of mixed law and fact.
12. Belief—Necessity of.
13. Suspicion and belief.
14. Good faith—Necessity of.
15. "Bound by law."
16. Legal practitioner acting under instructions.
17. Jail warder acting under order of superior.
18. Policemen's duty.
19. A soldier's duty.
20. Limits of soldier's justification.
21. Engine driver's mistake.
22. Mistake when no defence.
23. Rules regarding justifications of offence due to mistake.

1. Analogous law.—This chapter has been extended to offences added to the Code since its original enactment.[1]

This section is analogous to Sec. 79, the only difference between the two being that a person under this section believes himself to be *bound* by law to do a thing, whilst under Sec. 79 he similarly feels *justified* by law in doing it. In the one case he acts because he believed he must; in the other, he acts because he thought that it was right. In either case the two sections throw round him the same protection.

2. Principle.—This section in the Chapter of General Exceptions, applies to mistakes of fact and not to mistakes of law.[2] This section and Sec. 79 are a paraphrase of the English common law maxim in its application to criminal law: *ignorantia facit excusat ignorantia juris non excusat.*[3] A mistake of law is never a defence in law, whether civil or criminal: *ignorantia juris non excusat.*[4] This is the rule, but it is sometimes explained by another maxim. "Every man is presumed to know law,"[5] which, if a maxim, is not true, for there can be no presumption when it is a notorious fact that even professional lawyers are sometimes at war as to what the law is. The true reason why ignorance of law is never a defence is that if it were a defence, it would screen offenders and lead to endless complications. For there would have to be an inquiry in every case, if an accused person was cognizant of law, which would lead to evasions of its provisions on the plea of ignorance. Moreover, the peremptory mandates of law in so far as they are universal and of general application are based upon fairness and commonsenese, and they are, at any rate,

Ignorance of law is never an excuse.

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1. By the Indian Penal Code Amendment Act (XXVII of 1870). This Act adds new offences to the Code, to which Chaps. IV, V and XXIII were extended, see *ibid*, Sec. 13 as amended by the Repealing and Amending Act (XII of 1891), under which this chapter was made applicable to offence punishable under Secs. 121-A, 124-A, 225-A, 225-B, 294-A and 304-A.
2. Karim Ullah *v.* Ghulam Rasul Shah, A. I. R. 1936 Sind 153 at p. 154 : 37 Cr. L. J. 1068: 165 I. C. 78 (2).
3. 1 Co., 177. "Ignorance of fact excuses: ignorance of law does not excuse."
4. "Ignorance of law is no excuse "; *see* Karim Ullah *v.* Ghulam Rasul Shah, *supra*; Emperor *v.* Nanak Chand, A. I. R. 1943 Lah. 203: 44 Cr. L. J. 666: 46 P. L. R. 226.
5. *Per* Erle, C. J., in Pooley *v.* Brown, 11 C. B. (N. S.) 575; Kitchin *v.* Hawkins, L. R. 2. C. P. 22; *per* Sir W. Scott, The Charlotte, 1 Dods R. 392 ; *per* Pollock, C. B., in Cooper *v.* Simmons, 7 H. & N. No. 717; *cf.* maxim: "*Ignorantia juris, quod quisque tenetur scire neminem excusal*" (2 Rep. 3 b). "Ignorance of the law, which every man is presumed to know, excuses no one." This maxim is quoted and paraphrased with comment by Blackstone in 4 Black., p. 27. So Hale: "*Ignoran corum quo escire tenetur non excusa,*" (Ignorance of those things which one is bound to know, excuses not)—P. C. 42.

available to anyone desirous of acquainting himself with them. They are, therefore, never the copyright of the Legislature which offers every facility for their promulgation. Ignorance of law is, therefore, never an excuse, and all persons resident within a State are held to be bound by it "it being immaterial whether they are its subjects or are foreigners".[1]

3. Mistake of law—Meaning of "law". Mistake of law ordinarily means mistake as to existence or otherwise of any law on a relevant subject as well as mistake as to what the law is.[2] Of course, the term "law" as used in this connection means the general law of the land. But the rule applies equally to all laws, bye-laws, rules and regulations having the force of law.[3] For though no man is presumed to be a walking cyclopaedia of all laws, however parochial and artificial, still, if ignorance of law were ever admitted to be an excuse, it would introduce the element of uncertainty in the administration of justice which is the foundation of civil society.[4] All the same, the rule is properly applicable only to the general municipal law, though for the sake of convenience it is held to be a rule of universal application, and as one admitting of no exceptions.[5] But exceptions there must be; since no man can be convicted of violating a law of which, as a matter of fact, he is wholly ignorant. There are circumstances which make out cases of exception to the general rule that ignorance is no excuse—circumstances neutralising the presumption of knowledge of law, as in the case of a newly enacted statute.[6] It must, then, depend upon the law, the nature of publicity given to it, and the likelihood of the offender being acquainted with it. In a large number of Acts, some qualifying phrases occur which, in themselves, recognise the exceptions. On the other hand, there are bye-laws, such as those regulating the height to buildings, thickness of walls, preservation of open spaces and other conducive to public sanitation and hygiene—which no one can circumvent on the ground of ignorance. The question of *mens rea* must, therefore, depend upon the subject-matter of the enactment, its purpose and the various circumstances which would make the construction reasonable or unreasonable.[7]

Ignorance of law never an excuse—Exception.

Mistake of law however normally relates to mistake as to the accused's rights under the law to do a particular act or pursue a particular course of conduct. The Courts are not at all concerned with the legality or otherwise of the rights under which the accused purported to act. The only question that the Courts have to decide in such cases is, whether the claim of right was honestly and *bona fide* held by the accused. This question will essentially be one of fact. In such cases, it is the good faith of the accused and not the right itself which requires adjudication. In this sense, a mistake of law can, to a certain extent, be a defence to a criminal charge of personation at an election under Sec. 171-D of the Code, because the Court came to the conclusion that the accused honestly believed that his father could authorise

Mistake of law normally would rest on the determination of good faith of accused.

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1. Baronet and Allain, (1852) Dearsly 51: 1 Jurisprudence, 498.
2. King *v.* Tustipada Mandal, A. I. R. 1951 Orissa 284 at p. 289 : I. L. R. (1950) Cut. 75: 52 Cr. L. J. 837.
3. Kussim, 15 I.C. (Bom.) 802; *contra* Lewis, I. L. R. 38 Mad. 773.
4. *Cf. per* Willes, J., in Tolson, 23 Q.B. D. 168 at p. 172.
5. So Lord Westbury in one case remarked: "It is said '*ignorantia juris non excusat*' but in that maxim, the word '*jus*' is used in the sense of denoting a private right, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, the maxim has no application"—Cooper *v.* Chibbs, L. R. 2. H. L. 149 at p. 170.
6. King *v.* Tustipada Mandal, A. I.R. 1951 Orissa 284 at p. 289: 52 Cr. L. J. 837.
7. *Per* Willes, J., in Tolson, 23 Q. B. D. 168 at pp. 172, 173; Narantakath, I. L. R. 45 Mad. 986.

him to cast his vote. This decision could be justified on the ground that no *mens rea*, a constituent part of the offence under Sec. 171-D of the Code, was proved and so the accused was entitled to an acquittal, but it is submitted that a mistake of law cannot, to any extent, be a defence to a criminal charge in the face of the provisions contained in Sec. 76 and Sec. 79 of the Penal Code and this part of the decision, besides goes counter to the current of authority.[1]

4. Mens rea—No intention, no crime.—So far as the present Code is concerned, it is apparent from the exceptions here made that the test of criminality in the Code depends upon the presence of criminal intent. The maxim, —*actus non facit reum, nisimens sit rea*,[2] is, then, as true here as it is in England. It is, indeed, the keynote of the present chapter, as it is of the English criminal law. In holding a citizen guilty of any offence, the existence of *mens rea* in him is fundamental. It is only when the mind is at fault, that a man can be held guilty of an offence. It is fundamental, too, that whenever and wherever there is a mistake of fact on which is founded a belief in good faith of justification by law of an act, the requisite state of mind that would make the author of the act guilty is absent. Considered in this aspect, there is hardly any difference between mistake of fact and mistake of law, but it has been the policy of criminal jurisprudence of civilized countries that every individual shall be presumed to know the law and shall be debarred from pleading ignorance of law as an excuse.[3] So Coleridge, J., in one case said: "Ignorance of the law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into his state of mind; and if a person takes what he believes to be his own, it is impossible to say that he is guilty of felony."[4] In another case, the Court remarked: "It has been said that ignorance of the law is no excuse. But when the Court has a discretion, the petitioner's ignorance of the law may be properly excused."[5] Where, therefore, the Divorce Act, 1854,[6] enacts that the Court shall not be bound to pronounce a decree for divorce, if it shall find that the petitioner has during the marriage, been guilty of adultery, the Court was held to have discretion which it could exercise in favour of a person who had contracted bigamous marriage, in the belief that his marriage with his first wife had been dissolved by a private agreement setting each party free to marry again.[7] Here, then, was a case where a person had violated the statute in ignorance of its provisions, but as he had no intention to do so, and as the Court had a discretion in the matter, it gave him the benefit of that ignorance. This principle may be illustrated by the view taken by the Indian Courts in similar cases, in which it was laid down that inasmuch as the provisions of Sec. 494 of the Code are rigid and render a bigamous marriage, apart from intention, criminal, the plea of innocence is no defence to a charge under the section, though it would be a good defence to a charge under Sec. 497, the language of which leaves room for its admission.[8] But the language of a statute, though a guide, is not to be taken to

English criminal law.

Ignorance of law may properly be excused if Court has jurisdiction.

Judicial opinion of Indian and English Courts.

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1. State *v.* Siddhannath Gangaram, A.I.R. 1956 M.B. 241 at pp. 243, 244 (D. B.): 1956 M. B. L. J. 674: I. L. R. (1956) M. B. 374: 1956 Cr. L. J. 1327.
2. "The fact itself does not make a man guilty, unless his intention were so."
3. King *v.* Tustipada Mandal, A. I. R. 1951 Orissa 284 at p. 289: I. L. R. (1950) Cut. 75: 52 Cr. L. J. 837.
4. John Reed, (1842) C. &. M. 306.
5. Whitworth *v.* Whitworth, (1893) P. 85 at p. 88, citing Noble *v.* Noble, (1869) L. R. 1 P. & D. 691.
6. 20 & 21 Vict , c. 85, Sec. 31.
7. Whitworth v. Whitworth, *supra*.
8. Karsan, 2 B. H. C. R. 117, at p. 124, (1st Ed.); Manohar, 5 B. H. C. R. 17; Khemkor *v.* Umashankar, 10 Bom. H. C. R. 381; Robi *v.* Gobind, I. L. R. 1 Bom. 97 at p. 116; Sambu, 1 Bom. 347; Umi, 6 Bom. 126; Narantakath, I.L.R. 45 Mad. 956; *contra* Abdul Ghani *v.* Azizul Huq, I.L.R. 39 Cal. 409.

be the sole guide in judging of the criminality of an act. Foster, J., said : "that though the words of the statute seem to exclude any other excuse, yet the circumstances must be taken into consideration; otherwise, a law calculated for wise purposes might be made a handmaid to oppression".[1]

In the light of these cases, the rule laid down by the Bombay Court cannot be upheld. In another case, the facts were different, but it illustrates the same principle. There the captain of a ship had hired native labourers and carried them on board. At the time that he set sail there was no prohibition against the employment of native labour, but before the natives were engaged, an Act was passed which prohibited the enlistment of native labourers without a licence and their confinement and removal from one place to another was declared to be a felony,[2] and the question was whether the master of the vessel had brought himself within the Act. "It may, however, be suggested," the Court remarked "that the carrying, though not unlawful in its commencement, became so when the act came into operation, notwithstanding the ignorance of the master that any such Act was in force and though it was then out of his power to obtain a licence. But before a continuous act of proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may, nevertheless, be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued, and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued."[3]

5. Mens rea—Test to ascertain intention whether subjective or objective.—In *Director of Public Prosecutions* v. *Smith*,[4] it was accepted on all hands that to constitute murder, it must be found that the accused himself intended to kill or to cause grievous bodily harm. The only question was : what was the proper test to apply to ascertain that intention ? The Judge directed the jury in the time-honoured way[5] :

Proper test to ascertain intention.

> "....if you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder...."

When you analyse that direction, it means that, in judging of intent, the jury should regard the accused (in the absence of evidence to the contrary) as a "reasonable man". That means, in this contest, an ordinary man capable of reasoning who is responsible and accountable for his actions. So regarding him, the jury should ask themselves:

> "Is the evidence so strong that we are satisfied that he, the accused man, must himself have been aware that grievous bodily harm was likely to result?"

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1. Foster's *Crown Law*, (3rd. Ed.), App. 439 at p. 440, cited *per* Willes, J., in Tolson, 23 Q. B. D. 168 at p. 175; also followed by Lord Kenyon, in Banks, 1 Esp. 144; Willamett, 3 Cox. C. C. 281; Cohen, 8 Cox. C. C. 41; Sleep, 30 L. J. (M.C.) 170; O'Brien, 15 L. T. (N. S.) 419.
2. Kidnapping Act, 1872, (35 & 36 Vict., c. 19, Secs. 3, 6, 9, 16, 20. The title of this Act has been altered by 38 & 39 Vict., c. 51 to "The Pacific Islanders Protection Act, 1872.")
3. *Per* Baggallay, J. (Bramwell and Thesiger, JJ., concurring) in Burns *v.* Nowell, 5 B. D. 444 at p. 454.
4. (1960) 3 All E. R. 161 : (1961) A. C. 290.
5. (1960) 3 All E. R. 161 at p. 163 : (1961) A. C. at p. 323.

If so, he is guilty of murder. That test is clearly subjective, not objective. "Must *he, the accused man*, have been aware?" It is a test which has been used by the Judges of England for well over one hundred and twenty years, notably in *R.* v. *Walters*,[1] by Coltman, J; *R.* v. *Barnett* (*Fenian Conspiracy* case),[2] by Cockburn, C. J. and Bramwell, B; *R.* v. *Serne*,[3] by Stephen, J; in *R.* v. *Lumley*,[4] by Avory, J; and *R.* v. *Ward*,[5] by Pilcher, J., with the approval of Lord Goddard, C. J., in *Smith's* case,[6] counsel for the defence actually requested the Judge to direct the jury in those terms; and he did so.

Subjective or objective test.

All that *Smith's* case[7] decided, as a matter of binding authority, was that the Judge's direction to the jury, which I have quoted, was correct.[8]

6. Ignorance of law as extenuating circumstance.—In another case, however, ignorance of law was held to be a case for pardon and not acquittal. In that case, the accused, the Master of a ship, was indicted for maliciously shooting a mariner of another vessel on the high seas, on the 27th June, 1799, an offence made indictable by 39 Geo. III, c. 37, which came into force on the 10th May, 1799, that is, only six weeks before the commission of the crime, of whose existence the accused had no knowledge. The jury found that the accused had fired upon the vessel in consequence of a quarrel with its captain, and that the act of the accused fell within the Statute 39, Geo. III, and Lord Eldon, thereupon, held him to be guilty thereunder, though he was unaware of its existence, and it might be a case for pardon. However, on reference to twelve other Judges, it was held that the accused could not be indicted under a statute of whose existence he had no knowledge, and that they, therefore, thought it right that he should have a pardon.[9] These are extreme cases, but then extreme cases are always employed to test the validity of a rule. But as it is, these cases only go the length of holding that ignorance of law may be pleaded in extenuation, though not in justification of a crime.[10]

7. Presumption of mens rea being essential ingredient of offence.—There is, however, a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but the presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, both of which must, therefore, be considered.[11] It is a cardinal principle of criminal law that unless, the statute, either clearly or by necessary implication, rules out *mens rea*, as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind.[12]

So far as the Code is concerned, it declares that all the 32 sections forming this chapter should be read as qualifying the penal provisions which follow it. The question then is, whether any of the exceptions forming this chapter negative an offence otherwise shown to have been committed.

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1. (1841) Car. & M. 164.
2. (1868) "The Times," Apr. 28.
3. (1887) 16 Cox. C. C. 311 at p. 313.
4. (1911) 22 Cox. C. C. 635.
5. (1956) 1 All E. R. 565: (1956) 1 Q. B. 351.
6. (1960) 3 All E. R. 161: (1961) A. C. 290.
7. *Ibid.*
8. Hardy *v.* Motor Insurers Bureau, (1964) 2 All E. R. 742 at pp. 744-45.
9. Richard Bailey, (1880) R. & R. 1.
10. Sitaram Kunbi *v.* Emperor, A. I. R. 1928 Nag. 188 at p. 188: 29 Cr. L. J. 506: 24 N. L. R. 110.
11. Nichols *v.* Hall, L.R. 8 C.P. 322; Sherras *v.* De Rutzen, (1905) Q.B. 918 at p. 921: 1 Weir 74.
12. State Government, Madhya Pradesh *v.* Maganbhai Dasaibhai, A. I. R. 1954 Nag. 41 at p. 42: 1953 N. L. J. 514: 55 Cr. L. J. 89.

8. Absence of specific intention.—These sections necessarily lay down only *general* exceptions, that is to say, exceptions which negative in all cases, the presumption of criminality. Independent of them, there are certain other considerations which are referred to in the various sections defining offences or laying down penalties which alone determine criminality in a particular case. For example, some offences are only complete, if the act constituting them is done "voluntarily," or "dishonestly," "knowingly" or "having reason to believe" in the existence of certain facts or in other conditions of the mind, which is, then, the essence of criminal obligation, the absence of which form other exceptions to criminal responsibility. It is only when an act is otherwise an offence, answering, as it does, all the requirements of a given definition, that resort must be had to these general exceptions which form, as it were, the touchstone of criminality, to which reference becomes necessary, because the deed would otherwise be a crime. Indeed, reference to this chapter need not be made by the prosecutor at all, for the elements, there dealt with are not essential for the composition of a crime. They are rather dissolvent which reduce or annihilate criminality by associating it with other acts and intentions which have the effect of altering its original aspect and character.

General exceptions need not be referred to by the prosecutor at all.

Now, as the mental elements of different crimes differ widely, it follows that the appropriate exceptions to those crimes must also correspondingly differ. So the term "*mens rea*," "intent" or "guilty mind," though commonly supposed to underlie all crimes still differ in each case according to the nature and circumstance of the crimes. For instance, "*mens rea*" means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence (Sec. 304-A), it may mean forgetting to notice a signal. Recklessness is frequently, for legal purposes, classed with intention.[1] For the purposes of criminal law, an act or omission is voluntary, if it might have been avoided by the exercise of reasonable care; thus a negligent act or omission is willed because the person responsible does not will to prevent the commission or omission.[2] The term "*mens rea*" is, therefore, a mnemonic aid, but by no means an exact expression. And as an expression it is inexact and misleading.[3] Now, as this chapter generally provides an antithesis to such general criminality, it must necessarily be equally inexact and often misleading. Its exact applicability and its necessary shortcomings will best be illustrated by its application to concrete examples.

Applicability and necessary shortcoming of this chapter to be illustrated by concrete examples.

So far as regard this section, it lays down expressly what shall excuse an offence, and impliedly what shall not. Expressly it lays down that an act promoted by (*a*) a mistake of fact, (*b*) good faith, and (*c*) belief in legal compulsion is protected. Impliedly, it lays down that a criminal act under mistaken law is entitled to no protection. The question then is what is the meaning of these terms.

What this section expressly and impliedly provided.

9. Mistake of fact.—Mistake has a recognised place in civil law. As such it is a well-known concept. There it is used in the sense of misconception or error of judgment not intended to produce the result attained. Such a

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1. Salmond's *Jurispurdence* (1947 Ed.), p. 393.
2. Halsbury's *Laws of England* (2nd Ed.), Vol. 9, p. 10, Footnote (*h*).
3. *Per* Stephen, J., in Tolson, 23 Q. B. D. 168 at p. 186.

Reasons for the mistake.

mistake may,[1] or may not, be due to forgetfulness, ignorance, imperfect information or faulty ratiocination. It may be due to chance, negligence, stupidity or even superstition but it must not be due to design, pre-arrangement or pre-concert.[2] A mistake may be due to the imperfection of senses, or it may be due to the deficiency of intellect. Where, for instance, a man kills a man believing him to be a ghost,[3] a father kills his own son believing him to be a tiger,[4] a hunter mistakes a man for an animal and fires, his mistake may be as much due to defective vision as to defective intellect. In either case if there was no *mens rea* there was a mistake and, therefore, it may be no crime. Here, through a mistake, a man, intending to do a lawful act, has done that which is unlawful. There has not been that conjunction between his act and his will, which is necessary to form a criminal Act. "*Ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary. It is known in war that it is the greatest offence for a soldier to kill or so much as to assault his General: suppose, then, the inferior officer sets his watch or sentinels, and the General, to try the vigilance or courage of his sentinels, comes upon them in the night in the posture of an enemy; the sentinel strikes or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offence."[5]

Examples.

So where a person made thrust with the sword at a place where, upon reasonable grounds, he supposed a burglar to be, and killed a person who was not a burglar, he was held to have committed no offence.[6] Where the fact is a tangible object, a mistake regarding it may thus assume any form. Its identity may be mistaken or its form misread. Where, for instance, in a case the prisoner was indicted for unlawfully taking an English girl under the age of 16 out of the possession and against the will of her father, and it was proved that before the girl was taken away she had declared her age to be 18, which the prisoner also believed to be the case and his belief was reasonable, the question arose whether his erroneous *bona fide* belief exculpated him from the offence of abduction under the statute,[7] and it was held by the majority of the Court that he was guilty of the misdemeanour notwithstanding his mistake.[8] But this decision of the Court is regarded as unsatisfactory and in conflict with established principles.[9] But the eventual decision turned upon the wording of the statute, and the meaning of the word "unlawfully" therein occurring,[10] which was held to mean "without lawful

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1. Kelly *v.* Solari, 9 M.W. 54; Brownlie *v.* Campbell, 5 App. Cas. 952, followed *per* Kay, L. J., in Barrow *v.* Isaac and Sons, (1891) 1 Q. B. 417 at pp. 425 and 426.
2. Sandford *v.* Beal, (1895) 56 L. J. (Q. B.) 74.
3. Waryam Singh *v.* Emperor, A. I. R. 1926 Lah. 554 at p. 555; Bonda Kui *v.* Emperor, A. I. R. 1943 Pat. 64: 43 Cr. L. J. 77.
4. Chiranji *v.* State, A. I. R. 1952 Nag. 282 at p. 283: I. L. R. (1952) Nag. 348: 1952 Cr. L. J. 1212: 1952 N. L. J. 350.
5. 1 Hale P. C. 42.
6. Levet's case, 1 Hale 474, cited *per* Stephen, J., in Tolson, 23 Q. B. D. 168 at pp. 187 and 188.
7. As the question turned upon the wording of the statute, it may be here quoted : "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of 16 years, out of the possession and against the will of father or mother or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years with or without hard labour."—24 & 25 Vict., c. 100, Sec. 55 ; *cf.* Sec 361 , *post*, for a similar offence.
8. Prince, 44 L. J. (M. C.) 164, so held by 15 Judges, Brett, J. (afterwards Lord Esher, M. R.) alone dissenting.
9. 1 Russ. (5th Ed.) 888; Watkins *v.* Major, 44 L. J. M. 164. It should be noted that in 48 & 49 Vict., c. 69, Sec. 7, the following is added: "Provided that it shall be a sufficient defence to any charge under this section that the person so charged had reasonable cause to believe that the girl was of or above the age of 18 years. *See* this case explained *per* Stephen, J., in Tolson, 23 Q.B.D. 168 at pp. 189 and 190.
10. *See* Prince, (1875) L.R. 2 C .C. R. : 44 L. J. (M.C.) 122, 154 at pp. 170, 178 (*per* Blackburn and Denman, JJ.).

excuse" or "without such an excuse as, being proved, would be a complete legal justification for the act even where all the facts constituting the offence exist".[1] In other words, a person, who deliberately does that which is wrong, must also take the risk of its turning out to be criminal, and if criminal, he cannot turn round and say that he had not contemplated the consequence of his wrongful act.

The question whether a man is or is not a proclaimed offender is a question of fact within the meaning of this section as well as Sec. 79.[2]

10. Natural consequence.—That a man must be prepared to bear the *natural* consequences of his act is not disputed, as if he strikes with a dangerous weapon with intent to cause grievous hurt, and kills, he cannot be heard to say that he had misjudged his blow. The result makes the crime murder, not because there may not have been mistake but because the prisoner had run the risk. It may then be generally laid down that where an act is in itself criminal, criminal intention is presumed, and even proof of mistake of fact is then no defence. In this view the conviction of Prince[3] was right, but not otherwise. On the other hand, where the act is initially indifferent, and becomes only criminal, by the existence of certain facts superadded, then the fact that the accused had misconstrued or mistaken those facts is a good defence, whether the misconstruction of mistake was due to lack of will or lack of knowledge.

General proposition.

11. Mistake of mixed law and fact.—Sometimes the mistake pleaded is both a mistake of fact as well as of law. Such a case may arise where a person makes a bigamous marriage in ignorance of law,[4] or where he seizes property in the *bona fide* belief that it is his; or take again the case of two persons reasonably believed to have committed murder in trying to escape: whereupon two persons give them a chase to prevent their escape: one is a policeman, and the other a private citizen. What would be their offence, if suppose each of them kills the runaways to prevent their escape? It has been held that the policeman would be justified but not so the private citizen.[5] For, his mistake "would be not only a mistake of fact, but mistake of law in supposing that he, a private person, was justified in using as much violence as a public officer, whose duty is to arrest, if possible, a person reasonably suspected a murderer. The supposed homicide would be in the same position as if his mistake of fact had been true; that is, he would be guilty, not of murder, but of manslaughter."[6] So on this point Bishop says: "In civil causes, it would seem that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole may be regarded as ignorance of fact, of which the party is at liberty to take advantage. So, in criminal jurisprudence, if the guilt or innocence of the prisoner depends on the fact, to be found by the jury, of his having been or not, when he did the act, in some precise mental condition, which mental condition is the gist of the offence, the jury, in determining this question of mental condition, may take into consideration his ignorance or misinformation in a matter of law. Thus, to constitute larceny there must be an intent to steal which involves the knowledge that the property taken belongs not to the latter. Yet if all the facts concerning the title are known to the accused, and the question is merely one of law whether the property is his or

Position in criminal causes and criminal jurisprudence.

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1. Prince, (1875) L. R. 2 C. C. R. 122: 44 L. J. (M. C.) 154 at p. 175.
2. Emperor *v.* Hafiz Murid Dood, A. I. R. 1937 Sind 254 at p. 257: 38 Cr. L. J. 1101: 17 I. C. 672.
3. 44 L. J. (M. C.) 122: (1875) L. R. 2 C. C. R. 154.
4. Narantakath, I. L. R. 45 Mad. 986.
5. 2 Hale P. C. 89 at p. 97: 1 Russ. (5th Ed.), p. 726; *see* also Raghunath Dass *v.* Emperor, A. I. R. 1920 Pat. 502.
6. *Per* Stephen, J., in Tolson, 23 Q. B. D. 168 at p. 188.

not, still he may show, and the showing will be a defence to him against criminal process, that he honestly believed it his, through a misapprehension of law. A mere pretence of claim set up by one who does not himself believe it to be valid, does not prevent the act of taking from being larceny."[1] It is, however, settled that an error on mixed question of law and fact is treated as a mistake of fact. If the accused is misled into this error of fact on account of an error of law, his mistake shall be treated as a mistake of fact rather than of law.[2]

12. Belief—Necessity of.—A mere mistake of fact is not enough. It must be an honest mistake, and it must not be known to the actor as a mistake when the deed was done. If the doer knew that he was impelled by mistake to a deed which he knows to be wrong, he has no defence, save that of insanity. It is only an honest faith in a person's act, as a righteous act, that is entitled to legal protection. The fact may not exist, but he must honestly believe in its existence. On the other hand, if the fact exists, and he does not believe in its existence, there is no belief in "good faith" and consequently no protection. Where, for example, a person heard at night a noise and saw a man at the back of the door of his house from which he believed that an attempt was being made to break into it, and acting on that belief and on his wife telling him that the plaintiff was the man, he gave the plaintiff, a respectable neighbour, who happened to be passing the front of the house at the time, into custody whereupon the plaintiff sued for damages for false imprisonment, and the question was whether the defendant had reasonable grounds for believing the plaintiff to be guilty, and if so, whether he honestly believed it. It was then pointed out that a mere honest belief is not enough unless there also existed reasonable grounds for that belief. As Keating, J., remarked: "It cannot be supposed that if a man merely dreamt of a certain state of facts, without any grounds for his impression, and acted on it, it would be sufficient."[3] In this case, the defendant may have grounds for suspicion. But as was pointed out by Willes, J., in another case,[4] mere suspicion will not do.

Belief in good faith.

13. Suspicion and belief.—What is the difference between suspicion and belief? "Suspicion may rest on no grounds: belief rests upon some grounds." But as there can be no reasonable grounds unless there are facts sufficient to justify that belief, it follows that what the Court first inquires about is what were the facts and whether they were sufficient to induce an *honest* belief, and not necessarily a *reasonable* belief,[5] in them.[6] This view was emphasised in an Indian case to which reference has been made before (Sec. 52), in which the facts were somewhat similar.[7] So in another case where a policeman had arrested a person as Giria which in fact he was not, the Court acquitted him on the ground that he had made reasonable inquiries and having come to Bombay from an up-country station to effect the arrest he was honestly mistaken.[8]

Distinction.

The same view was taken in an English case in which the plaintiff, passing through the streets of the City of London with a bundle in his hand about 10 o'clock at night, was stopped by a watchman who took him to the defendant, a beadle, who questioned him as to the contents of the bundle, which the plaintiff replied he did not know and that he was carrying it to his sister in St. Georges

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1. *Criminal Law* (3rd Ed.), Sec. 378.
2. King *v.* Tustipada Mandal, A. I.R. 1951 Orissa 284 at p. 290: I. L. R. (1950) Cut. 75: 52 Cr. L. J. 837.
3. Leete *v.* Hart, L. R. 3 C. P. 322 at p. 325
4. Roberts *v.* Orchard, 2 H. &. C. 769 at p. 777.
5. *Per* Keating, J., in Leete *v.* Hart, L. R. 3 C. P. 322 at p. 323.
6. Hughes *v.* Buckland, 15 M. &. W. 346.
7. Bhawoo *v.* Mulji, I. L. R. 12 Bom. 377.
8. Emperor *v.* Gopalia Kallaiya, A. I. R. 1924 Bom. 333 at pp. 333-34: 26 Bom. L. R. 138: 25 Cr. L. J. 797.

Fields, and referred him to a house there. He was arrested without enquiry at the house referred to, but was subsequently discharged, and the question was whether the beadle had the power of arrest, and it was held that he had such a power and that the arrest was justified by "abundant ground of suspicion".[1]

14. Good faith—Necessity of.—As to meaning of "good faith", *see* notes on Sec. 53, *supra*. A person who kills another on jealous suspicion of a wife, however strong, cannot, therefore, plead mistake, for he had no facts whereon to build his honest belief as required by law.[2] So where a number of men seize hold of a woman believed to be a witch and do her to death, they cannot defend their atrocity by reference to honest belief in the woman's witchcraft. For, if such a belief were sufficient to take away human life, there will be no security left but that a person may with impunity slay another because he believes him to be a ghost, or possessed of an evil spirit.

15. "Bound by law."—For the meaning of the expression, *see* Sec. 43, *supra*. Where a defamatory statement is made by a person as a witness in a case, he is not protected by this section as he cannot be said to be "bound by law" to go into the witness-box and make the statement.[3]

16. Legal practitioner acting under instructions.—In a Burma case,[4] an Advocate had written a letter to a Magistrate demanding the return of a sum of money alleged to have been paid to him as bribe for the purpose of hushing up the matter and threatening the Magistrate, if the demand was not met, with the consequences of his act. It was held that the Advocate in writing the letter, to the Magistrate made himself a party to an attempt to compound an uncompoundable offence and that he could not set up the alleged instructions of his client as a justification of his action. Sections 76 and 79 of the Penal Code did not apply to such a case.

17. Jail warder acting under orders of superior.—Where convict warders and convict officials beat and torture the convicts with the result by such treatment accorded to these unfortunate convicts, has resulted in the death of two of them.

Held that Sec. 76, Penal Code, does not afford any defence to any of these convict warders. It is obvious that all of them knew that they were engaged in an illegal act. There was no question either of a mistake of fact, or mistake of law, or of good faith. All of them had been in jail for some time and must have known that the merciless beating of the convicts was contrary to law. Obedience to an illegal order can only be used in mitigation of punishment.[5]

18. Policemen's duty.—The power of a policeman or other recognised conservator of peace to arrest and detain a person in custody must depend upon the terms of the particular statute creating it. Where the terms of such a statute are satisfied, reference to these sections becomes unnecessary, because these sections deal with *bona fide* mistake, and not with due performance of duty, Indeed, in the latter case, the question of *bona fides* and sufficient grounds is immaterial. For there was duty to do, and it was done whatever may have been the doer's motive. It is only when the act was not justified by law that the

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1. Lawrence *v.* Hedger, 3 Taunt. 14-16; Dhanjibhai, I. L. R. 20 Bom. 348.
2. Devji Govindji, I. L. R. 20 Bom. 215.
3. Bhagwan Singh *v.* Arjun Dutt, A. I. R. 1920 All. 232 : 21 Cr. L. J. 564: (1920) 18 A. L. J. 846.
4. U San Win *v.* Hla, A. I. R. 1931 Rang. 83 at p. 85: 32 Cr. L.J. 934: 132 I.C. 553.
5. Chaman Lal *v.* Emperor, A. I. R. 1940 Lah. 210 at p. 216: I. L. R. (1940) Lah. 521.

other questions arise. This is implied in Ill. (*a*), where a solidier firing on a mob by the order of his superior officer, in conformity with the commands of the law, is held to be protected. Now this section does not state whether the order given by the superior officer was right or wrong. But it is implied that it was wrong. For if it had been right, then the act would have been legal, apart from good faith and his belief in its legality. It is only when the order is illegal that the questions of good faith and belief in its legality arise. A person is then not implicitly bound to obey commands of his superior officer. The latter may order him to torture a person to death, but he is not bound to obey such an order, and, of course, the maxim *respondeat superior* had no application to such a case.[1] Only the fear of instant death would extenuate such a crime.[2]

Section 46, Cr. P.C., lays down that when a police officer arrests a person and such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer may use all means necessary to effect the arrest; but this does not give a right to cause the death of the person unless he is accused of an offence punishable with death or transportation for life, and in the case of *Dakhi Singh* v. *State*,[3] that the man who had been arrested was suspected to be a thief. He could not have been accused of an offence punishable with death or with transportation for life. Consequently in effecting his arrest after the escape the police officer had not had the right to cause his death. Under Secs. 76 and 79, Penal Code, it was not open to the accused to plead justification to the extent that he was entitled to shoot the person dead, or by reason of a mistake to shoot the fireman dead, mistaking him to be a thief.[4]

19. A soldier's duty.—A soldier may be ordered to use force in four cases: (1) when his country is at war with another, (2) when an area is proclaimed under martial-law, (3) when he is called in to aid the civil authorities to preserve or restore order, and (4) when the civil authorities withdraw leaving the military to preserve or restore order. In the first two cases the civil law is suspended and with it this section is in suspense.

In the third case, the responsibility of the civil power remains and it is on them to observe the behests of the section. In the last case, that responsibility is thrown on the military who are called in to perform the police duties in the discharge of which they are as much subject to the ordinary law as they would if instead of being directly charged with the duty of restoring order they were still under the civil power, the only difference being that the directing control is shifted from the civil to the military.

Soldiers to obey his commands.

It may be said that it is the duty of the soldier to obey his command, it is not for him to reason why. That is true, but only true within limits. The soldier obeying his command only throws the responsibility on his Commandant who has to justify his action. He is not entitled to discharge his duty at his discretion. If this were the law, there would be no difference between a country being placed under martial-law which is no law at all and one in which the military are merely called in to perform the police duty.

Two principles of military conduct.

In is, therefore, settled that in such a case the military must put their conduct to the touchstone of the two following principles, namely, (*a*) they must act in good faith, i.e. with due care and caution, and (*b*) they must not use more force or destroy

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1. Devji Govindji, I. L. R. 20 Bom. 215; Queen-Empress *v.* Latifkhan, I. L. R. 20 Bom. 394.
2. Section 94 (q. v.); Queen-Empress *v.* Latifkhan, *supra*.
3. A. I. R. 1955 All. 379 at p. 381.
4. Dakhi Singh *v.* State, A. I. R. 1955 All. 379 at p. 381: 1955 Cr. L. J. 905 (D. B.).

more life and property than is absolutely justified by the necessities of the case.[1] The same rules apply to the private whose objection to military discipline is not higher than his subjection to the higher law in favour of public safety when the act which the military discipline attempts to enforce or to justify is one which affects the person or property of another. In such a case a soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. In judging of his action the civil law looks to the surrounding circumstances to see whether they are of such a character as would lead a man of ordinary intelligence to entertain a reasonable belief that he is bound by law to obey the commands of his superior.[2]

Military man if bound to obey illegal order.

A person who knowingly obeys an illegal order abets the illegal act of his superior, and as the latter, so is the former without any justification.[3] So where three sepoys of a regiment were cognizant of a quarrel which their Naik had with a mob which was threatening them under circumstances which did not render the act excusable under Sec. 96, and two men were shot dead, is was held that the sepoys who had fired in obedience to the Naik's orders were not protected by this section, as they must be taken to have known that the Naik was wrong in law in firing upon the mob, and that they were not bound to obey his illegal orders.[4]

20. Limits of soldier's justification.—This view makes it clear that in this respect the duty of the officer and the soldier is the same. Either has to believe in good faith that firing is necessary and that firing should not do more harm than is absolutely necessary. If the officer orders firing before it is necessary, the duty of the soldier is plain; he must refuse to fire, and if he does fire, he does so at his own peril. It might be said that this civil duty of the soldier is in conflict with his military duty and discipline, but as Willes, J., remarked: "I believe that the better opinion is that an officer or soldier acting under the orders of the superior—not being necessarily or manifestly illegal—would be justified by his orders." In fact, it is only in such case that the rule here enunciated becomes applicable. The soldier is to exercise good faith, and with good faith he must believe in his[5] legal duty. If he does not know that his officer is wrong, and if he believes that he is right, he is exempt from punishment, whatever may have been his mistake. As Sir James Stephen says: "Soldiers might reasonably think that their officer had good reason for ordering them to fire into a disorderly crowd, which to them might not appear to be at that moment engaged in acts of dangerous violence; but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street, when no disturbance of any kind was either in progress or apprehended."[6]

Willes, J.'s views.

Sir James Stephen's view.

This rule applies not only to soldiers but also to others who act in a similar contingency under the orders of their superior,[7] so where a first class constable verbally ordered two police constables to arrest bad characters on the road and to fire if resisted, whereupon the constables challenged two men and fired and

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1. Section 130(2), Cr. P.C. *See* the Report of Lord Bowen, Sir Albert Rollit and Mr. Haldane, Q. C., on the use of military force to suppress the collier's strike in 1893, printed in 1 *Penal Law* (4th Ed.), pp. 426-28.
2. Gurdit Singh, (1883) P. R. No. 16; Niamat Khan, (1883) P. R. No. 17; Kennett, 5 Car. & P. 282: 172 E. R. 976.
3. Latifkhan, I. L. R. 20 Bom. 394; *see* also Charan Das Narain Singh *v.* State, A.I.R. 195. E.P. 321: 52 P.L.R. 331: 5 D. L.R. (Simla) 286.
4. *Per* Tattigan, J., in Gurdit Singh, (1883) P. R. No. 16; Niamat Khan, (1883) P. R. No. 17.
5. Keighley *v.* Bell, 4 F. & F. 490.
6. 2 Criminal Law, 205.
7. Trainer, 4 F. & F. 105 at p. 112.

killed one man who did not stop, it was held that the order given being manifestly illegal, as it was uncalled for, the constables who obeyed it were themselves accused guilty of culpable homicide not amounting to murder, though the fact that the accused had acted under orders was material for mitigation of punishment.[1] So in a similar case a sailor was ordered by his superior officer on board a man-of-war to prevent the approach of boats and served out ammunitions for the purpose. Boats having persisted in approaching in spite of repeated warnings, he fired a shot and killed a man. He was indicted for and convicted of murder, the Court holding that although he had fired under the impression that it was his duty to do so, it was murder, as the act was not necessary for the preservation of the ship.[2] These are cases in which the superior had authority, but he had exercised it at the wrong moment.

Obdience to order of superior without legal authority.

The case where the superior was without legal authority is, of course, worse. So where at the trial and execution of Charles I, a soldier who commanded the Guards pleaded at his trial that all he did was as a soldier by the command of his superior officer whom he must obey or die, it was resolved that that was no excuse, for his superior was a traitor, and all who joined with him in that act were traitors, and where the command is traitorous the obedience to that command is also traitorous.[3] Now, however, Sec. 94 would be a complete answer in such a case.

21. Engine driver's mistakes.—The applicability of this exception in the case of the public may arise in a case where the public are bound by law to assist the magistracy and police as they are "in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest"; and "the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway canal, telegraph, or public property".[4] So, where the engine driver and fireman of a train were indicted for manslaughter arising out of a collision, it appeared that the engine driver had speical instructions on that day, when an unusual number of trains were running for the Ascot Races, that the red signal which usually means "stop" was to be read as only implying "danger" which he followed with the result that there was a collision with another train which had preceded them five minutes before and had stopped at Egham, of which fact the accused were ignorant. It was found that if this train had not stopped, as she did at Egham, there would have been no collision. Willes, J., directed the jury that the accused had obeyed the special instructions, believing that they were not illegal, that they had acted honestly in the belief that they were carrying them out and that they could not, therefore, incur any criminal liability for the result. As for the fireman, he had obeyed the driver, as he was bound to do, and he had no hand in the management of the train. They were accordingly both acquitted.[5]

Examples.

In another case, the deceased, a stoker on board of a steam tug, was killed by its explosion, whereupon the captain and engineer were indicted for manslaughter. It appeared that the explosion was due to the failure of the safety valve to act on account of its being tied down by weights, in consequence of which there was more pressure on the boiler than it could bear. There was another valve, the duplicate keys of which were to be in possession of a Government Inspector and the captain, but the latter had no key at the time of the explosion, and the valve was out of order, but the accused were unaware of it. Hill, J., held that, as the

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1. Nag Myat Tha, (1882) S. J. L. B. 164.
2. Thomas, 4 M. & S. 442.
3. Axtell, (1661) Sri John Kelyings Crown cases, p. 16.
4. Section 42, Cr. P. C.
5. Trainer, 4 F. & F. 105 at p. 112.

deceased could have as well seen that the valve was out of order and might have repaired it without the intervention of either of the accused there was no case for their conviction.[1] This case may seem to support the defence of contributory negligence, and the language used by Willes, J., in a case[2] would seem to support the view that a man was not criminally liable for negligence for which he would not be liable in a civil action, from which it might be inferred that as contributory negligence has a recognised place in tort, it should also have a place in delicts. But Lush, J., adverted to this expression of opinion in another case and said that it was quite at variance with what he had always heard,[3] and it is now the prevailing view.[4] The conduct of the person injured will, of course, have important influence as a matter of fact upon the relation of cause and effect between the act of accused and the consequence induced. But beyond this it has no application. Indeed in a civil action the primary object of the party injured being the recovery of damages, it is always admissible for the party in wrong to show that the injury complained of has been in part brought about by the party complaining upon himself. But in a criminal case, the object is not to redress personal wrongs but to protect the public, and the same plea cannot be allowed to prevail, for if it were, a person could not be convicted of murder for abetting suicide.[5] So Pollock, C. B., said that where there is a loss of life "each party is responsible for any blame that may ensue, however large the share may be and so highly does the law value human life that it admits of no justification wherever life has been lost and the carelessness and negligence of any one person has contributed to the death of another person".[6] (For a further commentary on this subject *see* Sec. 304-A.)

22. Mistake when no defence.—*Mens rea* is not required where the acts prohibited by a statute are not criminal in any sense, but are prohibited in the public interest under a penalty. Even in crimes properly so called, the Legislature sometimes prescribes a punishment without requiring proof of moral guilt. But the general rule is that a presumption exists that *mens rea* is essential to every criminal offence. The question in each case is one of construction, but it may be generally stated that while *mens rea* is usually necessary in the case of an offence under this Code, it is usually not necessary in the case of a statutory offence. Ordinarily, such statutes are enacted in the interest of public convenience, public health, morals or revenue, or to protect women and children, and other persons suffering from disability. But there are exceptions in each case, and this Code itself furnishes instances in the offences of bigamy, and abduction of a minor under Sec. 361,[7] where the offence is complete without the presence of a *mens rea*.[8] In cases of statutory offences regard must be had not only to the language but also to the policy which underlies the statute. For instance, under the English Lunacy Act, it is "not lawful" for any one to receive two or more lunatics in an unlicensed house. The accused received such lunatic but was found not to have known that the persons she received were lunatics. Stephen, J., who tried the prisoner told the jury "that an honest belief on the part of the defendant that the person was not a lunatic would be immaterial", and he was held to be right by a court of five Judges.[9] Offences insuring the purity of food and drugs are punishable in the public interest apart from any question of *mens rea*. So the innocent possession of adulterated tobacco,[10]

General rule of *mens rea* being essential ingredient of every criminal act.

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1. Gregory, 3 F. & F. 153.
2. Birchall, 4 F. & F. 1087.
3. Jones, 11 Cox. C. C. 544.
4. *Per* Pollock, C.B. in Swindall, 2 C. & R. 330; *per* Rolfe, B., in Longbottom, 3 Cox. C. C. 439: 6 M. H. C. R. (App.) 31 at p. 33.
5. 6 M. H. C. R. (App.) 31 at p. 33.
6. Swindall, 2 C. &. R. 330.
7. Prince's case, L. R. 2 C. C. 154.
8. Lolly's case, R. & R. 237.
9. Bishop, 5 Q. B. D. 259.
10. Woodrow, 15 M. & W. 404.

the sale of adulterated food or drugs[1] are offences which are punishable independently of *mens rea*. So, again, public policy demands the protection of infants and the preservation of moral relations which justifies the offences before mentioned, the control of intoxicants and poisons[2] and that which prohibits the delivery of intoxicating liquors to children under fourteen except in corked and sealed vessels.[3] Another class comprehends some, and perhaps all public nuisances.[4]

Proceedings criminal in form but summary mode of enforcing civil rights.

There are, again, cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.[5] Such cases often present much difficulty. The accused, a public works contractor, received permission from his department to quarry stones from a place which turned out to be a protected forest whereupon he was convicted under the Forest Act in Madras,[6] though the permission would have exculpated him in Bombay.[7] There can, of course, be no mistake of fact when there was no possibility for the existence of the fact. This was laid down in a case in which the accused pleaded his mistaken right to fish in a navigable river which Lush, J., held to be no defence as such a right was wholly unknown to the law.[8]

But these statutes, though they do not condone the crime, do not altogether ignore the *mens rea*, for it sill enters in the apportionment of the sentence. But otherwise it is not permitted to obscure the public policy which demands of every man the exercise of a certain degree of diligence which it regards incompatible with the possibility of a mistake.

23. Rules regarding justification of offence due to mistake.—The following are the five invaluable rules, laid down by 15 Judges in the case of *R.* v. *Prince*,[9] which have been the guiding star in England and elsewhere whenever the question of justification of an offence either due to mistake of fact or mistake of law has arisen:

Invaluable 5 rules laid by Judges.

"(*i*) Then when an act is in itself plainly criminal, it is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence.

(*ii*) That where an act is *prima facie* innocent and proper, unless certain circumstances co-exist, then ignorance of such circumstances is an answer to the charge.

(*iii*) That the state of the defendant's mind must amount to absolute ignorance of the existence of the circumstance which alters the character of the act, or to a belief in its non-existence.

(*iv*) Where an act which is in itself wrong is, under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the fact which turned the wrong into a crime.

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1. Fitzpatrick *v.* Kelly, L. R. 8 Q. B. 337; Roberts *v.* Egerton, L. R. 9 Q. B. 494; Derbyshire *v.* Houliston, (1897) 1 Q. B. 772.
2. Waman, 10 Bom. L. R. 171; Masse *v.* Morris, (1854) 2 Q. B. 414.
3. Brooks *v.* Mason, (1902) 2 Q. B. 743.
4. Stephens, L. R. 1 Q. B. 702 ; Madley, 6 C. & P. 292; Barnes *v.* Akroyd, L. R. 7 Q.B. 474.
5. Morden *v.* Porter, 7 C. B. (N. S.) 641.
6. Penchul, 9 I. C. 567; Lewis, 22 I. C. 747; dissenting from Kassim, 15 I. C. (Bom.) 802.
7. Kassim, *supra*.
8. Hargreaves *v.* Diddamas, L. R. 10 Q. B. 582; following Hudson *v.* Macre, 33 L. J. M. C. 65.
9. (1875) L. R. 2 C. C. R. 154: 44 L. J. (M. C.) 122.

(*v*) Where a statute makes it penal to do an act under certain circumstances, it is a question upon the wording and object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial."

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he belives to be, given to him by law.

Act of Judge when acting judicially.

SYNOPSIS

1. Analogous law.
2. Scope.
3. Principle.
4. Meaning of words.
5. What judicial acts are protected.
6. "Acting judicially."
7. "Good faith"—Illegal acts excluded.
8. Reasonable belief in jurisdiction essential.
9. Civil and criminal liability.
10. Previous sanction to prosecute.

1. Analogous law.—This and the next section extend to judicial officers and their ministerial officers the same protection against criminal prosecutions, as the Judicial Officers' Protection Act[1] gives them from civil liability.

2. Scope.—Though this and the next section speak only of "Judge" having regard to the meaning of that term in Sec. 19, it embraces "Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially". The two sections, therefore, cover the same ground though they are differently worded. And so while the older Act speaks of acts "whether or not within the limits of his jurisdiction," it does not mean anything more than an act done "in the exercise of any power which is, or which in good faith he believes to be, given to him by law". A maliciously unjustifiable act is as much outside the limits of the one act as it is of the other. So it was held under an old English statute,[2] replaced by the Act of 1850, that the protection afforded by it to Provincial Magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial officers, does not confer unlimited protection but places them on the same footing as those of English Courts of a similar jurisdiction and only give them an exemption from liability when acting *bona fide* in cases in which they have mistakenly acted without jurisdiction. Trespass will not lie against a Judge for acting judicially but without jurisdiction unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff in every case to prove that fact.[3] All that the plaintiff has to shew is that the conduct of the defendant amounts to a delict or an actionable wrong. It is then for the defendant to plead and prove the exemption.[4] The law, both civil and criminal is in this respect the same.[5]

Protection of Judges and Magistrates, etc. in exercise of their duty.

Law both in civil and criminal is the same.

The section is not the only section which is concerned with the protection of Judges and Magistrates in the exercise of their office. There are also the exceptions to Sec. 499, to be considered, and their very existence indicates that the present section cannot by itself cover the case of remarks made by a Judge or Magistrate in the course of his office, so as to exempt him from any liability under Sec. 500, I. P. C.[6] The law does not make any distinction in respect of

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1. XVIII of 1850.
2. 21 Geo. III, c. 70, Sec. 24; Calder *v.* Halket, 2 M. I. A. 293.
3. Calder *v.* Halket, 2 M. I. A. 293; Vinayak *v.* Bai Itcha, 3 B. H. C. R. (A. C.) 36; Sinclair Broughton, 9 C. 341 (P. C.).
4. Venkat *v.* Armstrong, 3 B. H. C. R. (A.C.) 47.
5. Vinayak *v.* Bai Itcha, *supra.*
6. Kamla Patel *v.* Bhagwandas, A. I. R. 1934 Nag. 123 at p. 123: 149 I. C. 140: 35 Cr. L. J. 947: 17 N. L. J. 43: 30 N. L. R. 234.

the protection afforded by the present section between a written judgment and remarks made in the course of a judgment delivered orally.[1]

3. Principle.—Judges and judicial officers have in all ages been the targets of malice and spite. Their function often leads to exhibition of temper and a feeling of retaliation. If, therefore, Judges had been placed on the ordinary footing as regards the defence of their official acts and conduct, they would soon have forsaken their legitimate duties in order to find time to vindicate themselves. Moreover, their exposure to the shafts of an unsuccessful party or of a condemned convict would have made their position one of considerable peril and precarious advantage. For no one would come forward to seek a situation in which his very fearlessness and independence would make him the butt of unscrupulous attack and organised opposition. The laws of all countries have therefore protected their Judges by special legislation, and the same protection has been thrown round them in this country from very early times (*see* para. No. 1 *ante*). So Markby, J., in one case said: "The duties which he (a Magistrate) usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an officer or to vindicate the rights of a private individual and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any person whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form the proceedings may take or however informal they may be. This has been so held in England,[2] and I do not see any reason to doubt that the same would be held here."[3]

Protection of Judges and judicial officers in all countries.

At the same time, while there is special protection, it is not unbounded or unqualified. A corrupt and a tyrannical Judge is as much a pest of society as a brigand and a cut-throat. The one attacks society by polished weapons, the other by crude appliances. The Legislature has, therefore, passed the strongest laws against the two besetting sins of public servants, namely, corruption and tyranny. The Code itself contains salutary provisions directed against these abuses, and this section offers no impediment to such offenders being brought to book.

4. Meaning of words.—"*Judge when acting judicially*": The exemption is only for acts done in the discharge of his duties. If a Judge fires a pistol on the highroad and kills passers-by, he is as much amenable to the ordinary criminal law as the humblest of the citizens of India. "*Power which is believed to be given to him by law*": "Power" here means jurisdiction, as it does in the auxiliary Code.[4] He may exceed his power, but he must not do so consciously. There must be (*a*) good faith, and (*b*) belief in his jurisdiction. "A Magistrate or other person acting in a judicial capacity is not liable for acts done within his jurisdiction, but he is liable to an action for false imprisonment if he unlawfully commits a person to prison in a matter in which he has no jurisdiction, provided that he has knowledge, or the means of knowledge of the facts which show that he has no jurisdiction."[5]

5. What judicial acts are protected.—Reference has already been made to the policy of the law in protecting judicial officers from civil (*see* para.

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1. Kamla Patel *v.* Bhagwan Das, A. I. R. 1934 Nag. 123 at p. 124: 149 I.C. 140: 35 Cr. L. J. 947: 17 N. L. J. 43 : 30 N.L.R. 234.
2. Tozer *v.* Child, 7 E. & B. 377.
3. Chunder Narain *v.* Brijo Bullub, 14 B.L.R. 254 at pp. 257 and 258.
4. *See* Ch. III, "Powers of Courts," Cr. P.C.
5. Sailajanand Pande *v.* Suresh Chandra Gupta, A. I. R. 1969 Pat. 194 at p. 202 : 1969 B. L. J. R. 1084.

No. 3 *ante*) and criminal liability. The two provisions are the outcome of the same policy, and they are subject to the same rules and restrictions. In such a case, four questions arise: (*i*) was the officer acting judicially; (*ii*) was his act within his jurisdiction; (*iii*) if not, did he *believe* that he had jurisdiction; and (*iv*) if so, did he believe it in good faith. If the first two questions are decided in the affirmative, his act is protected, and the two other questions do not then arise.[1] If his act was within his competency, the fact that he had acted carelessly and irregularly would not expose him to an action for damages[2] and *a fortiori* to a criminal prosecution. Again, no case for exemption arises if the officer was not acting judicially. It is an official, not a personal protection. That it is "the judicial character of the act which alone gives the protection" may be seen by comparing the law as applied to persons who act under somewhat similar conditions, but not judicially. Thus, it has long been the custom in England, and it is beginning to be the custom here, to confer large powers on individuals or bodies of individuals, to be used for the public benefit. The persons upon whom these powers are conferred in England are generally called Commissioners, and they are placed in this position: Whilst on the one hand, they are liable for any wrongful act committed by them, they are, on the other hand, generally protected from personal annoyance and from personal liability. A public officer (generally their secretary) is made defendant in the suit and the law allows them to defray the costs and damages in any suit, brought against them, out of the property entrusted to their care. Without such protection as this, no one would act as a Commissioner; whereas a greater immunity than this would be dangerous to the interests of those with whom they come in contact.[3]

Four questions to determine extent of protection.

So where a Deputy Magistrate, acting as Chairman of the Town Committee under a local Act, ordered the removal of an obstruction from the public road, it was held that though it was the act of a judicial officer, still it was not a judicial act and, therefore, not entitled to any special protection.[4] The cause under which this case was decided was somewhat ambiguously worded, for it said: "Whoever builds any wall or erects or sets up any fence, rail, post or other obstruction or encroachment in any public highway. . . shall be liable to a fine not exceeding Rs. 50; and the Magistrate shall have power to remove any such obstruction," the expenses of which were to be recovered from the obstructionist.[5] On the strength of this clause it was contended that the fine and the removal of obstruction were both judicial acts, as the one could not be separated from the other. But the Court held that if that were the correct construction, then the Magistrate could not remove an obstruction, unless he could find some body to fine and pay for the removal. The two clauses were, therefore, severable and separate, and the power to fine and the power of removal were two independent acts, the one being judicial and the other only executive, and as such, entitled to no protection.[6]

Examples.

6. "Acting judicially."—The case cited above[7] shows the difficulty of some times separating the judicial from what is purely a ministerial or executive

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1. Meghraj *v.* Jakir Hussain, I. L. R. 1 All. 280; Hilimoozzumah *v.* Municipal Commissioners, 13 W. R. 340.
2. Collector *v.* Tharaknath, 7 B. L. R. 449; on review from Tharaknath *v.* Collector, 4 B. L. R. (A. C.) 37.
3. Chunder Narain *v.* Brijo Bullub, 14 B.L.R. 254 at pp. 257 and 258; O.A., *ibid.*, 264-67.
4. *Ibid.*
5. Bengal Act VI of 1868, Sch. K.
6. *Per* Couch, C. J., in Chunder Narain *v.* Brijo Bullub, 14 B.L.R. 254 at p. 257.
7. *Ibid.*

act. And in a country where in several States the two functions are still combined in the same individual, this difficulty is not of infrequent occurrence. At the same time there must exist a clear line of demarcation between them. Even the word "judicial" is not free from ambiguity. For it has two meanings: "it may refer to the discharge of duties exercised by a Judge or Justice in Court; or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind, i.e. a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in Court, and they also act judicially when determining in the private room what is right and fair in some administrative matter brought before them, e.g. the levying of a rate."[1] The word "judicial" properly applies to such a proceeding as is proper to the function of a Judge.[2] The fact that the proceedings are conducted in Court do not necessarily make them "judicial", for a court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative: the duties of part of it only are judicial. It is nevertheless a court. There are many other courts which, though not courts of justice, are, nevertheless, courts according to our law. There are, for instance, Courts of investigation like the Coroner's Court. The existence of immunity does not, therefore, depend upon the question whether the subject-matter of consideration is a court of justice but whether it is a court in law. It is only to a court in law, that the privileges under reference apply.[3]

"Judicial"—Meaning of.

Privileges only apply to a court of law.

The act may be *sedent curia*, or it may not be, but if it was of a judicial character, it is entitled to the immunity of law.[4] Therefore, an order under the seal of a criminal court to bring an Indian citizen in that Court, to be there dealt with on a criminal charge, is an act of a judicial character and, whether there was any irregularity or error in it or not, would not be punishable by ordinary process at law.[5] So the taking or refusing of bail is a judicial and not merely ministerial act, and mistake in the performance of that duty is, apart from malice, insufficient to support an action.[6] As has been remarked (in para. No. 5 above), the fact that an officer or body of officials have judicial powers, does not imply that all their acts are of a judicial nature. The London County Council possesses judicial powers, but its members do not act judicially when they sit in council to consider the advisability of granting licences for music and dancing.[7] "In the case of duties properly administrative, such as that of granting licences, their action was consultative, for the purpose of administration, and not judicial."[8] So the proceedings of a military court of inquiry are not judicial, though the enquiry made is authorised and is made by that Court "judicially," that is to say, in a manner as nearly as possible similar to that in which a Court of Justice acts in respect of an enquiry before it.[9] In this case the inquiry had been ordered by the Commander-in-Chief who was to pass the final order. So, in a similar case, where the Viceroy suspected the

Judicial and ministerial acts.

1. *Per* Lopes, L. J., in Royal Aquarium *v.* Parkinson, (1892) 1 Q. B. 431 at p. 452.
2. *Per* Fry, L. J., in *Ibid.* p. 447.
3. *Ibid.*, pp. 336 and 447.
4. *Per* Baron Parke, in Calder *v.* Halket, 2 M. I. A. 293 at p. 308.
5. Calder *v.* Halket, *supra*, citing (1815) Taaffe *v.* Downes, (unrep.) Irish case, see *ibid.*, p. 300.
6. Parankusam *v.* Stuart, 2 M. H. C. R. 396.
7. *Per* Lord Esher, M. R., in Royal Aquarium *v.* Parkinson, (1892) 1 Q.B. 431 at pp. 441, 443.
8. *Ibid.*
9. Dawkins *v.* Lord Rokeby, L. R. 8 Q. B. 255 : O. A. L. R. 7 H. L. 744, explained *per* Lord Esher, M. R., in the Royal Aquarium *v.* Parkinson, (1892) 1 Q. B. 431 at p. 442. It may be added that Kelley, C. B., based his decisions on the ground that "the motives as well as the duty of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a court of law to determine," Dawkins *v.* Lord Rokeby, L. R. 8 Q. B. 255 at p. 272. Indeed, the

Maharaja of Panna of being implicated in a case of murder by poisoning, and he thereupon appointed a special Court of Inquiry which allowed counsel, recorded evidence, and submitted is report to the Viceroy for final orders, it was held by the Privy Council that the Court so constituted was in no sense a judical tribunal, and its inquiry was not a judicial inquiry, nor its report a "judgment" against which there could be an appeal. It was, in short, a tribunal specially constituted by the Viceroy "for the information of his mind" the final order passed being an act of State outside the pale of municipal law.[1]

"A Magistrate or other person acting in a judicial capacity is not liable for acts done within his jurisdiction, but he is liable to an action for false imprisonment if he unlawfully commits a person to prison in a matter in which he has no jurisdiction, provided that he has knowledge, or the means of the facts which show that he has no jurisdiction."[2]

7. "Good faith"—Illegal acts excluded.—Assuming now that the act complained of was a judicial act, and not within the power given by law, the section requires that it should be further done in good faith and in the belief that it was sanctioned by law. These two requisites are the necessary pre-requisites for exoneration from criminal responsibility of all persons empowered to act under the direction of law. The law extends its protection only to a person who *bona fide* believes that he is acting in pursuance of his legal power.[3] The question of *bona fides* will not arise if the act complained of was wholly illegal. A Commanding Officer of a cantonment, believing a person to be dangerous by reason of insanity, actual or impending, caused him to be arrested and detained in his house for medical examination. The medical officers reported him to be sane, but recommended that he should be placed under the observation of the Civil Surgeon of the place, for which purpose he was further detained. The Commanding Officer who had control and direction of the Police in the Cantonment did not act or intend to act under the Lunatic Asylums Act.[4] The person wrongfully detained sued the Commanding Officer for damages for false imprisonment, and the case ultimately went up to the Privy Council, whose judgment was delivered by Sir Barnes Peacock, who assumed, as it was the finding of the Courts below, that at the time of his detention the plaintiff was not a dangerous lunatic. He also found that the defendant had acted *bona fide* in the discharge of a public duty, and under belief that the plaintiff was dangerous by reason of lunacy. But at the same time he held that there was in law which empowered the defendant to put the plaintiff under restoration for such purpose, nor had he after the report of the medical offcers that the plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the Cantonment and placed under the observation of the Civil Surgeon, even though recommended so to do by the medical officers. The Act for the protection of judicial officers was relied on by counsel of the defendant, but their

Law extends protection to persons who *bona fide* believe in their legal power.

Examples.

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learned Judge cited the Queen's Regulations (*ibid.*, at p. 266) in which it is expressly laid down, that a court of inquiry is not to be considered in any light as a judicial body; and this view was affirmed in O. A. L. R. 7 H. L. 744 at p. 754 by Lord Cairns, L. C., who held that though the inquiry was not judicial still the same exemption from prosecution of witnesses examined by it should be made on the ground of public policy and this view was concurred in by the Full Court.

1. Maharajah Madava Singh, I. L. R. 32 Cal. 1 : 6 Bom. L. R. 763 (P. C.).
2. Sailajanand Pande *v.* Suresh Chandra Gupta, A. I. R. 1969 Pat. 194 at p. 202 : 1969 B. L. J. R. 1084.
3. Spooner *v.* Juddow, 4 M. I. A. 353 at p. 379.
4. XXXVI of 1858, Sec. 14.

Lordships summarily rejected that contontion, holding that the defendant was neither a judicial officer nor did he act judicially. In the result he was mulcted in damages for wrongful confinement.[1]

The same view was taken in another case in which the Commanding Officer of a regiment had caused a contractor of the regiment to be arrested and kept in confinement on a reasonable suspiction of fraud entertained against him, erroneously believing himself to be lawfully possessed of the authority to do so though he was shown not to have acted with malice or conscious violation of the law, nor for the furtherance of any unlawful purpose. The same view was taken by the Madras High Court[2] in the case of a Collector of Sea Customs who professed to act under an Act which empowered the levy of a penalty in case of importation of contraband goods. Under that Act,[3] the Collector seized the goods of a marchant from Ceylon on the ground that he was smuggling opium. It was found that the action of the defendant in fining him by telegram Rs. 56,000 after 5 months' delay without a retrial and without hearing him, that seizing and selling his palmyras to levy the fine, was, apart from jurisdiction, wholly illegal.[4] That, in these circumstances, he could not have acted in good faith is clear; for fair enquiry and considerations which are indicative of good faith were totally wanting. The fact that his proceedings were acquiesced in by his superior officers is immaterial, as is also the fact that he may have entertained a belief that he had jurisdiction. A judicial officer is only protected if he exercises reasonable care in the performance of his official duty.[5] Mere *bona fido* belief is, therefore, not enough; it must be supported by act and conduct from which the Court may reasonably draw an inference that the defendant had fallen into the error in spite of himself. A Magistrate who wilfully acts beyond his jurisdiction does so at his own peril. He is entitled to no consideration,[6] as Lord Denman said in a case: "Magistrates cannot, as is often said, give themselves jurisdiction merely by their own affirmation of it".[7] So where a Magistrate charged and convicted a tailor for "misbehaviour as domesic servant" under the regulation of 1814 without information or evidence of the offence charged, and in spite of the plea of the accused that the had given up service because his wages had not been paid, into which there had been no enquiry, it was held that the Magistrate had acted without jurisdiction, and as he had failed to act reasonably, carefully and circumspectly, he could not be said to have acted in good faith, and he was, therefore, not entitled to the protection of act.[8]

Plea of *bona fides* when available.

The plea of ***bona fides*** can, therefore, only arise when there was a jurisdiction but which was exercised under a misapprehension either with reference to a person not within it, or in excess of the power of the Tribunal. It is out place where there was initially no jurisdiction, and when the proceeding was throughou

***corum non judice*.**[9] If there was a jurisdiction, the fact that it was improperly conferred, or was otherwise defective, would be covered by the rule (*see* para. No. 5 *ante*.).

8. Reasonable belief in jurisdiction essential.—But a Magistrate who, whether from indolence or considerations of his own convenience,

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1 Calder *v.* Halket, 2 M. I. A. 293 at p. 308.
2. Patton *v.* Hurren Ram, 3 Agra 409.
3. VI of 1863, Sec. 24.
4. Collector *v.* Chithambaram, I. L. R. 1 Mad. 89 at p. 97 (F. B.).
5. *Ibid.* at p. 106.
6. Amiappa *v.* Mohd. Mustafa, 12 M. H. C. R. 443.
7. Balton, 1 Q. B. 66.
8. Vithoba *v.* Carfield, 3 B. H. C. R. (App) 1 at p. 24.
9. Sinclair *v.* Broughton, I. L. R. 9 Cal. 341 at pp. 353, 354 (P.C).

remanded under-trial prisoners for over three months, his proceedings could not be characterised as anything but unwarrantable and illegal.[1] An order for the removal of an obstruction under Sec. 144 of the Code of Criminal Procedure was in one case held not to be a judicial order, consequently a Magistrate who passes an illegal order has nothing to protect him.[2] But such an order cannot but be regarded as judicial, though it is necessarily summary.[3] And a Magistrate acts improperly when, purporting to act under that section, he orders the demolition of a house which is neither an obstruction nor a nuisance, though if in such a case, the Magistrate honestly believed that he had jurisdiction, he was held entitled to the protection.[4] But the soundness of this view is open to question.

Malice in fact and malice in law.

If a Magistrate acts in defiance of the law with his eyes open it cannot be said that he had acted in good faith. Indeed, such an order may be properly termed malicious, using that term in its wider sense. As Tounton, J., said: "There are two sorts of malice, malice in fact and malice in law; the former denoting an act done from ill-will towards an individual; the latter a wrongful act intentionally done without just cause or excuse."[5] This appears to have been the view taken in a case in which a Magistrate, professing to act under what is now Sec. 144 of the Code of Criminal Procedure,[6] had ordered the cutting of the plaintiff's *bund* to erect which he had acquired a right by prescription or user from time immemorial. In this case, the Magistrate had ordered demolition of the *bund* on a mere police report and without complying with the procedure laid down by law. He justified his action on the ground of public convenience but on this the Court pertiently remarked that a Magistrate's idea of what is for the public convenience in no degree justified him in appropriating or destroying the property of other persons except in such manner as the law provides.

"The Government and the officers of Government are just as much bound to proceed in such matters according to law, as are private individuals; and the Government and its officers are just as much liable in damages for illegally appropriating or destroying property, for the purpose of adding to the convenience of the public, as is a private individual who appropriates or destroys property for his own convenience."[7] "The Judge says that he erred from ignorance and a misapprehension of the mode of procedure; that he acted judicially; and that it does not appear that his proceedings were characterised by a want of care." "In my opinion," observed Macpherson, J., "when a Magistrate violates the plain language of the law and the very first principles of judicial inquiry, his proceedings presumably are characterised by a want of care; and I think that, in the absence of any evidence to rebut that presumption, the Judge of the Court below was wrong in law in holding otherwise."[8]

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1. Sahoo, 11 W.R. 19.
2. Ashburner *v.* Keshav, 4 H.C.R. (A.C.) 150.
3. Seshaiyangar *v.* Raghunatha, 5 M.H.C. R. 345 at p. 353; Taraknath *v.* Collector, 4 B.L.R. 37 at pp. 40, 41; Bishoo *v.* Chunder, 10 W. R. 27; Jaykisto, 1 B.L.R. (A. Cr.) 20; Bhyrao Dyal, 3 B.L.R. (A. Cr.) 4.
4. Seshaiyangar *v.* Raghunatha, 5 M.H.C. R. 345 at p. 359.
5. Mitchell *v.* Jenkins, 5 B. & Ad. 5; Kidersley, J., in Collector *v.* Chithambaram, I. L. R. 1 Mad. 89 at p. 99 (F.B.).
6. The case was decided under Act XXV of 1861, Secs. 62, 308 (Cr. P. Code).
7. Taraknath *v.* Collector, 4 B. L. R. 37 at p. 47, on review Collector *v.* Taraknath, 7 B.L.R. 449.
8. Taraknath *v.* Collector, 4 B. L. R. 37 at p. 49.

Requisite amount of care and circumspection varies with nature of proceedings and position of accused.

The amount of care and circumspection required varies with the nature of the proceedings and the position of the accused. A Magistrate could scarcely hope to be acquitted of malice where he issued a warrant for the arrest of a respectable person without any formal complaint or recording evidence. Action on the report of the police is as strongly to be deprecated as it is usual with inexperienced Magistrates. The extensive power of arrest possessed by Magistrates must proceed from the exercise of judicial discretion either on the Magistrate's own view, or upon materials furnished by a person responsible for putting the law in motion.[1] Even as such, the Magistrate is not a mere automaton, influenced by statements, however vague and improbable. Before deciding to take away a man's liberty, he must have reasonable and sufficient grounds for believing that action on his part is necessary. The question in such a case is not the question of jurisdiction but of abuse of jurisdiction. And the law on the subject is clear. Where the Magistrate's act is within his jurisdiction, the question is: Was his act illegal or merely irregular? If the latter, he is protected. In any other case his liability depends upon circumstances. If the act was both illegal and *mala fide*, he is entitled to no immunity merely on the ground that his act was within his jurisdiction. In this respect, the law discriminates between a Court of Record and experience to such an extent that it considers it to be exempt even though its action be alleged to be *falso malitiose scientor*.[2] But the law makes no such presumption in favour of inferior justices.[3]

Presumption of good faith is touchstone of judicial authority.

The presence of "good faith" is, therefore, the touchstone of judicial liability, whether his act was with or without jurisdiction. But the fact that an act was within jurisdiction may by evidence of good faith, though it is not invariably so. The law was thus summed up by Cockburn, C. J., in his charge to the Grand Jury: "When there is jurisdiction, but the jurisdiction is exercised under a misapprehension, either with reference to a person not within it, or in excess for the power of the Tribunal, in such cases the persons acting with judicial authority would not be criminally responsible but supposing that there is no jurisdiction at all that the whole proceeding is *coram non judice*, that the judicial functions are exercised by persons who have no judicial authority or power, and a man's life is taken, that is murder; for murder is putting a man to death without jurisdiction, or without any of those mitigating circumstances which reduce the crime of murdur to one of low degree. Thus in the case put by Lord Coke of a lieutenant having a commission of martial-law, who puts a man to death by martial-law in time of peace, that, says Lord Coke, is murder.

Law summoned by Cockburn.

"Again, on the second branch of the case, in which we take the legality of martial-law for granted, if you think that although there may have been a mistake and most grievous mistake, in condemning and sending this man to death, yet that the proceedings were done honestly and faithfully, and in what was believed to be due course of the administration of justice, again I say you

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1. Surendra Nath Roy, 5 B.L.R. 274 at p. 291.
2. *Per* North, C. J., in Bernardiston *v.* Some, Tay. Rep. 291; *er* Earle, C. J., in Kemp. *v.* Neville, 10 C.B. (N.S.) 523 at p. 547; Taaffe *v.* Lord Downes, 3 W.I.A. 36 at p. 39; Fray *v.* Sir Colin Blackburn, 3 B. & S. 67; Hammond *v.* Howell, 1 M. 84: O.A. 2 M. 218; Anderson *v.* Gorrie, 1 Q. B. 688.
3. Ferguson *v.* The Earl of Kimoul, 9 Cl. & F. 311; Miller *v.* Slore, 2 W. Bl. 1141.

ought not to harass the accused persons by sending them for trial to another tribunal."[1]

9. Civil and Criminal liability.—In the cases above cited, instances have been for the most part given of cases in which the Judges were proceeded against civilly. But the same principles which govern their civil liability also govern their criminal liability. The difference, if any, between the two cases, is one of degree and not of quality. So it is laid down in Bacon's Abridgment: "Any fraud or misconduct imputed to Magistrates in proceeding notwithstanding the issue of a *certiorari*, may be ground for criminal proceeding against them, and Lord Kenyon[2] said he believed there were instances in which a criminal information had been granted against Magistrates acting in Sessions. But these must have been instances of manifest oppression and gross abuse of power, for generally the justices are not punishable for what they do in Sessions."[3] Such was held to be the case where the Justices had caused a woman to be whipped for damning an older man under a statute which only applied to vagrants,[4] or where they corruptly refused to issue licenses to publications.[5] And the result would have been the same, even if, apart from corruption, they had acted from malevolence or perversity. So Ashurst, J., said in a case in which the Justices had discharged a vagrant who had been committed by another Justice, from mere caprice: "This, therefore, was gross misbehaviour in the defendants, which cannot be imputed to mistake or ignorance of law. And though they have denied generally that they acted from any interested motive in this business, yet that is not sufficient, for if they acted even from passion or opposition that is equally corrupt as if they acted from pecuniary considerations."[6]

Punishment for oppression and tyrannical partiality of Judges, etc.

The oppression and tyrannical partiality of Judges, Justices and other Magistrates in the administration, and under colour of their offices, may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence.[7] Thus, if a Justice of the Peace abuses the authority reposed in him by law, in order to gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information. But though a Justice of the Peace act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill-intention whatsoever, the Court will never punish him by the extraordinary course of an information, but will leave the party complaining to his ordinary remedy.[8] And whenever Justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might upon full and mature iuvestigation, be found strictly right, but from what motive it had proceeded whether from a dishonest, oppressive, or corrupt motive under which description fear and favour may generally be included, or from mistake or error. In the former case alone, they have become the subject of punishment.[9] So, if a Magistrate were to refuse bail in a bailable offence wilfully and in defiance of the law, he will be liable to a criminal prosecution.[10]

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1. Cockburn, pp. 124, 156.
2. Seton, 7 T. R. 373.
3. 4 Bac. Abr. 631.
4. Mather, 2 Barnardiston, 249.
5. Davis, 3 Burr. 1317; Halland, 1 T. R. 692.
6. Brooke, 2 T. R. 190.
7. 4 Black. 141.
8. 1 Black. 354, Note (17); Palmer, 2 Burr. 1162 : 1 Russ. Bk., Chap. XIV (5th Ed.) at p. 297.
9. *Per* Lord Tenterden, C. J., in Borrow, 2 B. & Ald. 434; *Ex parte* Fenton, 2 Ad. & E. 127 : Black., 354.
10. Badger, 4 Q. B. 468; Dogson, 9 A. & E. 704.

10. Previous sanction to prosecute.—The Code of Criminal Procedure provides that no Judge, Magistrate or public servant not removable save by or with the sanction of a State Government or the Central Government shall be prosecuted for any offence of which he is accused as such Judge, Magistrate or public servant without the previous sanction of Government having power to order his removal. Such Government may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.[1] The object of this provision is to prevent petty or vexatious prosecutions.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Act done pursuant to the judgment or order of Court.

SYNOPSIS

1. Analagous law.
2. Principle.
3. Requisites for exemption.
4. Meaning of words.
5. "Court of Justice."
6. "Order."
7. Protection of ministerial acts.
8. "In pursuance of" and "warranted by".
9. Latent and patent illegalities.
10. "Good faith."

1. Analogous law.—This section is a continuation of the last, and it is subject to the same rules. Its provisions should be compared with those of the Judical Officers' Protection Act, which is quoted here, so far as it is material for the purpose of the present section. The language of the Act and this section are not similar, but how far the two really differ will be presently considered. (see *post* para. No. 7). The clause under reference runs thus:

Judicial Officers' Protection Act.

"(1)....No officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."[2]

Police Act.

The Police Act lays down the following clause which confers a special protection upon police officers executing the orders of Magistrates:

"*Section* 43.—When any action or prosecution shall be brought or any proceedings held against any police officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate.

"Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate, and the defendant shall thereupon be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine:

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1. Section 197, Cr. P. C.
2. Act XVIII of 1850, Sec. 1.

"Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section."[1]

2. Principle.—To take property away from Court in accordance with the Court's order is not an offence apart from any exceptions created by Chapter IV of the Indian Penal Code.[2] Protection of judicial officers would be inadequate and incomplete, if though enjoining personal immunity, they may be attacked through their ministerial officers who have acted in obedience to their commands. The position of a ministerial officer, acting under the direction of a Judge, is not incompatible with that of a soldier obeying the commands of his commander. So Alison, in his *Principles of Criminal Law of Scotland*[3] writes: "The express command of a Magistrate or officer will exonerate an inferior officer or soldier unless the command be to do something plainly illegal, or beyond his known duty." If through gross ignorance, or neglect or design, a Judge or Magistrate pronounces an unlawful sentence, what shall be said of the officers and others who carry it into execution? If the order or warrant was plainly illegal, as for example to strangle a prisoner in jail, or to poison him or the like, certainly the mere possession of such a warrant will not prevent the officer who wickedly yields its obedience, from being held as party to the murder, and suffering for its commission. But on the other hand, if the error was in such a part of the proceedings as the officer entrusted with its execution had no opportunity of seeing and was not called upon in duty to examine, and if the warrant put in his hands be fair and in ordinary form, certainly he would not be answerable for any illegality or vice in the previous, and to him, inscrutable proceedings.

Protection of ministerial officers acting in obedience to judicial officers.

"The same distinction is applicable in the case of a soldier acting in obedience to the orders of his superior officer, with this additional circumstance in his favour, that he is not only in a much humbler station, and trained to more implicit obedience than a legal functionary, but subject to a peculiar and peremptory code of laws, armed with powers of extraordinary severity, for the express purpose of enforcing on his part the most implicit obedience to command. It will require, therefore, the very strongest case to subject a soldier to punishment for what he does in obedience to the distinct commands of his commanding officer. But still this privilege must have its limits; it is confined to what is commanded in the course of official duty, which plainly and evidently does not transgress its limits. For what if an officer were to command a private soldier to commit murder or to steal, or to aid him in a rape, or if he orders a file of soldiers to fire on an inoffensive multitude, certainly in none of these cases will the privates be exempt from punishment if they yield obedience to such criminal mandates."

Protection of soldiers acting in obedience to its command.

3. Requisites for exemption.—It will be noticed that (*a*) good faith, and (*b*) belief in the legality of the order are the only two requisites of an exemption from criminal liability under this section. Mistake of law may, therefore, be a good defence under this section, for in believing that an

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1. Act V of 1861, Sec. 43. For local variations, *see* the Madras District Police Act (Madras Act XXIV of 1859), Sec. 54; the Madras City Police Act (Madras Act III of 1888), Sec. 81; the Bombay City Police Act (Bombay V of 1902), Sec. 140 (3); the Bombay District Police Act (Bombay Act IV of 1890), Sec. 80 (3); Bombay Village Police Act (Bombay Act VIII of 1876), Sec. 20.
2. Moidin Kunhammad *v.* Ahmad Kutti Abdulla, A. I. R. 1933 Mad. 636 at p. 637: 145 I. C. 888.
3. P. 673.

order issued was legal, a person may be misled by a mistaken view of law as much as by a mistaken view of facts.

4. Meaning of words.—"*In pursuauce of, or which is warranted by the judgment or order,*" i. e. the act alone was either ordered by the Court or is justified by its order. "*If done whilst such judgment or order remains in force*": Suppose a warrant is issued for the arrest of a person or the attachment of his property, and while the bailiff is on his way to execution, the judgment of the Court is reversed. The bailieff does not know of it and cannot be communicated with. Is he protected under the section? Apparently not under this section, for the subsistence of the judgment is a *conditio sine qua non* for exemption. But he may be exempt under Sec. 76 or Sec. 79. "*Notwithstanding the Court may have had no jurisdiction*": The question raised is one of jurisdiction, and not propriety. A judicial order, if within jurisdiction, confers an absolute immunity upon persons commissioned to execute it, whatever may be said againstits propriety. It is only in the case of a judgment without jurisdiction that good faith and belief in its legality are essential to immunity. "*The Court had such jurisdiction,*" i.e. at the time of the judgment or order.

5. "Court of justice."—*See* Sec. 20, *supra.*

6. "Order."—For the protection of the section to be available, the order of the Court must be in writing, unless an oral order is authorised by law.

7. Protection of ministerial acts.—This section extends, as regards criminal prosecution to ministerial officers, the same immunity which they enjoy from civil liability under the Act of 1850.[1] Under that Act the immunity is confined to the execution of any warrant or order which under this section is extended to any thing done *in pursuance of, or which is warranted by the judgment or order.* The difference in language between the two statutes is noticeable not only because they both relate to the same subject but also because they are complementary safeguards against accountability of persons placed in positions of subordinate responsibility. Now ordinarily, it may be taken as a sound maxim, that a person's civil liability for a wrong is greater and not less than his criminal liability. If so, it follows that the Act of 1850 should be wider in its operation than the present section. But it is not. For under the language used by the two sections it may be that a person cannot be reached on the civil side, but still he may be proceeded against criminally For, under the Act of 1850 anything done in execution of any warrant or order protects the officer charged with its execution whether the warrant was or was not legal and whether it was issued with or without jurisdiction. But under this section the officer is not to the same extent protected against criminal prosecution for if the warrant was without jurisdiction it must be shown that "the person doing the act in good faith believed that the Court had such jurisdiction". But this need not be placed in bar of a civil suit. So it was held in an English case that the governor of a prison is protected in obeying a warrant of commitment, on its fact valid, though it may, if fact, be illegal.[2] So much appears to be deducible from the language of the Act itself. For it protects persons *bound* to execute legal warrants, who do any act "for the execution of any warrant which they would be bound to execute, if within the jurisdiction of the

Scope and extent of protection under this Code and Judicial Officers' Protection Act.

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1. Judicial Officers' Protection Act (Act XVIII of 1850).
2. Olliet *v.* Bessey, T. Jones R. 214; but Neuman, Gow, 97; Henderson *v.* Presto, 21 Q. B. D. 362.

person issuing the same". In other words, persons placed in habitual obedience to the lawful orders of others are entitled to presume that all orders emaating from them are lawful, and if any single order be illegal, they cannot be held to act at their peril. At the same time no subordinate, whatever his subordination, can be exonerated for doing an act palpably and apparently illegal. Having had actual notice of illegality or defective jurisdiction, he is bound to pause and not persist in an illegal pursuit.

Protection under Civil Act.

It is not necessary under the Civil Act that the officer should have been accustomed to execute orders of Courts. All that is necessary is that it should have been within the scope of his ordinary duties. If, for example, an orderly peon is employed as a bailiff, he is not entitled to exceptional protection. But this is not an ingredient in judging of the criminality of an act under this section, which approaches the question from a somewhat different standpoint. In the first place, while the Civil Act confines its protection only to "an officer of any Court or other person bound to execute the lawful warrants or order," the section is more general, and protects not only such persons but also the public at large—the test being the act and not the person, and the limit of criminal responsibility being determined not by the ordinary duties, but by the terms of the order and belief in its legality. For instance, a person may be awarded a decree declaring his right to maintain a police force. The Court may or may not have jurisdiction to pass such a decree, but if there was such a decree, and he believed in the jurisdiction of the Court he is entitled to enlist a police force, though, by so doing, he may contravene the law. So if a court pass a decree for possession of property or delivery of land and on motion or appeal the judgment-debtor obtains stay of execution, his resistance to execution by the decree-holder would be as legal as seizure in execution on behalf of the latter.

8. "In pursuance of" and "warranted by".—In this connection the words "in pursuance of" must be distinguished from "warranted by". The former imply an act directly authorised by the order, the latter an act which though not expressly authorised by it, follows from it, as a matter of course, or as a matter of legal or logical consequence. A warrant of arrest authorises the seizure of the person ordered to be arrested in pursuance thereof. If he escapes, his recapture again and again is warranted by it as a matter of necessity. Whether an act is warranted by, or is done in pursuance of an order, is a question, the answer to which must depend upon the construction of the order itself, and the legal incidents that may be attached to it. For instance, the warrant of a civil court, authorising the seizure of moveable property, must be read subject to the rule that a person executing any process under the Code of Civil Procedure directing or authorising the seizure of moveable property shall not enter any dwelling-house after sunest and before sunrise, or break open any outer door of a dwelling-house.[1] He has, therefore, no right to seize property of a third person, or in possession of a third person, in pursuance of such a warrant, which further does not warrant the breaking open the doors of a third person's house, or of the judgment-debtor except as and to the extent allowed by law.[2] If, therefore, a bailiff exceeds the power conferred upon him by the warrant and authorised by law, the party wronged may treat him as a trespasser, and avail himself of his right of private defence, or sue

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1. Section 271, Civil Procedure Code (Act XIV of 1882), now *see* Sec. 62, Act V of 1908.
2. Gazi, 7 B. H. C. R. 83.

him for recevery of damages."[1] So, since the judgment-debtor is exempt from arrest while attending a court, the protection being *eundo morando et redeundo*,[2] his arrest, while on his way to the Court in obedience to a citation to give evidence, and made within the precincts of a court and with some show of violence and in the sight of the Magistrate, could not be justified by reference to the section.[3] Indeed, the use of force is only in rare cases justified by the Civil Procedure Code; and whenever it is authorised, it must be used with discretion. In the absence of an express direction a bailiff has no right to use force, and if therefore, in executing a civil process he breaks open the gate of the judgment-debtor, he is guilty of mischief and may be proceeded against for it.[4] So again, since the jurisdiction to arrest is territorial, a person without jurisdiction cannot be illegally brought within jurisdiction and then arrested.[5] An officer charged with the duty to arrest must be in possession of his authority for under the Code of Criminal Procedure it is obligatory on him to notify the substance of the warrant to the person to be arrested and if so required to show him the warrant,[6] and the same rule would appear to apply to an arrest made in execution of a civil process.[7] If, therefore, a person attempts to arrest another under a warrant not in his possession, he may plead this section as a defence to a charge of wrongful confinement or wrongful restraint; but the person arrested has then also the right of private defence, and he cannot be punished, if he resists his seizure or escapes from custody,[8] In such cases, though the judgment or order may be lagal, and there may be no defect of jurisdiction, still the exemption does not apply because the act complained of was not done in pursuance of the judgment or order, nor was it warranted by it.

9. Latent and patent illegalities.—So under the Gambling Act,[9] the District Superintendents of Police and Magistrates, if satisfied on credible information, are empowered to authorise police officers of a prescribed rank to enter and search suspected gaming-houses. The receipt of credible information is a *sine qua non* of a legal search.[10] If the officer concerned issues a search-warrant without credible information, the warrant is defective,[11] but the officer executing it is protected. Those may be said to be cases of latent illegalities which no person in subordinate charge can be reasonably expected to canvass; where, however, the defect is patent and such as the exercise of a reasonable care may reveal, the case is different. For there is then no good faith. Indeed, in this connection it may be well to note that as there are different degrees of illegalities, so are there different grades of criminal liability. The judgment or order here referred to may be (*i*) illegal, or (*ii*) without jurisdiction. Its illegality may be either (*a*) patent, (*b*) latent and as regards jurisdiction, (*a*) it may have

Different degrees of illegalities and different grades of criminal liability.

1. Gazi, 7 B. H. C. R. 83; Damodhar *v.* Lall, 8 B. H. C. R. (A. G.) 177; Goma *v* Gokal Das, 3 Bom. 74; Raj Bullubh *v.* Issan Chunder, 7 W. R. 355; Sujjan *v.* Sariatulla, 12 W. R. 329; Kisharymohan *v* Hursook, I. L. R. 17 Cal. 436 (P. C.).
2. "While going, staying and returning."
3. Thakoordas *v.* Shunkar Roy, 3 W.R. 53.
4. Anderson *v.* McQueen, 7 W. R. 12.
5. Shearwood, 2 Tay. & Bell 71.
6. Section 80, Cr. P. C.
7. Amarnath, I. L. R. 5 All. 318.
8. *Ibid.*; Janki Persad, I. L. R. 3 All. 205; Abdul Gafur, I. L. R. 23 Cal. 896; Satis Chandra *v.* Jadunandan, I. L. R. 26 Cal. 748; Durga *v.* Nabin, I. L. R. 25 Cal. 274; H. Collville *v.* Kristo Kishore, I. L. R. 26 Cal. 746. The English law is identical. Codd *v.* Cobe, 1 Ex. D. 352. It would be otherwise in the case of an arrest by a police officer on a suspicion of theft. Vayankatrav, 7 B. H. C. R. 50.
9. Section 5, Act III of 1867.
10. Sbusookh, 2 N. W. P. H. C. R. 4762; Chunni Mull, (1871) P.R. No. 35; Sandhi *v.* Kanhya, (1876) p. R. No. 14; Kada, (1882) P. R. No. 7 (F.B.)
11. Banwari, (1895) P. R. No. 38; Vir. Singh, (1895) P. R. No. 59.

been issued by a court acting wholly without jurisdiction, or (*b*) having jurisdiction, it may have been irregularly or improperly exercised. These distinctions do not directly affect the question to be here considered; but their importance will be readily appreciated in cases arising out of resistance to lawful authority.[1]

10. "Good faith."—Lastly, the section contemplates cases in which the act lacks in *bona fide* belief in the jurisdiction of the Court. Criminal law protects persons acting in good faith. On the other hand, it makes no concession in favour of persons who act with their eyes open. In considering this question, regard must always be had to the nature of the act as well as to the position and education of the person acting. A jailor charged with the duty of carrying out the sentence of whipping, a form of punishment now abolished by the Abolition of Whipping Act, 44 of 1955, may be aware that the Magistrate had no jurisdiction to pass it. He is not then bound to execute his order, and if he does so, he acts at his own peril. On the other hand, a menial flagellator may plead his exoneration on the basis of this section. The exercise of good faith then depends not only on the nature of the act, but also upon the character of the actor. The greater the illegality the less is the chance of exoneration. But it is not all. For even a most flagrant act of illegality in a judgment or order may be unnoticed by a person ignorant of the language and too indolent to get it read. Such a person may lack "good faith" if he believed in jurisdiction without inquiry and without bestowing even causal attention. A nod is as good as a wink to such a blind person, and he cannot claim protection of law; *vigilantibus non dorimentibus jura subveniunt.*[2]

Exercise of good faith depends upon nature of act and character of actor.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of facr and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it.

Act done by a person justified or by mistake of fact believing himself justified by law.

Illustration

A secs *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons of apprehending murders in the act, seizes *A*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that *Z* was acting in self-defence.

SYNOPSIS

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3. Relative scope of Secs. 76 and 69.
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5. Applicability to offences under special or local laws.
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28. Justifiable force.
29. Private persons.

1. Sections 172—190, 223—227, 353.
2. "Laws come to the assistance of the vigilant, not of the sleepy."

30. Duty of a private person.
31. Arrest when justified.
32. Arrest by private person.
33. Detection and destruction of postal articles.
34. Acts done under civil process.
35. Other justifiable acts.
36. Cases.

1. Analogous law.—This section is closely analogous to Sec. 76 with which it should be read in order to understand its true significance. It is well to note that the same facts which exempt a person under that section are sufficient to exempt him here. The commentary under this section is, therefore, merely supplementary.

2. Scope.—A mistake of law could not justify accused's act within meaning of Sec. 79, Penal Code, but Sec. 79 is not exhaustive. There are cases in which intention and knowledge are ingredients of the offence and have to be established either by evidence or legal inference and which do not necessarily come within the ambit of this section.[1]

It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of Sec. 79 of the Indian Penal Code.[2]

3. Relative scope of Secs. 76 and 69.—Section 76 deals with cases in which a person acts in the belief that he is *bound* by law to act. This section deals with a case in which a person acts in the belief that he is *justified* by law. Otherwise, the two sections are identical. Cases in which a person feels justified by law are naturally more numerous and complicated than those in which the act is the result of a legal compulsion. This section, like Sec. 76, is generally worded, and protects not only acts justified but also justifiable by law in which case, however, the question of criminality does not arise, for what is legal cannot be criminal. The section then properly applies to cases in which a person acts in the belief that his act is justified by law but which is not.

4. Distinction between this section and Sec. 132, Cr. P. C.—This section is distinguishable from Sec. 132 of the Code of Criminal Procedure. It can only be applied only when all the facts are known, i.e. when the trial is over; Sec. 132, Cr. P. C., can only operate before the trial begins. Protection given by the present section is a protection against conviction; while the protection given by Sec. 132, Cr. P. C., is a protection against trial.[3]

5. Applicability to offences under special or local laws.—In a Bombay case,[4] the principles of this section were applied to an offence under a special Act, namely, the Forest Act. This was dissented from in a subsequent Madras case,[5] in which Sadasiva Aiyar, J., following a ruling of the same Court in *In re Penchul Reddy Kottur*,[6] observed : "I do not think that the principle of Sec. 79, I. P. C., should be applied to an offence created by the Forest Act for the protection of the Government revenue and of property belonging to Government. Section 79 itself cannot apply as the definition of 'offence' in Sec. 40 covers only 'a thing made punishable' by the Code except when the word is used in certain

Bombay view.

Madras view.

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1. Emperor *v.* Nanak Chand, A. I. R. 1943 Lah. 208 at p. 209: 52 P. L. R. 331 : 3 D. L. R. (Simla) 268.
2. State of Andhra Pradesh *v.* N. Venu Gopal, A. I. R. 1964 S. C. 33 at p. 37: (1964) 1 Andh. L. T. 31.
3. M. N. Schamanad *v.* M. N. Rama Rao, A. I. R. 1933 Mad. 268 at p. 269 : 34 Cr. L. J. 528.
4. Emperor *v.* Kasim Isub Sab, 15 I.C. 802. (1): 13 Cr. L. J. 530: 14 Bom. L. R. 365.
5. K. R. Lewis *v.* Emperor, I. L. R. 38 Mad. 773: 1 L. W. 132: 22 I. C. 747.
6. 9 I. C. 567: 12 Cr. L. J. 99.

sections which do not include Sec. 79." With all respect to the learned Judge, it is submitted that this view requires reconsideration. As observed by Almond, J. C., in *Abdul Aziz* v. *Emperor*,[1] "the learned Judge who tried the latter case appears to have misread Sec. 40 which states that in Chapter IV, Penal Code, the word 'offence' denotes a thing punishable under the Code or under special or local law. Section 79, Penal Code, comes within Chapter IV and, therefore, an offence to which Sec. 79, Penal Code, refers includes an offence under a local or special law." In this case Sec. 79 was applied to offence under the Punjab Pure Food Act—a local law. In *Bux Soo Meah Chowdhry* v. *The King*,[2] in which the offence was under rule 107-I of the Land Revenue Rule published under the authority of the Burma Land and Revenue Act—a local Act—Sec. 79, Penal Code, was not applied, not because the section had no application to the offence, but because there a was lack of "good faith" in the particular case. In recent case of the Orissa High Court,[3] it has been held that the general exception in Chapter IV of the Penal Code are applicable to offences under a special or local law like the Orissa Livestock (Control of Movement and Transactions) Order, 1947.

Peshawar view.

Rangoon view.

6. Meaning of words.—"*Justified by law*" : The word "law" is used here in its large sense as signifying both written and unwritten law. "*Mistake of fact*", "*Mistake of law*" for the meaning of which *see* Sec. 76. "*Believes himself to be justified by law*" : It is not necessary that the belief so entertained should be communicated to others. All that is necessary is that it should be entertained in the mind of the actor *at the time* of the performance of the act. This is essential, for belief *ex post facto* can have no effect upon its criminality.

7. Burden of proof.—This section embodies one of the general exceptions in the Code and the onus of showing that the section applies in his case is on the person who seeks to take advantage of it.[4] This burden is on him to satisfy that the conditions that could exonerate him, existed at the time when the offence was committed.[5]

8. "Good faith."—Section 79 requires that the party pleading exemption should have acted in good faith and the definition of good faith involves due care and attention.[6]

In *Bux Soo Meah Chowdry* v. *The King*,[7] the question was whether the applicant permitted his coolies to work in an area which was outside the licensed area and secondly, whether in so permitting them and abetting them in the work they were doing he was acting without due care and attention having regard to the limits of the licensed area, the Rangoon High Court observed as follows :

> "Absence of good faith in this connexion, and within the meaning of the Penal Code (Secs. 52 and 79), means simply carelessness or negligence. Absence of good faith, under the General Clauses Act, means 'want of honesty'....But it is fair to say, in dismissing this

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1. A. I. R. 1943 Pesh. 72 at p. 73: 45 Cr. L. J. 95: 209 I. C. 540.
2. A. I. R. 1938 Rang. 350 at pp. 351,352: 39 Cr. L. J. 985 : 178 I. C. 121.
3. King *v.* Tustipada Mandal, A. I. R. 1951 Orissa 284 at p. 288: I. L. R. (1950) Cut. 75 : 52 Cr. L. J. 837.
4. Nirmal Kumar Bhowmik *v.* Emperor, A. I. R. 1938 Cal. 551 at p. 553 : 177 I. C. 29: 42 C. W. N. 896: 39 Cr. L. J. 835.
5. King *v.* Tustipada Mandal, A. I. R. 1951 Orissa 284 at p. 290.
6. Jwala Prasad *v.* Emperor, A. I. R. 1934 All. 331at p. 332 : 35 Cr. L. J. 677 (2): 148 I. C. 351.
7. A. I. R. 1938 Rang. 350 at pp. 351, 352

application that it must be dismissed not because of any fraudulent action on his part which is no part of the charge against him but because of his want of due care and attention in neglecting to see that the area which his coolies worked over was that over which Gul Mohd. was licensed to do work."

Whenever and wherever there is a mistake of fact on which is founded a belief in good faith of justification by law of an act, the requisite state of mind that would make the author of the act guilty is absent.[1]

9. Acts justified by law.—As remarked before, acts justified by law form by far the most complicated and numerous cases in criminal law. In England, the powers of Government officers depend partly upon statute and partly upon common law. In India, however, where the laws have been mostly codified, Government servants derive their powers mainly from statute law, though they still retain some powers not derived from statute. This is specially so in the case of superior officers of the State possessing some of the attributes of sovereignty, whose acts cannot be canvassed in a criminal court because they are done by virtue of a power which stands above the law.

10. Act of State.—A sovereign may possess rights which may be amenable to the jurisdiction and control of the Municipal Courts and in respect of them it would be no defence to say that they were acts of State.[2] On the other hand, the Municipal Courts cannot arrogate to themselves any jurisdiction over the legitimate exercise of sovereign rights against which the subject may have a remedy—as will be seen in the sequel—but that is not in the Civil Court. So far it is clear and universally conceded. But it does not advance the discussion much further. We have still to ascertain the exact nature and extent of the two classes of rights, for upon that depends the practical solution of the question. There are, no doubt, certain acts of the sovereign power which would be obviously regarded as acts of State. Such would be an act of the sovereign power, in relation to peace or war, or an act done by it as being absolutely necessary for the public safety.[3] As the Privy Council observed : "The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."[4]

Privy Council's view.

But there is no such thing as an act of State between the sovereign and its citizens. Any seizure of their property or of their person to be legal, must be justified by law. If otherwise, Municipal Courts have the jurisdiction to canvass the propriety and justice of the order and to afford redress in case of impropriety, injustice or illegality. And for this purpose the State has no advantage over private subject, for both must appeal to the same law

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1. King *v.* Tustipada Mandal, A. I. R. 1951 Orissa 284 at p. 289; *see* also Benda Kui *v.* Emperor, A. I. R. 1943 Pat. 64; Bahadur Khan *v.* Emperor, A. I. R. 1944 Pesh. 30.
2. The term "act of State" has been used in two senses—in one sense as meaning the lawful act of the executive Government and its servants; in the other and narrower sense, as denoting warlike and other acts done by the authority of the Government affecting rights of aliens out of its territories.
3. *Cf.* Secretary of State *v.* Kamachee, 7 M. I.A. 475 at p. 501. The view taken by the Supreme Court at Madras is not affected by fact that their judgment was reversed by the Privy Council—*Ibid.*, p. 529.
4. *Per* Lord Kingsdown in Secretary of State *v.* Kamachee, 7 M. I. A. 476 at p. 529.

Stephen's view.

for the justification of their act or conduct. So Stephen says : "Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals."[1]

Where then the legality of an act is called in question against a servant of the State by a citizen, it is not enough for the defendant to plead that it was an act of State; he must also show that it was lawful in accordance with the law of the country in which the act complained of was committed,[2] any unlawful interference with the person and property of the subject being actionable.[3]

So far, then, we have dealt with the personal exemptions of executive officers of Government. The liability of judicial officers to criminal prosecution has already been discussed elsewhere (*see* Sec. 77).

11. Members of armed forces.—The Indian Army Act (VIII of 1911) as amended by the Army Act (XLVI of 1950), the Indian Air Force Act (XIV of 1932) and the Indian Navy (Discipline Act) (XXXIV of 1934) which respectively deal with the control and discipline of the members of the Indian Army, Air and Naval Forces, provide that the members of these Forces are triable exclusively by courts-martial in respect of purely "military offences," while they are triable both by the ordinary Courts as well as by courts-martial in respect of offences under the ordinary law.[4]

12. Suspension of civil law.—Turning next to the exemption of persons from criminal prosecution on account of justifiable acts, the question may be regarded from the following standpoints : (*i*) when the act is defended, not under the ordinary law, but on the ground of emergency; (*ii*) when the act is defended under the ordinary law, but under exceptional circumstances; and (*iii*) when it is defended on the ground of private defence. As regards justification on the ground of public emergency, sufficient has been said before as to when the use of force is justifiable for the suppression of lawlessness in a given locality. But the question here is, in what circumstances and how far is the suspension of ordinary law, and its supersession by military law justifiable. Now, martial-law is neither more nor less than the will of the General who commands the army; in fact, martial-law means no law at all. Therefore, the General who declares martial-law, and commands that it shall be carried into execution, is bound to lay down the rules, regulations and limits according to which his will is to be carried out.

Justification for suspension of civil law by military law.

Whenever a country is in open rebellion and the power of the civil authorities cannot be exercised, and the country is in the occupation of the military force, the suspension of civil law follows as a matter of course, for there can be no law when the power to enforce it is gone. In such a case, therefore, resort must be had to martial-law, in its widest sense.

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1. Stephen's Commentaries, p. 65. But the Sovereign possesses the power of dismissing its servants at pleasure on public grounds, and the persons so dismised have no redress, though under the same circumstances they might have had redress, if their employer did not wield sovereign powers. This is a prerogative of the Crown justified on the ground of public necessity. It could scarcely be designated an act of State. Grant *v.* Secretary of State, 2 C. P. D. 445 at pp. 460, 463; Chatterton *v.* Secretary of State, (1895) 2 Q. B. 189; Shenton *v.* Smith, (1895) A. C. 229; Dunn *v.* The Queen, (1896) 1 Q. B. 116; Mitchel *v.* The Queen, (1896) 1 Q. B. 1321 (foonote); Gould *v.* Stuart, (1896) A. C. 575; Jehangir *v.* Secretary of State, I. L. R. 27 Bom. 189 at p. 213.
2. Carr *v.* Francis Time & Co., (1902) A.C. 176.
3. Fabrigs *v.* Mostyn, 20 St. Tr. 229; Gubik *v.* Garrington, 18 St. Tr. 1029; Walker *v.* Baird, (1892) A. C. 491.
4. *Cf.* A.W. Meads *v.* King-Emperor, A.I.R. 1945 F. C. 21: 49 C. W. N. (F. R.) 23: 79 C. L. J. 81, affirmed in A. I. R. 1948 P. C. 156.

13. Martial-law when justifiable.—"The proclamation of martial-law is in fact no more than a declaration that, under circumstances of urgent public danger, the law is for a time suspended, and that for the safety of the State, the Government deems it necessary to set aside the ordinary rules of law by military force and to proceed summarily to put down the rebellion, or punish those who are concerned in it. Courts-martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions by instituting an enquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion. But courts-martial so assembled have nothing in common with the tribunals bearing the same name which, under the Mutiny Act, take cognizance of miltary offences. Courts-martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record, which can be enforced by the military authorities, which is not the case with courts-martial assembled for the punishment of rebels, under proclamation of martial-law, without the sanction of any positive enactment. Sentences of such Courts add nothing to the legality of the punishments inflicted, and serve only to show that these punishments have not been inflicted, without due regard to the guilt of those who were subjected to them. Accordingly, it is the practice where martial-law has been used, and punishments have been inflicted under it, that when the danger is over, the Legislature should be applied to for laws of indemnity, for the security of those by whom these powers have been exercised, and for whom there is no legal warrant, however necessary it may have been to assume them."[1]

Channappa Shantriappa v. *Emperor*[2] reviewed the authorities on the subject of martial-law and laid down the following propositions :

Propositions laid down in *Channappa* v. *Emperor*.

"*Firstly*, a state of war and armed rebellion or insurrection must exist and not merely a state of riot which could be put down with the aid of the military and other citizens. *Secondly*, neither the military, nor citizens can refuse or impose conditions on such aid. *Thirdly*, the necessity must be proved, not merely of recourse to the military, but also of the impossibility of functioning of the ordinary civil laws and the necessity of their abolition for the time being, and the Courts have power to go into the question whether such necessity existed. *Fourthly*, it is only when the existence of war, whether against foreigners or rebels, and necessity are established, that the jurisdiction of the Courts ceases. *Fifthly*, the powers exercised by the military commonly but incorrectly known 'as martial-law,' in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal, and therefore, need Acts of Indemnity, if they are not to be questioned."

14. Power to proclaim martial-law.—Article 34 of the Indian Constitution refers to martial-law and Act of Indemnity. There is no specific legislative entry relating to martial-law. Entry I of List II (State List) which relates to "public order" excludes from the expression "the use of naval, military or air forces or other armed forces of the Union in aid of the civil power". This exception together with the residuary Entry 9 of List I

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1. Finlayson's *Review of Authorities as to Suppression of Riot or Rebellion*, p. 96.
2. A.I.R. 1931 Bom. 57 at p. 63: I.L.R. 55 Bom. 263: 32 Bom. L. R. 1613 (S. B.): 32 Cr. L. J. 403.

(Union List) shows that the power to declare martial-law or to use the armed forces to establish civil order is a legislative power belonging exclusively to Parliament. Article 352 of the Constitution empowers the President to proclaim a state of emergency and under Art. 123, if both the Houses of Parliament are not in session, the President "may promulgate such Ordinances as the circumstances appear to him to require".

15. General result.—The decided cases[1] establish three propositions of law, namely, (*i*) that the Governor has power in case of rebellion to suspend the operation of civil law, and to place the country under martial-law, (*ii*) that an Act may be warranted by martial-law when it is unjustifiable by civil law, and (*iii*) that though on the restoration of peace an Act of Indemnity is ordinarily passed legalizing all acts committed during the period of disturbance, and though such an Act is in ordinary cases, sufficient to absolve all persons from criminal or civil liability, still it is not a sufficient answer to an act of gross oppression or brutal barbarity.

Scope of Art. 33 of the Constitution.

Under Art. 33 of the Constitution, Parliament may by law determine to what extent any of the fundamental rights conferred by Part III of the Constitution shall, in their application to the members of the armed forces or the forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them. The rights of private persons during the existence of an insurrection do not necessarily involve suspension of all rights of person and property. They exist, as they existed before, but they are liable to be superseded by the higher interests of society, for the attainment of which they may be even encroached upon or ignored : *salus populi est supreme lex*.[2] The position in such a case is not incomparable to that of a house on fire, when no one denies that it would be perfectly right to pull down neighbouring houses to arrest the progress of the fire. It is, indeed, the natural deduction from the primary law of society, based, as some philosophers term it, on the original compact, that every member of society shall in the case of necessity, subordinate his individual welfare to the welfare of the community. So there are many cases in which individuals sustain injuries for which the law gives no action, as where private houses are pulled down or bulwarks raised on private property for the preservation and defence of the kingdom against the King's enemies.[3] So long, therefore, as the acts of the Executive Government were directed to the maintenance of order and preservation of peace, the private subject has no remedy, and it would be a sufficient defence to say that the act was considered in the circumstances justifiable. Nor can the conduct of those arraigned acts for acts done on the spur of the moment and at a time of great national danger be judged by the standard applicable and applied to ordinary cases, though there are naturally limits to this doctrine of irresponsibility, but those limits can only be reached if there is shown to be the presence of malice, cruelty or inhumanity manifestly unnecessary or uncalled for.[4]

Scope of Art. 34 of the Constitution.

16. Act of indemnity.—In order to prevent litigation of this nature it is the usual practice of all States to pass an Act of "grace, and general pardon, indemnity and oblivion," on the restoration of peace. "The protection of military men and others against actions or prosecutions in respect of unlawful

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1. Phillips *v.* Eyre, L. R. 6 Q. B. 1 at pp. 16, 17, affirming L. R. 4 Q. B. 225; Wright *v.* Fitzgerald, 27 St. Tr. 759 at p. 765.
2. "The safety of people is the supreme law."
3. Carter *v.* Thomas, (1893) 1 Q. B. 673.
4. *Per* Bullar, J., in Plate Glass Co. *v.* Meredith, 4 T. R. 797; *see* Sec. 81, Ill. (*b*)

acts done during a time of war, *bona fide*, and in the service of the country, is an Act of Indemnity."[1] Article 34 of the Indian Constitution which provides for the protection of persons engaged in the maintenance or restoration of order runs as follows :

Restriction on rights conferred by this Part while martial-law is in force in any area.

"Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial-law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial-law in such area."

It may be noted that the Article provides for the protection not only of military officers but also of "any person in the service of the Union or of a State" or "any other person". Such on "Act Indemnity" has necessarily retrospective effect and is a sufficient defence to all actions, whether civil or criminal, for liability arising under the general law.[2] Usually, Acts of Indemnity protect only *bona fide* acts and not any wanton acts.[3] But once an Indemnity Act is duly passed, it is not for the Municipal Courts to enquire into its propriety.

17. Authority of parents and persons in loco parentis.—There remain other acts which may be justified by law. A moderate chastisement is, for instance, justifiable in the case of parents and persons in *loco parentis*. It is customary in this country *de jure maritiss*. The correction in each case must be administered to the person placed as child, wife, pupil or apprentice, and in every case it must be moderate and inflicted with discretion. As Cockburn,

Cockburn's observation.

C. J., said in a case : "A parent, or schoolmaster, who for this purpose represents the parents, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it is administered for the gratification of passion or of rage, or if it be immoderate and excessive in its degree, or if it be protracted beyond the child's power of endurance, or with an instrument unfitted for the purpose, and calculated to produce danger to life, or limb, in all such cases the violence is unlawful, and if death ensue, it will be culpable homicide."[4] This was the case of a schoolmaster who had caused the death of a boy by excessive beating. In another case, where the father beat a child two and a half years old with a strap, of which he died, Martin, B., said : "The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two and a half years old. Although a slight slap may lawfully be given to an infant by its mother, more violent treatment of an infant by its father would not be justifiable; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner."[5]

18. Limits of authority.—The question what degree of chastisement is appropriate depends upon the circumstances of each case. A father whose son

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1. Dicey, quoted in Channappa's case, A.I.R. 1931 Bom. 57 at p. 65.
2. Phillips *v.* Eyre, L. R. (1869) 4 Q. B. 255; *see* also Channappa Shantirappa *v.* Emperor, A. I. R. 1931 Bom. 57.
3. *Ibid*; *see* also Wade & Phillips, p. 372; Stephen's Commentaries, Vol. 1, p. 572.
4. Hopley, 2 F. & F. 202.
5. Griffin, 11 Cox. C. C. 402.

had got into the habit of stealing, questioned him as to a theft clearly proved against him. He resolutely denied it, whereupon he beat him in a passion with a rope, of which he died. The father was struck with horror at the consequence, as his intention was only to punish him so as to cure him of his wickedness, and it was held that though the beating was justifiable it had been immoderated and the father was convicted of manslaughter.[1] In another case a girl, aged 15, was placed in the care of her aunt who made her work 14 or 15 hours a day. She was suffering from consumption, and could not turn out the requisite work, whereupon the prisoner gave her a severe beating, saying that she was sure that she was acting the hypocrite and shamming illness, and that she was not unwell. The surgeon said that death was due to consumption accelerated by her ill-treatment. And the question was whether the prisoner could not be convicted of murder, but the Court considered that having regard to the fact that the prisoner believed her to be sound, the offence was only manslaughter.[2] In a similar case the same view was taken of a master who had by privation and ill-treatment compassed the death of an apprentice placed under his care, as the ill-treatment was held to be prompted by a desire to cure the apprentice of his lazy and dirty habits.[3] So, again, where a person locked up his idiot brother in his house and kept him in a dark room without sufficient warmth or clothing, he was held not guilty of assault or imprisonment.[4] These are all cases in which a person placed in civil domination over another exercises his authority for the correction of another, and for that purpose uses force. In such cases, the questions to be considered are : (*i*) was the force employed reasonable ? (*ii*) was it necessary ? and (*iii*) was it used for correction ? If these questions are answered in the affirmative, it is no offence if from any unforeseen cause death should ensue.

Example.

19. Schoolmaster's authority.—The authority of the schoolmaster to inflict reasonable corporal punishment is not limited to offences committed by the pupil upon the premises of the school, but may extend to acts done by such pupil while on the way to and from school. The law on the subject has been thus lucidly expounded by Collins, J., who said : "In my opinion the purpose with which the parental authority is delegated to the schoolmaster who is entrusted with the bringing up and discipline of the child, must, to some extent, include an authority over the child while he is outside the four walls of the school. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right. Very grave consequences would result if it were held that the parent's authority was exclusive up to the door of the school, and that then and only then, the master's authority commenced; it would be a most anomalous result to hold that in such a case as the present the boy who had been assaulted had no remedy by complaint to his master, who could punish the assailant by a thrashing, but must go before the Magistrate to enforce a (?) between them as citizens."[5]

Law expounded by Collins, J.

In contrast to these cases, may be mentioned those in which the persons in authority not only do not obtain protection of law for their acts, but their position rather aggravates the crime. A master taking indecent liberties with his female pupil aged 13 would be guilty of assault notwithstanding his position and intention.[6] Cases could be multiplied if it were necessary, but they all illustrate the same principle, namely, that the act

Limit of his authority.

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1. Connor, 7 C. & R. 438.
2. Cheseman, 7 C. & P. 455.
3. Self, 1 East P. C. 226 and 227.
4. Smith, 2 C. & P. 449.
5. Cleary *v.* Booth, (1893) 1 Q.B. 465 at pp. 468, 469.
6. Nichol, R. & R. 130; M'Gavarson, B. C. & R. 320.

is only justifiable so long as it is a correction; when it is used for any other purposes it ceases to have the protection of law.

20. The authority of the Captain at sea.—The right of the Captain of a ship at sea to inflict corporal punishment upon a seaman for mutinous conduct rests upon the law of necessity. Of course, the predicament of a Captain placed before a mutinous crew is not better but worse than that of a Governor of a rebellious country. For while the Governor may consult his council of war and obtain protection from elsewhere, the Captain of a ship is placed in a position of imminent peril, and cut off as he is from the rest of world, he has to act on his own jugment and under circumstances when the safety of his vessel and himself is all in all to him. His conduct is, therefore, to be judged not by the ordinary standard of men who act in cold blood, not of those who judge after the event, but a reasonable man placed under the same predicament as the Captain.

21. Arrest, right of.—Another case for legal justification arises where a person circumscribes the liberty of another in the real or supposed exercise of a power conferred on him by law. The right of arrest is ordinarily possessed by police officers in cognizable cases,[1] that is to say, cases in which a police officer within or without the presidency town may in accordance with the Second Schedule of the Code of Criminal Procedure or under any law for the time being in force, arrest without warrant.[2] So far as regards the offences dealt with in this Code, the Code of Criminal Procedure divides them for this purpose into cognizable or non-cognizable, the difference between the two classes being that while a police officer may on his own responsibility arrest in the one case, he cannot do so in the other. In the latter case he can only arrest on a magisterial warrant. The Criminal Procedure Code still deals with a class of cases in which any person may arrest with or without a warrant. In the case of offences under a special or local law, police officers and others also possess similar power of arrest.

22. Police officers.—A police officer may arrest without a warrant in the case of the following offences under the Penal Code :

Secs.	109—120 (if the substantive offences are cognizable).
Secs.	131—136, 138, 140, 143—148.
Sec.	149 (if the offence committed is cognizable).
Secs.	150—153.
Secs.	170, 171.
Secs.	212, 216, 216-A.
Secs.	224, 225, 225-B, 226.
Secs.	231, 363-A.
Secs.	269, 270, 277, 279—283, 285, 286, 289, 291—294, 295—297.
Secs.	302—311, 317, 318.
Secs.	324, 333, 335—344, 346, 348.
Secs.	353, 354, 356, 357, 363—369, 371, 374.
Secs.	376 (rape on a person other than wife, 377).
Secs.	379—382, 392—402.
Secs.	406—414.
Secs.	419, 420.
Secs.	428—433, 435—440.
Secs.	447—462.
Secs.	467—471.

In the case of offences under other laws a police officer may arrest a person without warrant, if the offence is punishable with death, imprisonment for life or imprisonment for three years or upwards. In any other case, the police cannot arrest without a warrant.

Any police officer may without an order from a Magistrate, and without a warrant also arrest persons mentioned in Sec. 54 of the Criminal Procedure Code.

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1. Section 4 (*f*), Cr. P. C.
2. *Ibid.*

Similar powers of arrest are given to officers-in-charge of police stations under Secs. 54 and 55 of the Criminal Procedure Code.

A person committing a non-cognizable offence in the presence of a police officer may be arrested if on demand he refuses to give, or gives a false name and residence till the true name and residence have been ascertained.[1]

Police officers also possess power of arrest without warrant under certain special and local laws.[2]

23. Forest officers.—Forest officers are also empowered to arrest a person "reasonably suspected of having been concerned in any forest offence punishable with imprisonment for one month or upward if such person refuses to give his name and residence, or gives a name or residence which there is reason to believe to be false, or if there is reason to believe he will abscond."[3]

24. Limitation on the power of arrest.—As regards the power of the police, it will be observed that they have the absolute power of arrest in a cognizable case, but this power, though plenary, has to be exercised with discrimination. There must be at least a reasonable complaint or suspicion against a person of the commission of a non-bailable offence before he could be placed under restraint. It seems to be generally supposed, and the supposition seems to be generally acted upon, that police officers, in making enquiries into criminal cases are limited by their own discretion as to what persons they may arrest and detain in custody. But so far from this being the case, the powers of a police officer to arrest without a warrant are strictly defined by the Code of Criminal Procedure.

25. Some grounds required.—Under Sec. 54 of the Criminal Procedure Code, the police are empowered to arrest a person reasonably suspected of being in possession of stolen property. Where it is so, a policeman must allege and prove grounds for his suspicions, otherwise, he is not protected under this section. Where, for instance, a policeman questioned a person carrying clothes in a bag and upon receiving replies which he erroneously believed to be false, arrested him on a charge of being in possession of stolen goods, the Court held that the arrest was justifiable under this section.[4] But the same defence could not be availed of by a policeman who seeing a horse openly tied up without any attempt at concealment, at once jumped to the conclusion that it was his father's missing horse, and who thereupon at once arrested the owner and the person from whom he had purchased it; though as a matter of fact the lost horse had been previously found in another place.[5] This may be distinguished from the last on the ground that, while in the one case there was an enquiry and the exercise of some judgment, in the other case there was no inquiry at all, and therefere, no fact elicited

Policeman to avail protection must allege and prove his grounds of belief.

1. Section 57, Cr. P. C.
2. Arms Act (Act XI of 1878), Secs. 12; Cantonments Act (Act XIII of 1889), Sec. 15; Criminal Tribes Act (Act XXVII of 1871), Secs. 20, 26; Cruelty to Animals Act (Bengal Act III of 1869), Sec. 1; Europeans Vagrancy Act (Act XXII of 1874), Sec. 19; Excise Act (Act IX of 1881), Sec. 27; Emigration Act (Act XXI of 1883), Secs. 82; Explosives Act (Act IV of 1884), Sec. 13; Fisheries Act (Act IV of 1897), Sec. 7; Forest Act (Act V of 1882) Sec. 51; Railways Act (Act IX of 1890, Sec. 13; Public Gambling Act (Act III of 1867), Sec. 13; Reformatory Act (Act VIII of 1897), Sec. 24; Salt Act (Bengal Act VIII of 1864), Sec. 24; Madras Act (IV of 1889), Sec. 49; Bombay Act (II of 1890), Sec. 39.
3. Act V of 1882, Sec. 51.
4. Bhawoo, I. L. R. 12 Bom. 377; *see* for a similar case Lawrence *v.* Hedger, 3 Taunt. 14.
5. Sheo Surun *v.* Mohd. Fasle, 10 W. R. 20.

for the formation of a judgment. This principle may be aptly illustrated by the case of the court-peon who went with two of the decree-holder's men to arrest one *M*. A *palki* with closed doors was noticed to be coming out of male apartment of *M*'s house, whereupon the peon intercepted it and examined it in spite of the protests of its attendants. The peon being prosecuted under Sec. 341, the Court held this section applicable on the ground that the coming of the *palki* from the direction of the male apartments of *M* gave the peon some reason to believe that it contained *M* who was trying to evade his arrest.[1]

While the police possess abundant power of arrest, they are not free to choose their own procedure for effecting an arrest. The right procedure is laid down in Secs. 46, 47, 48 and 50 of the Code of Criminal Procedure which must be strictly followed.

26. Execution of warrant, how protected.—As regards the protection of the police acting under a warrant, police officers are doubly protected. For not only are they protected under this section, but they have been exempted from criminal responsibility by the Police Act.[2]

27. Forcing doors.—While a man's house is his own castle, it cannot be used for harbouring criminals, and so in England as well as in this country, the law has been and is that "where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before mentioned having been previously made".[3] So a constable may break open the door to keep the peace if a felony is imminent though not committed as if there be an affray in a house with fear of bloodshed. "Where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence, fly to a house, and are immediately pursued by him, and he is not allowed to enter—in order to suppress the affray in the first case or to apprehend the affrayers in either case," the house may be broken open.[4]

28. Justifiable force.—The amount of force that may justifiably be used to effect an arrest by a police officer is defined by Sec. 46 of the Criminal Procedure Code, which lays down that in the case of heinous offenders the police have the right of arresting a man dead or alive, but in other cases the police have no right to cause death in effecting the arrest. In either case, the police must not use more force than is necessary to effect the arrest, and in judging of what is the proper exercise of force, the question would be whether the means employed to stop the fugitive were such as an ordinary prudent man would make use of who had no intention of doing any serious injury.[5] Merely excessive use of force, without malice, is not however criminal, though it may not be civilly excusable.[6] And while the Criminal Procedure Code condemns use of excessive force, or force resulting in death, still that section does not deprive the police of their right of private defence in exercise of which even death may be caused,[7] though the causing of death would be otherwise

Cr. P. C. condemns use of excessive force.

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1. Kanailal Gowala, I. L. R. 24 Cal. 885.
2. Act V of 1861, Sec. 43 : for similar provisions in the other local Police Acts, *see* under Section 78.
3. Foster, Cr. L. 320.
4. 2 Hawk., P. C. 136.
5. Protab Chowkidar, 2 W. R. 9.
6. Budrool Hossein, 2 W. R. 51.
7. Section 100, *post*.

unjustifiable. Such a case may arise where the police encounter resistance, in which case they are entitled to repeal force by force. Their first duty is to effect an arrest, and they are bound to effect it whatever resistance they may receive. They would be guilty of cowardice and a grave dereliction of duty if upon a mere show of resistance they desisted from arrest. They are employed to apprehend criminals, and it is their duty to apprehend them at the risk of their life. In this respect English law is even more stringent, for it recognizes the right of the police even to kill the felon if he cannot be arrested alive.[1] But the right to kill is limited in this country to only offenders charged with offences punishable with death or imprisonment for life, that is to say, offences under Secs. 121, 132, 194, 302, 303, 305 and 396, which are punishable with death; and Secs. 121, 121-A, 122, 124-A, 125, 126, 130, 132, 194, 195, 222, 225, 232, 238, 255, 302, 304, 305, 307, 311, 313, 314, 329, 364, 371, 376, 377, 388, 389, 394, 396, 400, 409, 412, 413, 436, 438, 449, 459, 467, 472, 474, 475 and 477, which are punishable with imprisonment for life.

English law.

29. Private persons.—There are cases in which private persons may exercise the right of arrest.[2] Village watchman or chaukidars are not police officers within the meaning of the Criminal Procedure Code, and they have, therefore, no greater power of arrest than private persons.[3]

30. Duty of a private person.—It will be observed that there is no law under which a private person is bound to discharge the same duties as the Police. Under Sec. 42 he is bound to *assist* a Magistrate or police officer reasonably *demanding* his aid. Under Sec. 43, it is optional with him to assist or not in cases provided by that section. Under Sec. 59 it is equally optional with him to arrest a person committing an offence as therein described. In no case is the private person then entitled to play the policeman with an offender, his duties being merely to assist the police if so required, or so disposed. In this respect English law would appear to differ. For under that law, a private person has the same right of arresting a felon as the police, the only difference between their rights being that while the police may justify a wrongful arrest upon a reasonable suspicion, a private person cannot do so but must show a felony committed.[4] And in the case of death in capture he will have moreover to show not only that the felony was committed, but that the person killed was felon.[5] With respect to the right of a private person to arrest in the case of misdemeanour, the rule has been thus stated by Cockburn, C. J.: "Where anyone is found actually committing an offence, it is not necessary to wait till a warrant can be obtained if the arrest is effected actually on the spot, and the prisoner is forthwith brought before a Magistrate. It seems to be sometimes supposed that the right of private persons to arrest an offender committing misdemeanour is limited to those misdemeanours which partake of the nature of a breach of the peace. But the more correct view appears to be that, excepting such crimes as consist of mere omission, or non-feasance, e. g. neglecting to provide one's family with food, there is no distinction

Difference under English and Indian law.

1. 1 Hale P. C. 489, 490 : 1 Hawk., P. C. 81 : 1 East P.C. 293 at p. 300; Foster, Cr. L. 271.
2. Sections 41, 43, 59, Cr. P.C.
3. Kallu, I. L. R. 3 All. 60 ; Kalai, I. L. R. 27 Gal. 366 ; *cf.* Sec. 45, Cr. P. C.
4. Samuel *v.* Payne, 1 Dougl., 359; Beckwith *v.* Philby, 6 B. & C. 637 ; Davis *v.* Russell, 5 Bing. 344.
5. 2 Hale P. C. 88 : 1 East P. C. 300; Foster Cr. L. 318 : 1 Russ. 713.

between one misdemeanour and another. In fact, all misdemeanours, with the possible exception of perjury and forgery, are breaches of the King's or Queen's peace, as appears from the old forms of indictments *contra pacem*."[1]

31. Arrest when justified.—In order to justify an arrest, the police must show one of two things, *first*, that the prisoner had committed the offence, or *secondly*, that the person arresting knew or believed at the time that the person arrested had committed the offence. A constable was employed to guard a corpse from which wood had been stolen, and for this purpose he carried a loaded gun. He saw the complainant coming out of the copse carrying stolen wood which of itself was a misdemeanour and challenged him, whereupon he ran away constable finding no other means of bringing him to justice fired and wounded him in the leg, for which he was indicted. It, however, appeared that the prisoner had been twice before convicted of stealing wood which aggravated his theft to a felony[2] and which, if known to the constable, would have justified the act. But Erle, J., told the jury that neither the belief of the constable, that it was his duty to fire, if he could not otherwise apprehend the prosecutor, nor the alleged felony unknown to him at the time, constituted such justification, and this view was confirmed on appeal on the ground that though the act of the prisoner amounted to a felony, still it was no justification for the shooting as the constable did not know of it at the time.[3] But where a person was indicted for wounding a constable with intent to prevent the lawful apprehension of himself, Talfour, J., held that to support the charge it was sufficient that the prisoner was lawfully apprehended, and it was immaterial whether the prisoner believed his apprehension to be lawful.[4] Whether apprehension in a given case was or was not lawful depends upon the facts of each case. On an indictment for wounding with intent to disable, it appeared that the prosecutor was a sergeant of police and the prisoner a constable under him and that after some alteration with him, the prisoner had struck him, and fell when attempting to strike him a second time. The prosecutor then went away for assistance, and returned to the prisoner's house with two police constables, when the prisoner was not at home; they returned again in two hours and saw him, and the prosecutor told him he must go with him to the station, and the prosecutor attempted to take hold of him, whereupon the prisoner inflicted a severe wound upon him; and the jury found him guilty of wounding with intent to prevent his apprehension. Upon a case received, it was held that the apprehension was not lawful; for the assault was committed at another time, and there was no probability of its being renewed.[5]

Two principles.

Examples.

32. Arrest by private person.—The illustration appended to this section exemplifies the operation of this section in the case of private persons effecting an arrest in accordance with the rules of the Procedure Code. The right of a person to arrest *suo motu* is confined to cases described in Sec. 59, that is, to cases in which a person commits a non-bailable and cognizable offence in his views, or where a person is a proclaimed offender. A

Rules under Criminal Procedure Code.

1. Griffiths *v.* Taylor, 48 L. J. App. (C. P.) 152.
2. 7 & 8 Geo. IV, c. 29, Sec. 39: 24 & 26 Vict., c. 96, Sec. 33.
3. Dodson, 20 L. J. M. C. 57.
4. Bentley, 4 Cox C. C. 406.
5. Russell on *Crime*, 11th Ed., Vol. I, p. 511, citing R. *v.* Walker, (1854) Dears. 358; Marsden, L. R. 1 C. C. R. 131.

private person has, therefore, no right to arrest a person on mere suspicion or information.[1] The fact that the person arrested had in fact committed a non-bailable and cognizable crime is in reality no defence to such an arrest, if the person arresting had not witnessed the crime. But where he so witnessed it, he is protected though there may be facts behind his view which may place a different complexion upon the affair, and which, if known to him at the time, would not have justified his apprehension. A person lawfully arresting another may make him over to his servant for delivery to the police. For in such a case his original custody continues even whilst the person arrested is in charge of his servant.[2]

Where the accused was drunk and was creating a serious disturbance and when a Police Officer attempted to arrest, he resisted arrest, it was held that "it is true that even drunken men are entitled to the protection of the law but if they break the law and attack either the person or the property of the people any member of the public is entitled to exercise the right of private defence provided that he does no more harm than the necessities of private defence require....if Nga Sein resisted arrest or attempted to escape, were entitled to use all means necessary to effect the arrest, short, of course, of killing him."[3]

Where the petitioners were alleged to have stopped the *ekka* and prevented the Cloth Inspector from going home, and they took the Cloth Inspector to the *thana* where an information was given by the Cloth Inspector about the wrongful restraint. A counter-information was also given by the two petitioners alleging that the cloth was removed cloth in contravention of the rules then in force regarding the purchase and movement of cloth. It was held that "the petitioners were not justified by law in either apprehending the Cloth Inspector or compelling him to go to the *thana*; nor were they justified in preventing him from going in the direction in which he wanted to go. If the petitioners had any suspicion that the Cloth Inspector had contravened any of the rules relating to purchase and movement of cloth, they could have given an information to the authorities concerned. They had no legal right to restrain the free movement of the Cloth Inspector. The second part of Sec. 79, Penal Code, states that nothing is an offence which is done by any person who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it. The Courts below have found that there was no good faith in the petitioners. To satisfy the Court of good faith a person must show that he acted with due care and attention, and had reasonable ground *prima facie* for believing that he ought to do what he did....."[4]

Where the accused had arrested a police constable and took him to the Magistrate, and it was found that the constable was caught in the act of abetting an extortion, an offence which is bailable, the Court acquitted the accused holding that the act was covered by this section in that the accused had acted in the *bona fide* but mistaken belief that he had the authority to arrest the constable.[5]

33. Detection and destruction of postal articles.—There are certain powers which special Acts confer upon departmental officers, the exercise

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1. Potadu, I. L. R. 11 Mad. 480.
2. *Ibid*; Fakira, I. L. R. 17 Mad. 130.
3. Mani Karki *v.* Emperor, 28 Cr. L. J. 445 at p 446.
4. Chiranji Lal *v.* Durga Dutt Tripathi, A. I. R. 1948 Pat. 299 at pp. 229 and 300 ; 3 D. L. R. (Pat.) 3.
5. Raghunath Dass *v.* Emperor, A. I. R. 1920 Pat. 502 at p. 504 : 54 I. C. 997.

of which is subject to the rules and restrictions contained in those Acts. Thus, for instance, the Indian Post Office Act[1] empowers a postal officer-in-charge of a post office or authorised by the Post-master-General in this behalf, to open or unfasten any newspaper or any book, pattern or sample packet, in the course of transmission by post, which is suspected to have been sent by post in contravention of any provisions of the Act relating to postage.[2] The Post-master-General has further authority to authorise the opening and destruction of any postal article containing obscene, seditious, or grossly offensive matter.[3] The Central Government have also power to detain or take delivery of any postal article "on the occurrence of any public emergency, or in the interest of the public safety or tranquillity".[4] A certificate signed by a Secretary to the Government of India is conclusive on the point.[5] Acting under the powers so conferred, the Government of India had caused to be detained a number of private letters of English tourists and Indian public men in the autumn of 1907, and on a question being raised in the House of Commons the act was held to be justifiable under this Act.

Rules under Indian Post Office Act.

34. Acts done under civil process.—Persons executing civil process are bound to follow strictly the rules laid down in the Code of Civil Procedure. These rules have now been relegated to the Schedules of the Civil Procedure Code, the terms of which are to be strictly complied with.[6]

35. Other justifiable acts.—Several instances occur of acts which the law would justify as done in the belief that they were warranted by law. A bigamous marriage contracted by the wife in the belief that her marriage with her husband has become dissolved by his apostasy is an instance of a mistake of mixed law and fact which the law condones.[7] Other similar instances are afforded by the seizure of his wife by the husband,[8] the pulling of a woman's hair by her lover,[9] the arrest of a person by a policeman who erroneously believed that the person arrested had committed a non-bailable offence.[10]

36. Cases.—In *Bahadur Khan* v. *Emperor*,[11] the accused said that he had killed the deceased by mistake, he stated that he had many enemies, and was very nervous about every one, who visited his place. He was definite that the visitors did not answer when they were challenged. It was held that—"There is no doubt whatsoever that the accused fired in good faith thinking that he was acting in the exercise of the right of private defence of person against his enemies....Where there is so much violence, a person, who has got enemies, would be very chary and would hasten to protect himself if he receives visitors at night, and the visitors do not disclose their identity at once. It would not make, any difference whether in response to a challenge the visitors say that they are friends or keep quiet. It is the duty of such visitors to immediately disclose their identity, and to stay where they are when challenged, so that the inmates of the place should satisfy themselves that they are friends. The party of the deceased did not take any such precautions. Rather they kept their identity secret and on the top of it used a torch which would naturally arouse the suspicions of those inside the Chauk. I think in these circumstances the accused is completely protected by Sec. 100, Penal Code, read with Sec. 79, Penal Code."

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1. Act VI of 1898.
2. *Ibid.*, Sec. 23.
3. *Ibid.*, Secs. 20, 23 (3).
4. *Ibid.*, Sec. 26.
5. *Ibid.*, Sec. 20 (2).
6. Act V of 1905, Sch. I.
7. Narautakath, I. L. R. 45 Mad. 986,
8. Ramlo, 12 S. L. R. 29: 47 I. C. 807.
9. Mi Hia So, 4 Bur. L. J. 268: 13 I. C. 189.
10. Raghunath Dass *v.* Emperor, A. I. R. 1920 Pat. 502 at p. 504.
11. A.I.R. 1944 Pesh. 30 at pp. 30, 31: 214 I. C. 242.

The accused, a policeman, found on one morning the complainant carrying some cloth under his arm. The accused suspecting the cloth to be stolen approached the complainant and questioned him. The complainant gave evasive answers and refused to let the accused have a look at the cloth. It led to a scuffle between the two. The accused arrested the complainant who was, however, set free by a higher police official. The complainant prosecuted the accused for wrongful restraint and confinement and succeeded in obtaining his conviction from the Trial Court. The High Court quashed the conviction holding that the policeman had acted in good faith which was clear from his attempt to put questions to the complainant to clear up his suspicion.[1] Same is the case where a *chowikdar* in good faith takes a person for a thief and captures him.[2]

The legality or otherwise of the warrant is relevant in connection with the accused's plea that they acted in the exercise of the right of private defence. Such a right did not exist, "as" the constables acted under colour of the office; and even if their act was not strictly justifiable by law, the villagers had no right of private defence, since the constables were acting in good faith. Any technical flaw, therefore, in the warrant is immaterial in considering the question whether the villagers acted in the exercise of their right of private defence.[3] In a Burma case, *Maung Htwe* v. *Ba Thant*,[4] an application in revision was filed against the discharge of Mg. Ba Than, a process-server, and Mg. Khe Yu, a decree-holder, who were charged by the applicant Mg. Htwe, a judgment-debtor, under Sec. 342 and Sec. 342 read with Sec. 114, I. P. C., with causing wrongful confinement to Mg. Htwe. A warrant for Mg. Htwe's arrest was issued at the instance of Mg. Khe Yu and the bailiff endorsed it for service to the process-server Mg. Ba Than. Mg. Htwe was arrested but was released by the Additional Township Judge under Sec. 135, C.P.C., on the ground that he was on his way back from attending Court at the time. As a matter of fact it appears that that was mistaken in that Mg. Htwe, though he had attended Court, was not returning from Court to his home but was going in another direction.[5] The process-server had returned the warrant the same day to the bailiff without any endorsement on it, and the bailiff Mg. Nyein in evidence said that he merely returned the warrant to the process-server for want of his report, as he had made no report of execution. As the warrant was returnable on a date 19 days afterwards the bailiff presumably was under the impression that it had been executed (though the bailiff speaks to the contrary effect) when the process-server returned the warrant to him. On this the process-server, instead of endorsing execution on the warrant, re-arrested Mg. Htwe next day. When the judgment-debtor was arrested and brought before the Court the process had been executed, that is to say, the arrest had been carried out, though

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1. Bhowoo Jivaji *v.* Mulji Dayal, I. L. R. 12 Bom. 377.
2. Protab Chowkidar, 2 W. R. (Cr.) 9.
3. Kallan Beg *v.* Emperor, A. I. R. 1936 All. 306 at p. 308 ; 1936 A. W. R. 223.
4. A.I.R. 1940 Rang. 112 at pp. 112, 113: 188 I. C. 303.
5. *Vide* Andeshirji *v.* Kalyan Das. (1909) 32 All. 3 : 3 I.C. 46; 6 A. L. J. 912.

it may not have been carried out in accordance with law. It was held that "the bailiff had power to delegate the execution of the warrant to the process-server[1] and did so in the first instance. But on the second occasion the bailiff did not delegate his authority to arrest to the process-server, but merely returned the warant to him for endorsement. As I have said in the circumstances of the case the endorsement for which the process was returned must have been endorsement of execution, and could not be at that date endorsement of non-execution, though the bailiff tried to make that out. In any case it was only returned for endorsement and not for further execution. In these circumstances the re-arrest was unlawful. I do not propose however in revision to order a trial. The offence was not a serious one, for, it does not appear that the process-server was actuated by malice. It is possible that he made a genuine mistake of fact (Sec. 79, I. P. C.) and thought that the process was being returned to him for re-execution." In *Kania Lal's* case,[2] certain persons went to the judgment-debtor's house to execute a warrant of arrest against him. On reaching there they saw a palanquin with closed doors coming out of the male apartments of the house and, believing that the judgment-debtor was making good his escape thereby, stopped, and examined the palanquin in spite of a protest by the person accompanying it who stated that a lady was sitting therein. Their statement was found to be correct as a *pardanashin* lady of rank was in fact sitting in the palanquin. It was held that the accused were entitled to the protection given by Sec. 79. Where in answer to a charge under Sec. 341 of the Penal Code, the accused set up a plea of owership and claimed the benefit of the general exception contained in Sec. 79 and the prosecution evidence did not exclude the possibility of such a *bona fide* dispute, it was held that the accused was entitled to be acquitted.

In the case of *Dakhi Singh* v. *State*,[3] the man who had been arrested was suspected to be a thief. He could not have been accused of an offence punishable with death or with transportation for life. Consequently in effecting his arrest after the escape the police officer had not had the right to cause his death. Reference in this connection may also be made to Secs. 76 and 79, Penal Code. Under these two sections, it was not open to the appellant to plead justification to the extent that he was entitled to shoot the person dead, or by reason of a mistake to shoot the fireman dead, mistaking him to be a thief. When a police officer arrests a person and such person

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1. *Vide* Dharam Chand Lal *v.* Queen-Empress, I. L. R. 22 Cal. 596 and Sheo Progash Tewari *v.* Bhoop Narain Prosad, I. L. R. 22 Cal. 759.
2. I. L. R. 24 Cal. 885
3. A. I. R. 1955 All. 379 at p. 381.

forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer may use all means necessary to effect the arrest; but this does not give a right to cause the death of the person unless he is accused of an offence punishable with death or transportation for life (Sec. 46 of the Criminal Procedure Code).

Where an act was done under a Full Bench decision which later was not accepted as laying down the correct law, the offence was only technical.[1]

The occupier of land may cut off the overhanging branches of his neighbour's trees, or sever roots which have spread from these trees into his own land. It is one of the "General Exceptions" recognised by the Indian Penal Code that when a person is justified by law in doing an act the commission of that act cannot amount to an offence.[2]

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Accident in doing a lawful act.

Illustration

A is at work with a hatchet, the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of *A*, his act is excusable and not an offence.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Accident when a good defence.
5. "Accident or misfortune."
6. Exercise of lawful right in unlawful manner.
7. Wrestling bout.
8. Unlawful games.
9. Facts negative defence of accident.
10. Gun accidents.
11. Culpable negligence and rashness.
12. Negligent driving.
13. Contributory negligence no defence.
14. Servant's negligence.
15. Civil liability.
16. Accident in doing an unlawful act.
17. Burden to rebut presumption.

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1. State *v.* Krishna Murari, A. I. R. 1955 All 397 at p. 399: 1955 Cr. L. J. 1025 (D. B.)
2. Ouseph Thomen *v.* Joseph Antony, 1956 Ker. L. T. 370 at pp. 370, 371: 1957 Cr. L. J. 166.

1. **Analogous law.**—This section is closely analogous to the next section with which it should be studied. The main difference between these two sections appears to be that while under this section there should be the absence of both criminal intention as well as criminal knowledge, the next section postulates a case in which there is only the absence of criminal intention. The use of the two terms in this section, and the absence of one in the next, shows that the Legislature intended to make a distinction between them. And indeed there is a distinction, as has been explained before. (*See* para. nos. 4 and 6 of Sec. 39.)

2. **Principle.**—In so far as this section lays down that there can be no crime without a criminal intention, it states what is a transparent truism, for there is no such thing as crime in the abstract. No act is *per se* criminal unless the actor did it with criminal intent : *Actus non facit reum, nisi mens sit rea*,[1] which only means that both the intent and act must concur in order to constitute a crime. The object of the repression of crime is to preserve order and peace in human society, and it is, therefore, only against human beings who are its component members that criminal law is directed. And as the object of criminal law is to punish only serious infractions of the rules of society, it follows that criminal law cannot punish a man for his mistake or misfortune. But accident is not of itself a defence to a civil suit, unless it was not only an accident but also a misfortune.

3. **Meaning of words**—"*Nothing . . . done by accident*" The word "*accident*" does not mean here a mere chance. It rather means an unintentional, an unexpected act. The words imply the idea of something not only not intended, but something which was so little expected that it came as a surprise. So the term "*misfortune*" means the same thing, with this fact superadded that it was as unwelcome as it was unexpected. "*The doing of a lawful act in a lawful manner*" means that the act which originated another act must be not only lawful but performed in a lawful manner and by lawful means. "*And with proper care and caution*," the propriety being judged by the nature of the act.

4. **Accident when a good defence.**—Accident and misfortune have a recognised place in criminal jurisprudence. They always afford a good defence to the charge of criminality.[2] But they are only a good defence in certain cases and under certain circumstances. They do not furnish an unqualified defence in every case in which the resultant act was unintentional or unexpected. In order that an act should be justifiable on the ground of accidence it must be shown (*i*) that the act was an accident or misfortune, and (*ii*) that it was not accompanied by any criminal intention but that, on the other hand, (*iii*) it was the outcome of a lawful act, (*iv*) which was done in a lawful manner, (*v* by lawful means and (*vi*) with proper care and caution.

Example. Where an accused in a spirit of bravado or of wrecklessness struck a blow on the vulnerable part of the deceased as a result of which the man died, and the accused in his trial under Sec. 80 read with Sec. 302, I. P. C., pleaded in his defence that there was no intention on his part to commit murder of the man and the death was caused by accident or by chance ; it was held that this plea of accident or his lack of intention to murder did not take the case out of the offence of murder.[3]

5. **"Accident or misfortune."**—Now, in the first place what is an accident ? Literally, the term means only the befalling of an event.[4] In

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1. "The act itself does not make a man guilty unless his intention were so."
2. Dwijendra, 31 I.C. (Cal.) 164.
3. Mohan Singh Balwant Singh *v.* State, A.I.R. 1965 Punj. 291 at p. 295.
4. From L. at. Ad. Cadere, to fall.

ordinary parlance it means an event that takes place without one's foresight or expectation. And this is substantially the sense in which the term has been used here.

Accident and misfortune—Meaning and distinction.

It means here not only an event, or a thing which occurs, for every occurrence is not an accident. An accident is an occurrence out of the ordinary course[1] which no man of ordinary prudence could anticipate or provide against. A misfortune is only an accident with attendant evil consequences. Now as the words "accident" as well as "misfortune" are here used necessarily in the sense of implying injury to another, the word "misfortune" differs from "accident" in that while the latter involves only injury to another the former causes injury as much to the author as to another unconnected with the act.

Illustrative examples.

It is easy to conceive of a variety of cases of accident, but the accident, here spoken of, as a defence to criminality, is an accident, which causes injury to another, but causes it only in the manner here described. Suppose *A* intending to poison *B* lays a bait for *B*, which *C* takes, and dies. Here *C*'s death was an accident in the ordinary sense of the term. So it is in law. But *A* is nevertheless reponsible for it in the same manner as if *A* had planned his death. And why? Because *A*'s act in attempting to poison *B* was illegal, and there being one illegal act in the chain of events between the original act and the resultant effect, the same as if all the acts had been illegal throughout. So where a mother, being angry with one of her children, took up a small iron bar used as a poker and threw it after the child as he was running away from her and it hit another child who was returning by the same way, in consequence of which he died, the mother was held to be guilty of manslaughter, although it appeared that she had thrown the poker merely to frighten the child with whom she was angry and she had no idea of the presence of the other child who was actually hit and killed. Commenting on these facts, Park, J., said: "If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful as an improper mode of correction—and strikes another and kills him, it is manslaughter; and there is no daubt if the child at whom the blow was aimed had been struck and died it would have been manslaughter, and so it is under the present circumstances.[2] So if *A* and *B* conspire to assault *C* with their fists, and *C* receives chance blow from the fist of either of them causing his death, both *A* and *B* are guilty of manslaughter, because their initial act was illegal. But if suppose in such a case instead of hitting *C* with fist either *A* or *B* were to suddenly lay hold of a weapon and therewith strike *C*, the other will not be liable for causing the death, as he could not be held responsible for an unlawful act not done in pursuance of the common design of them both.[3]

6. Exercise of lawful right in unlawful manner.—The exercise of a lawful right in an unlawful manner is an unlawful act taking away the defence afforded by the section. A person had trespassed into the house of the prisoner in his absence. On his return he desired him to leave, but he refused, which led to an altercation which excited the prisoner who gave him a kick, causing him an injury which occasioned his death. The prisoner being indicted for manslaughter, Alderson, B., said: "A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having

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1. So held by Willes, J., in Fenick *v.* Schinnalz, L. R. 3 C.P. 313 at p. 316 in which the question was about the loading of a ship under a contract executed "in cases of riots, strikes, or any other accident beyond his control." To the same effect Hamilton *v.* Pandorf, 12 A. C. 518 at p 524.
2. Connor, 7 C. & P. 438.
3. Caton, 12 Cox C. C. 624.

unlawfully caused that injury, he is guilty of manslaughter."[1] The same view was taken in another case in which a person in sport threw stones down a coal-pit whereby a man was killed, though he happened to be a trespasser.[2]

7. Wrestling bout.—There is nothing illegal in a friendly contest for the trial of skill or strength, but if a party taking undue advantage of another causes him injury, he will be criminally responsible. Thus in an Allahabad case[3] it was held that "the appellant and deceased were friends, both fond of wrestling, and the injury was sustained by Munshi accidentally. When they agreed to wrestle with each other, there was an implied consent on the part of each to suffer accidental injuries. There is no proof of any foul play on the part of the appellant. There can be no doubt that the fracture was caused by the impact of the skull with the edge of the *chabutra*. But this impact was accidental and not intentional. The present case falls completely within Secs. 80 and 87, Penal Code. The appellant is not guilty under Sec. 304 A."

8. Unlawful games.—The above is the law in cases where the game itself was lawful. But where the game itself was unlawful, then no consent would condone an injury therein committed. In England, prize-fights, public boxing matches and the like wherein combatants fight for lucre and not for sport are unlawful, and persons engaging therein are guilty of assault to which the consent of the persons to the interchange of blows affords no answer,[4] whatever may have been the agreement between the parties. In fact Courts have even gone the length of not only holding the actual combatants liable, but they have even held the spectators to be accomplices.[5]

9. Facts negative defence of accident.—The absence of criminal intent or knowledge alone does not therefore suffice. If it were sufficient, there was no criminal intent, or knowledge in any of the cases before cited. Indeed, the presence of these elements effectively rebuts any presumption of accident. For, as remarked before, an act could not have been accidental, if it had been intended or known. In practice, therefore, the cases relating to accident presenting any difficulty, are those in which there is a question of unlawfulness or negligence at some stage. If the act was unlawful and an injury is caused, it is an offence, whatever may have been the intention. So if a person gives an improper quantity of liquor to a child and death ensues, it will be manslaughter, though the liquor may have been supplied for sport and without any criminal intention.[6] The goods of a debtor were seized by a person who was put in possession thereof. The debtor plied with him liquor, himself drinking freely, till he was drunk. The debtor then put him into a cabriolet and caused him to be driven about the streets. Within a couple of hours the man died. Lord Denman told the jury that the prisoner would be guilty of manslaughter, if he had driven him about the place, when the deceased was drunk, in order to keep him out of possession and thereby accelerating his death.[7] So the prisoner having the right to possession of a gun in the hands of the deceased, attempted to take it away by force, though he knew it to be loaded. In the struggle which ensued, the gun went off accidentally and killed the deceased. Lord Campbell told the jury that though the prisoner was entitled to the gun, to take it away by force was unlawful; and that as the evidence showed

Cases of accidents involving unlawfulness or negligence at some stage.

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1. Wild, 2 Lew. C. C. 214.
2. Fenton, 1 Lew. C. C. 179.
3. Tunda *v.* Rex., A. I. R. 1950 All. 95 p 96.
4. Boulter *v.* Clark, Buller's N. P. 16; Mautlew *v.* Ollerton, Comb. 218; Perkins, 4 C. & P. 537; Lewis, 1 C. & K. 419; Coney, 8 Q. B. D. 534.
5. Murphy, C. & P. 103: 1 Hale P. C. 439; *see* to the same effect, Foster, C. L. 350; Coney, Q. B. D. 534.
6. Martin, 3 C. & P. 211.
7. Packard, C. & M. 215.

that the discharge of the gun, though accidental, was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter.[1]

Case of pure accident.

It is, however, evident that the case would have been one of pure accident, if the prisoner had not known that the gun was loaded. In one case, however, the prisoner had found a pistol in the street, which he had reason to believe was not loaded, having tried it with a rammer. He took it home and standing before his wife he pulled up the cock in sport and touched the trigger. The pistol went off and killed the woman. He was indicted and convicted of manslaughter, though it was found that the rammer was too short and had, therefore, deceived him But this is a view which is not likely to be taken, should such a case again arise. Indeed as Foster says, "Accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall among the nearest friends and relation."[2] Foster himself cites the case of a man who went with his wife to dinner at the house of a friend, carrying with him his loaded gun, which on arrival at the house he discharged and kept aside in a private place. After the dinner he found it there and carried it home, his wife carrying it a part of the way. On arrival at home he touched the trigger and the gun went off, killing the wife whom he dearly loved. It was found that a stranger had in the meantime handled the gun and returned it to the place from where it had been taken The prisoner was acquitted, on the ground that he had no reason to believe that the gun was loaded.[3]

10. Gun accidents.—The accused with some twenty companions went into the jungle to shoot pigs. He took up his position and waited in the jungle while his companions proceeded to beat a pig towards him. In due course a boar was driven in his direction, and, on coming into the open, where he was the accused fired at him. He, however, missed the boar and hit one of the accused's companions causing him injuries which resulted in his immediate death.[4] In the above-noted case Broadway, J., held that "I cannot regard his act in firing as either negligent or rash within the meaning of those two expressions as continued in Sec. 304-A, I P.C."

In another case[5] the respondent fired at the object from a distance of 152 feet; and, to the horror of all this was followed by the cry of a human being in pain. The respondent in examination admitted that he had fired at the object with the gun, because he was under the impression that it was the same hyena which had been seen in the vicinity of his quarters on the previous day. He also pointed out that at the time of the shooting rain was falling, and in defence he added that he had not expected a human being to be at the place in question and the object at which he aimed had a brown covering. The respondent had, therefore, no reason to suppose that the object might well be a man who was grazing cattle or cutting grass. It was held that the amount of care and circumspection taken by the respondent was that which a prudent and reasonable man would consider to be adequate upon all the circumstances of the case. The whole affair was a pure accident and he was protected by the provisions of Sec 80 of the Indian Penal Code. The fact that he used an unlicensed gun would

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1. Archer, 1 F. & F. 351.
2. Foster, Cr. L. 263 at p. 264; 1 East S. C. 266.
3. *Ibid*., 265.
4. Basant Singh *v.* Emperor, A. I. R. 1927 Lah. 880 at p. 881: 29 Cr. L. J. 487, followed in the similar case of Shakur Khan *v* Emperor, A. I. R. 1931 Lah. 54 : 32 Cr. L. J. 587 ; *see* also Timmappa, (1901) 3 Bom L. R. 678.
5. State Government, Madhya Pradesh *v.* Rangaswami, A. I. R. 1952 Nag. 268 at pp. 268, 269, 270 : I.L.R. (1952) Nag. 93,

not deprive him of the benefit of that immunity; and in *King-Emperor* v. *Timmappa*,[1] a Division Bench held that shooting with an unlicensed gun does not debar an accused from claiming immunity under that section of the Indian Penal Code.[2]

Difference in view in cases of gun accident.

Cases of gun accidents present difference due to the difference of views as regards the liability of persons handling dangerous weapons. It is sometimes said that a person handling a gun ought to know that it might be loaded. So he should, but what if he examined it and was satisfied that it was not, though this examination was defective? Such was the case of the man who had examined the gun with a short rammer. He was reasonably cautious, though he was held to be guilty. But, as remarked by Foster, J.: "The law in these cases doth not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken."[3] This is as true as it is supported by precedents.

11. **Culpable negligence and rashness.**—Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[4] The question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man will consider to be sufficient upon all the circumstances of the case.[5] The amount of care and caution required depends upon the nature of the occupation and the amount of risk to human life. The instance of a chemist's apprentice negligently delivering laudanum, mistaking it for paregoric and thereby occasioning the death of a child, is an instance of negligence which may or may not be criminal according to the circumstances. So Bayley, J., told the jury that if they thought that there was negligence on the part of the prisoner they were to find him guilty; if not, they must acquit him.[6] In another case, the prisoner was indicted for causing the death of two females passing along the causeway in Liverpool where he had been slinging a cask, which fell and caused the deaths. It appears that there were three customary modes of slinging casks there, one by slings passed round each end of the cask, a second by crane hooks, and a third by a single rope round the centre of the cask which was the manner in which the prisoner had slung it. The cask was hoisted up to the fourth storey of a warehouse, and on being pulled endways, towards the door, it slipped from the rope, which it would not have done if it has been secured by any of the first two modes. Park, J., told the jury: "The double slings

Criminal negligence is gross and culpable neglect.

1. (1901) 3 Bom L R 678.
2. State Government, Madhaya Pradesh v. Rangaswami A. I. R. 1952 Nag. 268 at p. 270 : I. L. R. (1952) Nag. 93.
3. Foster, Cr. L. 264 : 1 East P. C. 260.
4. Empress v. Idu Beg, I. L. R. 3 All. 776 at pp. 779, 780, *per* Straight, J.
5. H. W. Smith v. Emperor, I. L. R. 53 Cal. 333 : 27 Cr. L. J. 153 : A. I. R. 1926 Cal. 300, approved in State of M. P. v. Rangaswami, A. I. R. 1952 Nag 268 at p. 269 I. L. R. (1952) Nag. 93 : 1952 Cr. L. J. 1191 : 1952 N. L. J. 320.
6. Tessymond's case, 1 Lew. C. C. 169.

are undoubtedly the safest mode ; but if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him."[1]

12. Negligent driving.—It is the duty of every person making use of a public way so to use it as not to cause injury to others who are equally entitled to use it. A person driving a cart has to see that persons walking on foot are not injured by his driving. And this liability continues whether the carriage-way is or is not apart from a footpath, for a foot passenger has the right to walk on the carriage-way if he is so minded.[2]

Amount of care required in driving or riding along a public highway.

The amount of care required in driving or riding along a public highway depends upon the time of the day, its crowded state and the nature of the animals driven or ridden. The same care is not required in driving at day-time as is required when driving at night. Again, a street crowded with children or a busy thoroughfare demands more caution than a deserted road. So, while a quiet animal may be easily driven, one has to take care that an unmanageable animal does not get out of hand. A person using the highway has to acquaint himself with and observe the rule of the road.

Public way is not a race-course

Again, a public way is not a race course and persons have no right to use it as such. If, therefore, carts race each other and run over a man killing him, they are both responsible for the death for they were both using the road in an unlawful manner. Such was the case of Swindall and Osborne who were driving two carts loaded with pots from the potteries. On the way they got drunk and began to race with each other. It was night, and arriving at a tollgate Swindall who appeared all along to have led the way, told the gate-keeper "We have driven over an old man." The man died and they were indicted for manslaughter. For the prosecution it was contended that it was perfectly immaterial in point of law whether one or both carts had passed over the deceased. The prisoners were in company and had concurred in jointly driving furiously along the road which was an unlawful act ; and as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. For the prisoners it was contended that evidence showed that only one of the carts had run over the deceased, and the other was therefore entitled to an acquittal. But Pollock, C. B., said : "I think that is not so. I think the counsel for the Crown is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man whether he be the first or the last, he would be equally liable. The person who runs over the man would be a principal in the first degree, and the other a principal in the second degree." And referring to the condition of the deceased the Chief Baron said : "The prisoners are charged with contributing to the death of the deceased by their negligent and improper conduct ; and if they did so, it matters not whether he was deaf, or drunk or negligent, or in part contributed to his own death, for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the driver of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life the law takes a totally different view ; for there each party is responsible for any blame that may ensue, however large the share may be ; and so highly does the law value human life, that it admits of no justification. There life has been lost and the carelessness or negligence of any one person has contributed to the death of another person."[3]

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1. Rigmaidon's case, 1 Lew. C. C. 180.
2. Boss *v.* Litton, 4 C. & P. 407 ; Grout, 6 C.& P. 629.
3. Swindall, 2 G. & R, 230.

13. Contributory negligence no defence.—It is no defence in such a case that the deceased was guilty of contributory negligence.[1] On an indictment for manslaughter, it appeared that the deceased was walking along a road in a state of intoxication. The prisoner was driving a pair without reins of horses. On seeing the deceased the prisoner called out to him twice to get out of the way but because of the rapid pace of the horse and his own intoxication he could not do so, and one of the cart wheels passed over him and he was killed. It was held that the prisoner was guilty of manslaughter, as it was his duty so to drive as to prevent any accident or injury that may occur and that the intoxication of the deceased and his calling him out did not take away that responsibility.[2] In another case the driver of a cart was sitting inside instead of at the driver's seat, and while he was sitting there, his cart passed over a child who was gathering up flowers on the road. He was held guilty of manslaughter, as by sitting inside the cart he was guilty of negligence.[3] So where two opposition omnibuses were racing each other, and a driver of one in whipping up his own horses frightened the horses of the other, which upset the omnibus, Patterson, J., said: "The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence he had lost the command of his horses; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act he would be answerable, for a man is not to say 'I will race along a road, and when I am got beyond another carriage I will pull up.' If the prisoner did really race, and only when he had got past the other omnibus endeavoured to pull up, he must be found guilty, but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could in order to get past the other omnibus? and had he urged his horses to so rapid a space that he could not control them? If you are of that opinion you ought to convict him."[4]

Gross negligence.

The plea of contributory negligence was again strongly urged in a case where a man deaf from his childhood was run over by the prisoner's cart, and it appeared that at the time he had been walking in the middle of the road in spite of repeated warnings, whereupon Rolfe, B., said: "Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion that if anyone should drive so rapidly along a great thoroughfare leading to a large town as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law, and, if death ensues from the injuries thus inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased."[5] The learned Judge then went on to add that there was a wide distinction between a civil action for pecuniary compensation for death arising from negligence, and a proceeding by way of indictment for manslaughter. In the one case liability of one depends upon the balance of negligence, whereas in the

Plea of contributory negligence.

1. *Per* Lush, J., in Jones, 11 Cox. C.C. 544.
2. Walker, 1 C. & P. 320.
3. Knight's cases, 1 Lew. C.C. 168.
4. Knight's case, 1 Lew. C. C. 168.
5. Longbottom, 3 Cox. C. C. 439.

other, negligence is punished ; but, if there be contributory negligence, it is taken into account in awarding the sentence.

Observance of rule of road.

The crowded state of a road was urged as a plea in extenuation in a case in which Parrin, J., however, told jury that "this unusual concourse of people, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if they found it to have been such, would but be a circumstance to add to it, and that it was his duty as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public."[1] So while a person is not bound to observe the rule of the road, he is bound to use additional precaution if he uses the wrong side, for he ought then to know that he runs a greater risk of causing accidents.[2]

14. Servant's negligence.—Allied to the subject of contributory negligence is the subject of negligence of servants. If the master and servant engage in a dangerous trade, and the master is guilty for some negligence,

Negligence of servant superadded to that of the master.

which alone, however, was insufficient to produce the mischief, the fact that the negligence of the servant, superadded to that of the master, had caused the injury, would not render the master criminally liable for it. It was so held in a case in which the prisoner was the maker of fireworks which he stocked on the premises, contrary to statute. During his absence by the negligence of one of his servants, the fireworks became ignited and set fire to a neighbouring house, the occupant of which was burnt to death. Willes, J., convicted the master of misdemeanour holding that, if he had not stocked the fireworks contrary to the statute, the fire would not have occurred. But on a case reserved, the prisoner was acquitted, Cockburn, C. J., holding that, though the prisoner was guilty of an illegal act, it was not the necessary and immediate cause of the death, since superadded to this negligence, there was the negligence of the servant.[3] But this was a case of negligence of the servant. The case could have been differently decided, if the servant had been guilty of a wilful act as in the case of the baker who was held liable, because his servant, to his knowledge, had mixed noxious materials in his bread.[4] In another case, it was suggested that even in a case of negligence of a servant, if it could be shown that the injury was well within the contemplation of the master, he would be liable.[5]

15. Civil liability.—As already observed (in para. No. 13 above) a person may not be civilly liable and yet he may be criminally prosecuted. These cases are, however, those which stand on the borderland between civil and criminal law. It is sometimes said that accident of itself is not a defence to a civil suit, but this is certainly not the view of civil law.

Accident of itself not a defence to a civil suit.

As Parke, B., said : "When the act is that of the servant in performing his duty to his master, the rule of law we consider to be is that the only remedy in that case is against the master and then only is maintainable when that act is negligent or improper ; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. . . . In all cases where a master gives the direction and

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1. Murray, 5 Cox. C. C. 509.
2. Pluckwelt v. Wilson, 5 C. & P. 375
3. Bennett, Bell C.C. 1.
4. Dixon M, & S. 11.
5. Lister, 36 L. J. M. C. 196.

control over a carriage, or animal or cattle to another rational agent, the master is responsible in an action on the case for want of skill or care of the agent—no more."[1] So where the servant was driving his master in a carriage and the horses took fright at the barking of a dog and bolted knocking down the plaintiff who was in the highway, it was held that the injury was purely accidental, and as it could not be attributed to the negligence of the servant, neither the master nor the servant was liable for damages.[2] In one case the defendant who was one of a shooting party fired at a pheasant but one of the pellets from his gun accidentally glanced off the bough of a tree and accidentally wounded the plaintiff who was a servant engaged to carry cartridges and game for the party. The jury found that the defendant was not guilty of any negligence in firing as he did, and it was, therefore, held that the defendant could not be held liable for damages.[3] The civil and criminal liability of a person on account of negligence is, therefore, based on the same considerations. The difference is one of degree and not of kind.

16. Accident in doing an unlawful act.—The prisoner went out to shoot porcupines with the deceased. They agreed to take up certain position in the jungle and lie in wait for game, which was done. After a while the accused heard a rustle, and believing it was a porcupine, he fired in that direction, but the shot penetrated the heart of his companion who died immediately. The accused shot with an unlicensed gun, but it was held that the case was one of pure accident under the section and that the accused was entitled to be acquitted.[4] The judgment in this case gives no reason for acquittal, but it is clear that it draws a distinction between *malum in se* and *malum prohibitium*, that is to say, whenever it said that a person causing injury in an unlawful occupation is responsible for the result, what is implied by the unlawfulness of the occupation is something more than what is prohibited by law for the purpose of revenue or census. It implies something which is prohibited because it is essentially wrong.[5] In other words, where a statute renders the doing of thing illegal for some purpose, it cannot be referred to for anything wholly unconnected with the purpose.

Operation of negligence in the formation of crime.

So when a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another neglect of the statutory duty, suffers a loss of a differen kind, is not entitled to maintain an action in respect of such loss. For instance, where a ship-owner was carrying the plaintiff's sheep, but omitted to pen them as required by the Contagious Diseases Act, 1869, in consequence of which they were washed over board, it was held that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to prevent them against perils of the sea, the plaintiff could not recover.[6] As Piggott, B., put it : "If, indeed, by reason of the neglect complained of, the cattle had contracted a contagious disease, the case would have been different. But as

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1. Shorrod *v.* London and North-Western Ry. Co., 4 Ex. 580 at p. 586.
2. Holmes *v.* Mather, L. R. 10 Ex. 261 ; the same view has been taken by Denman, J., in Stanley *v.* Powell, (1891) 1 Q. B. 86, in which all the cases on the point have been reviewed.
3. Stanley *v.* Powell, (1891) 1 Q. B. 86.
4. Timmappa, 3 Bom. L. R. 678 ; *see* State of M. P. *v.* Rangaswami, A. I. R. 1952 Nag. 268 : I. L. R. (1952) Nag. 93 : 1952 Cr. L. J. 1191 : B. L. R. (1952) Nag. 140 : 1952 N.L.J. 320; Shakar Khan *v.* Emperor, A. I. R. 1931 Lah. 54 : 32 Cr. L. J. 587 : 130 L. C. 654 : 31 P. L. R. 955 ; *see* also Waryam Singh *v.* Emperor, A I. R. 1926 Lah. 554 : 41 Cr. L. J. 787.
5. 1 Hale P. C. 475 : 1 East *P.* C. 260 ; Foster, Cr. L. 259.
6. Gorris *v.* Scott, L. R. 9 Ex. 125 ; Ward *v.* Hoebres, 4 App. Cas. 13.

the case stands on this declaration, the answer to the action is this: Admit there has been a breach of duty; admit there has been a consequent injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose."[1] The appellant was beating one *S* with his fists when *S*'s wife with a two months' baby on her shoulder interfered, apparently the appellant hit at the woman and the blow struck the child on the head; the baby died two days later from the effects of the blow. It is clear, that the child was hit by accident but the appellant's act is not covered by the exception of Sec. 80 because at the time he was not doing a lawful act in a lawful manner by lawful means.[2] These cases, by no means exhaustive, are sufficient to explain the operation of negligence in the formation of crime. Other cases will be found cited in the commentary under Sec. 52.

17. Burden to rebut presumption.—As in England, so in India, the prosecution must prove the guilt of the accused, i.e. it must establish all the ingredients of the offence with which he is charged. As in England, so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt. In India if an accused pleads an exception within the meaning of Sec. 80 of the Indian Penal Code, there is a presumption against him and the burden to rebut that presumption lies on him.[3]

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Act likely to cause harm but done without criminal intent, and to prevent other harm.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations

A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B*, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that by changing his course, he must incur risk of running down a boat *C* with only two passengers on board, which he may possibly clear. Here, if *A* alters his course without any intention to run down the boat *C* and in good faith for the purpose of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C* by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C*.

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1. Gorris *v.* Scott, L.R. 9 Ex. 125 at p. 130; Ward *v.* Hoebres, 4 App. Cas. 13.
2. Jageshar *v.* Emperor, 24 Cr. L. J. 789 at p. 789: 21 Bom. L. R. 1101; *see* also Chatur Nath *v.* Emperor, A. I. R. 1920 Bom. 224 (The accused was held guilty of causing only simple hurt.).
3. K. M. Nanawati *v.* State of Maharashtra, A. I. R. 1962 S. C. 605 at p. 618: 64 B. L. R. 488.

(*b*) *A*, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*'s act, *A* is not guilty of the offence.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. *Mens rea* or criminal intent as constituent of a crime.
5. Proof of criminal intent.
6. Intent and motive.
7. "Preventing or avoiding other harm."
8. Punishment by *panchayat*.
9. Necessity as defence to criminality.
10. Necessity justifying homicide.
11. Explanation—Limit to justifiable ha
12. Dangerous method of detecting crime.
13. Self-defence.

1. Analogous law.—This section recognises the doctrine of self preservation, since it speaks of prevention of harm to person or property which may be of the offender or of any other person. The authors of the Code gave an instance of a smith forced by dacoits to open a door which he did, to avoid his own torture and death. But the case would be different if he had belonged to a gang of dacoits and had then been forced to open the door which he was unwilling to do. A thief who steals, because he would otherwise starve, has similarly no excuse for doing so; if he were excused, it would let in a large body of men to prey upon society and thus destroy the very foundation of society.

2. Principle.—This section only gives legislative sanction to the doctrine of salvage common in the law of all nations. Indeed, it is a doctrine of necessity which has, since the sacrifice of Iphigenia, found ready recognition in all mundane transactions. It sanctions the doing of an evil so that good may come. It permits the infliction of a lesser evil in order to avert a greater evil. The two illustrations appended are based upon that assumption. The section requires that the act done should be without "criminal intention", but the word "intention" is here evidently used in a somewhat narrower sense and as distinguished from "knowledge". Its primary meaning is the aim or resolution of the mind to produce an effect upon the sensible world. Its secondary meaning is the presumption which the law makes of such a resolution from action accompanied by knowledge of the consequence. The section only requires that "criminal intention" in the first sense shall be absent, for intention in the second sense was certainly present in the mind of the captain in Illus. (*a*) who knowingly ran down boat *C* to save his own (*see* Sec. 24). His motive was certainly not to run down *C*, but motive is not always the same thing as intention The antithesis of intention and motive may in practice create difficulties. But the Legislature has wisely excluded cases of deliberate mischief from penal immunity, though the boundary line between knowledge and intention may sometimes be invisible. The conditions imposed by the Legislature for penal immunity in any case is that the act which constitutes an offence should not have been so intended, but what should have been intended is the prevention of some imminent injury. The explanation leaves the determination of this question to the jury, and rightly so, for the question depends upon how a reasonable man would have acted under similar circumstances. According to Bentham harm can only be justified if it is established (*a*) that it was

Doctrine of necessity.

Bentham's view.

inflicted to avert a greater evil, (*b*) that other means were less effective or more costly, or (*c*) that the means employed were more efficient.[1]

3. **Meaning of words.**—"*With the knowledge that it is likely to cause harm*" : As to the meaning of the term "knowledge" here, *see* Sec. 24. "*Without any criminal intention*" : The word "intention" here means the purpose or design of doing a prohibited penal act (*see* para. No. 2, *ante*). "*And in good faith,*" for the meaning of which *see* Sec. 52.

4. **Mens rea or criminal intent as constituent of a crime.**—The establishment in England of the principle that there must be a mental element, even though objective, in crime, is now a few centuries old. Tracing the evolution of this principle, Russell on *Crime*,[2] says : "The new conception that merely to bring about a prohibited crime should not involve a man in liability to punishment unless in addition he could be regarded as morally blameworthy came to be enshrined in the well-known maxim *actus non facit reum nisi mens sit rea*". This ancient maxim which means that an act does not make a man guilty unless there be guilty intention propounds a moral test of criminal liability which has lingered in the law for no man can be convicted in England of a crime at common law unless both the physical and mental elements are present in the crime. Despite the grammatical clumsiness of the whole maxim,[3] it has, as Russell says,[4] a telling aphoristic quality which signifies legally blameworthy, i. e. an attitude of mind which the law reprobates. Lord Kenyon, C. J., long ago declared : "It is a principle of natural justice and of our law that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime."[5]

Principle of *mens rea* in English law.

The law relating to *mens rea* in statutory offences is substantially the same. The basic rule of interpretation of statutory offences is that "unless the statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has a guilty mind".[6] This rule is "of the utmost importance for the protection of liberty of the subject".[7] With this view their Lordships of the Privy Council agreed in *Srinivasa Mall* v. *Emperor*.[8] This statement of the law by the Privy Council was approved by the Supreme Court in *Ravula Hariprasada Rao* v. *State*.[9] In *Evans* v. *Dell*,[10] Goddard, J. (as he then was), said : "With the complexity of modern legislation one knows that there are times when the Court is constrained to find that by reason of the clear terms of an enactment, *mens rea* or the absence of *mens rea* becomes immaterial and that if a certain act is done, an offence is committed whether the person charged knew or did not know of the act." In a much earlier case Wills, J., observed : "Although *prima facie* as a general rule there must be a mind at fault bef re there can be a crime, it is

Privy Council's view approved by Sup-reme Court.

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1. Bentham's *Principles of Penal Laws*.
2. 11th Ed., Vol. I, p. 23
3. Cave, J , described it as uncouth in R. *v.* Tolson, (1889) 23 Q. B. D. at p. 181.
4. Russell on *Crime*, 11th Ed., Vol. I, p. 28.
5. Fowler *v.* Padget, (1798) 7 T. L R. 509 at p. 514
6. Brend *v.* Wood, (1946) 175 L. J. 306 (D. C.) at p. 307 : 62 T. L. R. 462 at p. 463, *per* Lord Goddard, C. J.
7. Brend *v.* Wood, *supra*.
8. A. I. R. 1947 P. C. 135 at p. 139 : 1947 A. L. J. 496 : 49 Bom. L. R. 688 : 51 C. W. N. 900 : (1947) 2 M L. J. 328 : 1947 M. W. N. 589 : 60 M. L. W. 634 : I. L. R. 26 Pat 460.
9. A. I. R. 1951 S. C. 204 at p. 206 : 1951 S. C. R. 322 : 1951 S. C. J. 296 : 1951 A. L J. (S. C.) 55 : (1951) 1 M L. J. 612 : 1951 M. W. N. 374 : 64 L W. 493 : 52 Cr. L J. 768.
10. (1937) 53 T. L. R. 370 at p. 313 : (1937) 1 All E. R. 349.

not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal, whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law at the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls and a variety of other matters necessary for the general welfare, health or commerce and such bye-laws are enforced by the sanctions of penalties ; the breach of them constitutes an offence and is a criminal matter . . . and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed and that if he fails to do so he does so at his peril."[1] There is a presumption that *mens rea* . . . intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence ; but that presumption is liable to be displaced either by the words of the statute, creating the offence or by the subject-matter with which it deals and both must be considered.[2] The Privy Council in *Srinivas Mall's* case,[3] recognised that there exists a limited and exceptional class of offences which can be held to be committed without a guilty mind[4] and that offences within this class are usually of a comparatively minor character. Apart from isolated and extreme cases, the principal classes of exceptions may perhaps be reduced to three, and these three are : One is a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. The second class is, all public nuisances, a d the third, cases in which, although the proceeding is criminal in form, it is really a summary mode of enforcing a civil right.[5] The law relating to *mens rea* in statutory offences under the English law is summed up by Halsbury's *Laws of England*,[6] thus : "A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases the Courts have concluded that despite the absence of express language the intention of the Legislature was that *mens rea* was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of *mens rea*. Instances of this strict liability have arisen on the legislation concerning food and drugs, liquor licensing, and many other matters."

English law summed by Halsbury.

Their Lordships may now turn to the Indian law on the doctrine of *mens rea*. Though it is true that *actus non facit reum nisi mens sit rea* is a cardinal doctrine of criminal law the Legislature can create an offence which consists solely in doing an act, whatever the intention or state of mind of the person acting may be. Whether *mens rea* is a constituent part of a crime or not must in every case depend upon the wording of the particular enactment.[7] The general rule enunciated in *Srinivasa Mall's* case,[8] is not of universal application. It not only depends upon the subject-matter of the enactment but also

Indian law on the doctrine of *mens rea*.

1. R *v.* Tolson, (1889) 3 Q. B. D. 173.
2. Sherras *v.* De Rutzen, (1895) 1 Q. B. 918 at p. 921 : 64 L. J. M. C. 218, *per* Wright, J.
3. A. I. R 1947 P. C 135.
4. Referring to Sherras *v* De Rutzen, *supra*.
5. Sherras *v.* De Rutzen, *supra*, cited with approval in Isak Soloman Macmull *v.* Emperor, A. I. R. 1948 Bom. 361 at pp. 366, 367 : I. L. R (1948) Bom. 329.
6. 3rd Ed., Vol. 10, Sec. 508, pp. 273, 274.
7. State *v.* Ismail Shakur Morani, A. I. R. 1958 Bom. 103 at p. 109 : I. L. R. (1957) Bom. 437 : 59 Bom. L. R. 491 : 1958 Cr. L. J. 352.
8. A. I. R. 1947 P. C 135 at p. 139 : 49 B. L. R. 638.

the various circumstances that may make the one construction or the other reasonable or unreasonable.[1] As the Privy Council observed in *Srinivasa Mall's* case,[2] in a limited class of offences which are usually of a comparatively minor character the offence can be committed without a guilty mind. This class is generally made up of acts *mala prohibita* and the prohibitions are intended to protect the public or to promote the general welfare, and, therefore, *mens rea* is not insisted upon as an essential ingredient of the offence unless so declared in express words by the Legislature. The principles stated above have been applied or reiterated in a number of cases and these are collected in the footnote.[3]

So far as the Indian Penal Code is concerned, every offence under it virtually imports the idea of criminal intent or *mens rea*.[4] Intent denotes all those states of mind which the statute creating the offence in question regards as necessary that an accused must have in order to fix the guilt in him.[5] But no question of *mens rea* arises where the Legislature has omitted to prescribe a particular mental condition as an ingredient of an offence, because the presumption is that the omission is intentional.[6]

5. **Proof of criminal intent.**—To constitute a crime the act must, except in the case of certain statutory crimes, be accompanied by a criminal intent or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to criminal intent.[7] Intention, however, is not capable of positive proof: it can only be implied from overt acts. As a general rule, every sane man is presumed to intend the necessary or the natural and probable consequences of his acts and this presumption of law will prevail unless from a consideration of all the evidence the Court entertains a reasonable doubt whether such an intention existed. This presumption, however, is not conclusive, nor alone sufficient to justify a conviction and should be supplemented

Proof of criminal act by implied overt acts.

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1. State v. S. P. Bhadani, A. I. R. 1959 Pat. 9 at p. 11 : 1958 B. L. J. R 436 : 1958 Cr. L. J. 68 ; Crawford on *Statutory Construction* 1940 Ed., Sec 275 at p. 555.
2. A. I. R. 1947 P. C. 135 at p. 139 : 49 B. L R 688.
3. State v. Sheo Prasad Jaiswal A I. R. 1956 All 610 at p. 612 : 1956 Cr. L. J. 1156 : 1954 A. L J 767 [neither Cl. 13 of the V. P. and Oilseed Products Control Order nor Sec 7 of the Essential Supplies (Temporary Powers) Act, 1946, necessarily excluded *mens rea*] ; State Government, M. P. v. Maganbhai Desabhai, I L R. (1953) Nag. 501 : 1953 Nag. L. J. 514 : 1954 Cr L. J 89 : A. I. R. 1954 Nag 41 (D. B.) ; Ramachandra Gupta, *In re*, (1957) 1 Andh. W R. 279 (offences under the Defence of India Rules are not of a minor character so as to rule out *mens rea* as an integral part of the offence) ; State v. B. D. Meattle, 1957 Cr. L. J 472 : A. I. R. 1957 Punj. 74 [no offence is committed under Sec 29 of the Industrial Disputes (Appellate Tribunal) Act, if there was no *mens rea*] ; State v S. P. Bhandani, A. I R 1959 Pat 9 [barring sub-section (1) of Sec. 14 of the Employee's Provident Funds Act, XIX 1952, the Legislature deliberately avoided making *mens rea* a constituent part of the offence under the Act or the scheme] ; State v Ismail Shakur, I. L. R. (1957) Bom. 437 : 59 Bom. L. R. 491 : 1958 Cr. L. J. 352 : A I. R. 1958 Bom. 103 ; A. P. Misra v. State, 1958 Cr L. J. 1396 : A. I. R. 1958 Cal. 612 [absence of *mens rea* in a case under the Calcutta Wheat (Movement Control) Order, 1958, absolved the accused from liability] ; Shrinath v. Municipality, Gwalior, 1957 M. P C. 247 : (1957) Jab. L J. 11 : 1957 M P.L.J. 89 (in the absence of reference to *mens rea* in Sec. 139 of the Madhya Bharat Municipal Act, 1954, the section does not attract the doctrine of *mens rea*).
4. B. Sunder Lal v. Emperor, A. I. R. 1937 Oudh 273 at p. 274 : 38 Cr. L. J. 188.
5. Bank of New South Wales v Pipar, 1897 A. C. 383.
6. Legal Remembrancer, Bengal v. Ambika Charan, I. L. R. (1946) 2 Cal. 127.
7. Ismail v. Emperor, A. I. R. 1947 Lah. 220 at p. 221 : 48 P. L. R. 410 : 231 I.C. 150 ; *see* also Emperor v. Ram Chandra Raoji. I. L. R (1938) Bom 114 : A. I. R 1938 Bom. 87 : 39 Bom. L. R. 1184.

by other testimony.[1] In *Ram Chandra's* case,[2] the accused, a money-lender, was keeping an account book called *vyaj vahi* in which he made entries regarding loans advanced to various persons by him. These entries were signed by the debtors but none of them was stamped. The prosecution against him was launched under Sec. 60 (*c*), Indian Stamp Act, 1899. The accused was held to be not guilty on the ground that the prosecution had failed to prove any intention on the part of the accused to defraud the Government of stamp duty. It was further held that the Court would not infer the requisite fraudulent intention merely because the result of the action of the accused was to deprive the Government of its stamp duty. The accused must be judged to have the intention that is indicated by the proved acts.

In all graver cases of crimes intent is an essential ingredient of offence

In all the graver class of crimes a particular intent or state of mind is a necessary ingredient of the offence and must be proved by the prosecution. When an act which is of itself indifferent becomes criminal if done with a particular intent, the intent must be proved. If the act is unequivocal, the proof that it was done may of itself be evidence of the intention which the nature of the act conveys. In such a case there is a presumption of law that the person accused intended the probable consequences of his act.[3] Where a statute absolutely prohibits the doing of an act and apparently dispenses with *mens rea*, it has been stated that the doing of the act itself supplied the *mens rea*.[4]

6. Intent and motive.—The wrong-doer's immediate intent if he has one, is his purpose to *commit* the wrong; his ulterior intent, or motive, is his purpose in *committing* it.[5] In criminal law "motive is ulterior intention—the intention with which an intentional act is done (or, more clearly, the intention with which an intentional consequence is brought about). Intention, when distinguished from motive, relates to the means, motive to the end; yet the end may be the means to another end and the word 'intention' is appropriate to such medial end";[6] as the learned author points out, in a chain of intention each intention is a motive for that preceding it.[7] The distinction between "intention" and "motive" is clearly brought out in Stephen's *History of the Common Law*[8] as follows: "The maxim (viz. that a man must be held to intend the natural consequences of his act), however, is valuable as conveying warning against two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention. For instance, it will often be

Intention and motive—Distinction.

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1. Ismail *v.* Emperor, A. I R. 1947 Lah 220 at p. 221.
2. I. L. R. (1938) Bom 114 : 39 Cr. L. J. 284 : A. I. R. 1938 Bom. 87.
3. It is a "universal principle that when a man is charged with doing an act of which the probable consequences may be highly injurious, the intention is an influence of law resulting from doing the act;" *see* R. *v* Dixon, (1814) 3 M & S. 11 at p. 15, *per* Lord, Ellenborough C. J.; R *v*, Burdett, (1820) 4 B & Ald 95; R. *v*. Hicklin, (1868) L. R. 3 Q B 360 at p. 375; Miles *v.* Hutchings, (1903) 2 K. B. 714 and *cf*. R *v* Meade, (1909) 1 K. B. 895 C. C A. In certain circumstances, e. g. where an act has been done by person in subjection to an enemy power on inference that he intended the natural consequences of his act should not be drawn merely from the fact that he did it; the guilty intent cannot be presumed and must be proved; **R.** *v.* Steane, (1947) K. B. 997.
4. Kate *v.* Diment, (1951) 1 K. B. 34 D. C. at p 42 : (1950) 2 All E. R. 657 at p. 661, *per* Lord Goddard. C. J, Reynolds *v* G H Austin and Sons Ltd. (1951) 2 K B. 135 at p. 150 : (1957) 1 All E. R. 606. at p 612 *per* Devlin, J.; Halsbury's *Laws of England* p 282; *see* also **R.** *v.* Grimwood, (1962) 3 All E R. 285.
5. Salmond on *Jurisprudence*, 11th Ed. by Glanville Williams, Sec 137, p. 444.
6. Glanville Williams *Criminal Law*; he General Part, 1953 Ed., Sec. 15, p. 47
7. *Ibid* 3.
8. Volume II, pp. 111 and 112.

argued that a prisoner ought to be acquitted of wounding a policeman with intent to do him grievous bodily harm, because his intention was not to hurt the policeman but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence ; but if the difference between motive and intention were properly understood, it would be seen that when a man stabs a police constable in order to escape, the wish to resist lawful apprehension is the motive, and stabbing the policeman the intention, and nothing can be more illogical than to argue that a man did not entertain a given intention because he had a motive for obtaining it. The supposition that the presence of an ulterior intention takes away the primary immediate intention is a fallacy of the same sort." The Supreme Court distinguishing between motive, intention and knowledge observed that "motive is something which prompts a man to form an intention".[1]

Intention, motive and knowledge.

Intention is a state of mind consisting of desire that certain consequences shall follow from party's physical act or omission.[2] It may well be that in doing a particular act a man may have more intentions than one.[3] The distinction between motive, intention or knowledge can be stated in the language of the Supreme Court : "of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things."[4]

Operation of intention, motive, etc.

Intention is not to be confused with the ultimate aim and object or with motive. If a man knows that a certain consequence will follow from his act it must be presumed in law that he intended that consequence to take place although he may have had some quite different ulterior motive for performing the act.[5] It is the intention, and not the motive, that determines the criminal nature of an act. Therefore, the prosecution is under no obligation to prove the motive with which a certain offence has been committed. If the prosecution proves clearly that the accused had committed the offence it has discharged its burden and it is immaterial what motive induced the accused to commit the offence.[6] If the prosecution does suggest a motive, then the Court must consider the matter carefully.[7] Where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. The fact that the prosecution has failed to lead such evidence has this effect only, that the other evidence bearing on the guilt of the accused has to be very closely examined.[8] Absence of motive

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1. Basdeo *v.* State of Pepsu, A. I. R. 1956 S. C. 488 at p. 490 : 1956 S. C. R. 363 : 1956 S. C. A. 695 : 1956 S. C. J. 554 : 1956 A. L. J. 666 : 1956 Andh. L. T. 49 : 1956 Nag. L. J. 711 : 58 Punj. L. R, 569
2. Mark on *Elements of Law*, 4th Ed , Sec. 220.
3. Sinnaswamy Subranayagam *v.* The King, (1961) A. C. 83.
4. Basdeo *v.* State of Pepsu, A. I. R. 1956 S. C. 488 at p. 490.
5. Mir Chittan *v.* Emperor, A. I. R. 1937 All 13 at p. 14 : 38 Cr. L. J. 202 ; Emperor *v.* Ram Sukh, 10 O. W. N. 1075 : 34 Cr L. J 1055 : A. I. R. 1933 Oudh 436
6. Ratan Lal, I. L. R. 18 Luck. 57.
7. Hari Bag *v.* State, A. I. R. 1958 Cal. 118 at p. 120 : 1958 Cr. L. J 362.
8. Atley *v.* State of U. P., A. I. R. 1955 S C. 807 at p. 810 : 1956 A. W. R. 483 : 56 Cr. L. J. 1653 ; Satya Vir *v.* State, 1958 Cr. L. J. 1266 : A. I. R. 1958 All. 746

is a factor to be considered in determining the guilt of the accused.[1] Motive becomes vitally important in a case depending on circumstantial evidence although it may not be important in a case depending on direct evidence.[2] If the facts are clear so far as the act is concerned, the motive is irrelevant ; if they are not clear, motive may explain what otherwise would be difficult of explanation.[3] Where there is no evidence of motive, the setting is not proper and the test of arriving at the truth is somewhat difficult.[4] Proof of motive must be assigned a minor place in a criminal trial and its importance should not be exaggerated.[5] Simply because it is not possible to find out the exact motive, the direct evidence cannot be disbelieved if it is reliable.[6] For the purpose of proving the offence or the incident itself, where there is direct evidence, motive pales into insignificance but in the matter of the plea of insanity absence of motive is a great circumstance which is always taken into consideration.[7] Motive is not irrelevant and its proof may have an important bearing on the guilt of the accused. Thus it has been held that though it is not a *sine qua non* for bringing home the offence to the accused, it is relevant on the question of intention.[8] A motive put forward by the prosecution cannot be discredited merely by reason of the impractical nature of the accused's plan.[9] The intention specified for any statutory offence must be the dominant intention.[10]

7. **"Preventing or avoiding other harm."**—The harm caused need not be necessarily less than the harm averted, though this question would become material when judging the good faith of an act. Moreover, it is a question upon which depends the justifiability of the act otherwise criminal, as the explanation appended shows.

Common law of England if applicable in India.

In *In re Ramaswami Ayyar*,[11] It was held that the Common Law of England was applicable to this country and that on the facts found the accused had ample justification, not as a village Magistrate, but as a private citizen to put a restraint upon the complainant who was drunk and disorderly and threatened to commit breach of the peace and was a danger to other villagers. The question whether this case was rightly decided was answered in the affirmative by a Full Bench of five Judges in *Gopal Naidu* v. *Emperor*,[12] not on the ground that the Common Law of England was applicable but by reason of the act complained of coming within the exceptions contained in Chapter IV of the Indian Penal Code. As pointed out by Devadoss, J., the village Magistrate who arrested the complainant to prevent harm to himself and others was protected by this section and if a person threatens to commit an assault he can be disarmed and if necessary put under restraint to prevent harm to persons or property. In *Gopal Naidu's* case, police officers who

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1. Hans Raj v. Emperor, 30 Cr. L. J. 478 at p. 479.
2. Papallugan Veera Reddi *v.* State, 955 Audh. W. R 426 (D. B.).
3. Kazi Bazlur Rahman *v.* Emperor, A.I.R 1929 Cal. 1 at p. 8 : 48 Co. L. J. 307 : 33 C. W. N. 136 : 115 I C. 561 : 30 Cr.L.J. 494.
4. Ramlal Singh *v.* State, A. I. R. 1958 M. P. 380 at p. 387 : 1958 M. P. C. 604 : 1958 Cr. L. J. 1402.
5. Arjun Raghu *v.* State, A. I. R. 1956 Bom. 183 at p. 184 (D. B) : 1956 Cr. L. J 389.
6. Ghansa Singh *v.* State, A. I. R. 1958 Raj. 226 at p. 232 : I. L. R. (1957) 7 Raj. 997 : 1958 Cr. L. J. 1232.
7. Nita Naik *v.* State, A. I. R. 1957 Orissa 168 at p. 170 : I. L. R (1957) Cut. 408 : 23 Cut. L. T. 703 : 1957 Cr. L. J. 875.
8. Emperor *v.* Ram Sukh, A I. R. 1933 Oudh 436 at p. 437 : 34 Cr. L. J 1095.
9. Immamni Hanumantha Rao *v.* State, 1956 Audh W. R. 360 (D. B.).
10. Nagendra Kumar *v* Etwari Sahu, A. I. R. 1958 Pat. 329 at p 347 : 1957 B. L. J. R. 546
11. I. L. R. (1921) 44 Mad. 913.
12. I. L. R. (1922) 46 Mad. 605 (F. B.).

arrested without warrant for a non-cognizable offence, namely, under Sec. 290, I.P.C., were *prima facie* guilty of the offence of wrongful confinement under Sec. 342, I. P. C , unless they could plead justification under the provisions of the Code relating to the right of private defence or under Sec. 81 of the Code. The principle of *Gopal Naidu's* case was applied in *D. Sanni Babu v. V. Sani Babu*,[1] and it was said that a person could confine another under a genuine and reasonable apprehension that to allow the other to remain at large would endanger the person and property of others and the act of confinement was done in good faith to prevent or avoid harm to the person or property of another.

8. Punishment by Panchayat.—In an Allahabad case, the complainant having molestec a Chamar girl, abc ut 20(Chamars armed with *lathis* collected together and, determined to punish the complainant, caught hold of him. Three persons of the locality intervened and tried to bring about a settlement. They, along with other accused who were the relations of the girl, had in good faith collected a *panchayat* and with a view to avoid other harm to the complainant and with his consent, the *panchayat*, had decided, in the interest of and for the benefit of, the complainant, to blacken his face and to give him shoe-beating In pursuance of the decision of the *panchayat* the complainant's face was blackened and he was given a shoe-beating. The accused who formed the *panchayat* were prosecuted for offences punishable under Secs. 323 and 5(6, I. P C. It was held that since the accused had intervened in good faith and but for their intervention grave consequences might have ensued, they were entitled to the benefit of the exception contained in Sec. 81, Penal Code.[2]

9. Necessity as defence to criminality.—As has been already remarked, this section is grounded on the wide doctrine of necessity (*see* para. No. 2 above). It is the universal law that all good involves some sacrifice. The ploughman who sows his seed in the expectancy of an abundant harvest is probably appealing to the same law of necessity as led Agamemnon to make the sacrifice of Iphigenia. The captain who capsizes a boat to save his own, a person who dismantles houses to arrest the progress of fire, appeal to the same law of necessity as those who deal blow for blow, or even take away another's life to save their own[3]: Necessity *vincit legem*.[4] How far the Indian Legislature has thought fit to sanction this doctrine will be manifested from this section. It places no limit on the extent of the injury that may be caused, and the question may be whether this injury may extend to the slaughter of a fellow-being to assuage hunger. Such a question arose in England, and it forms the leading case on the point. There three seamen and a boy, the crew of an English yacht were cast away in a storm on the high seas. 1,600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. They had no food and no water in this boat and in order to save themselves from certain death they put the boy to death and fed on the boy's body when they were picked up by a passing vessel.

Universal law that all good involves some sacrifice.

It was certain that if they had not fed on the boy's body they would have died before they were picked up. It was also probable that the boy killed would have succumbed earlier than the three remaining seamen. In

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1. A. I. R. 1959 A. P. 102 at p. 103 : (1957) 2 Andh W. R 201 : (1957) 1 M. L. J. (Cr.) 474 : 1959 Cr. L. J. 167
2. Bishambhar *v.* Roomal, A. I. R. 1951 All. 500 at p. 501 : 52 Cr. L. J. 179.
3. Section 100, *post*.
4. "Necessity overcomes law."

fact the slaughter of someone was imminently indispensable to save the lives of the rest, and the question was whether the prisoners who had killed and eaten the boy were guilty of murder, and it was so held by Lord Coleridge, C. J., with the concurrence of the other four Judges. In so holding, the learned Chief Justice, however, laid some stress upon the fact that the boy was selected for the sacrifice unfairly and without his consent. But on the question of the right of a person to take another's life to save his own, the judgment was equally explicit. It laid down that the law does not recognise in man the absolute necessity of preserving his life and that as regards morality, it recognises the duty of sacrificing it for the sake of saving another life. It is further admitted that there was in this case no such excuse unless the killing was justified by what has been called "necessity". But the temptation to the act, which existed there, was not what the law has ever called necessity, nor is it to be regretted.

Law and morality.

Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be a fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. "To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty in the case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children. . .these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all it is to be hoped in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity for preserving one's life. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case weakest, the youngest, the most unresisting, was chosen. Was it more necessary, to kill him than one of the grown-up men? The answer must be "No"—

> So spake the Fiend, and with necessity,
>
> The tyrant's plea excused his devilish deeds.

"It is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for Judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fitted to dispense it.

"It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might

himself have yielded to it, or allow compassion for the criminal to change or weaken in any manner the legal definition of crime."[1]

Grove, J., fully concurred with this judgment and added: "If the two accused men were justified in killing Parker, then if not rescued in time, two of the three survivors would be justified in killing the third, and, of the two who remained, the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."[2] This was the case, it will be noted, of a person who had deliberately killed another for food. And it was a case in which the victim had not been a consenting party. If suppose the boy and the three men had cast lots for the life of one of them, would the case have been different? Evidently not, for such was the case supposed by Sir James Stephen of sailors who had to cast lots to throw some of them overboard to save themselves and to which Lord Coleridge referred in these terms: "The American cases cited by my brother Stephen in his Digest from Wharton on *Homicide*, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my brother Stephen says, be an authority satisfactory to a court in this country."[4]

10. Necessity justifying homicide.—The principles deducible from the leading English case are then the following: (*i*) Self-preservation is not an absolute necessity; (*ii*) no man has a right to take another's life to preserve his own; (*iii*) there is no necessity that justifies homicide. The last requires an explanation. When it is said that no necessity justifies homicide, what is implied is that no private necessity justifies it, that is to say, such necessity as conservation of one's life as distinguished from public necessity or even necessity when it is a justification. So Lord Hale said: "The necessity which justifies homicide is of two kinds: (*i*) The necessity which is of a private nature; (*ii*) the necessity which relates to the public justice and safety. The former is that necessity which obliged a man to his own defence and safeguard."[5]

Homicide is justifiable only in self-defence.

In other words, homicide is justifiable only in self-defence[6] and when it is necessary for the good of society—as in the case of war. It is justifiable in no other case. But these cases naturally refer to death when it is the result of direct volition and violence. The same principle cannot be extended to where a person puts another's life in jeopardy to save his own. Such a case is assumed in Illus. (*a*), where a captain runs down the boat *C* with two passengers, imperilling their life for the sake of saving the passengers of his own boat. This case presents some analogy to the case supposed by Lord Bacon of two shipwrecked persons clinging to a plank not large enough to support both on which one pushes off another to save himself upon which he is drowned.[7] Sir William Blackstone thinks this is not a crime on the ground

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1. *Per* Lord Coleridge, C. J., in Dudley and Stephens, 14 Q. B. D. 273 at pp. 287 and 288. The Court passed the sentence of death on the prisoners, but that sentence was afterwards commuted to one of six months' imprisonment. (*ibid.*, p. 288, note 2); *see* also Nga Ywa, I. L. R. 12 Rang. 616 (Starvation as excuse for murder)
2. Dudley and Stephens, 14 Q. B. D. 288, note 1.
3. This was the case of Commonwealth *v.* Holmes, cited in Wharton's *Homicide*, p. 237.
4. Dudley and Stepehns, 14 Q. B. D. 273 at p 285.
5. Hale, P. C. 478.
6. Section 100, *post*.
7. Bacon's Elements, C. 5; Hawk., P. C, 73.

of self-defence "since their both remaining on the same weak plank is a mutual, though innocent, attempt upon and an endangering of each other's life".[1] Both in this case as well as in the case of the captain of the Illustration, there was no direct bodily harm, but harm nevertheless, which jeopardised life. Harm to this extent is in extreme case evidently justifiable.

11. Explanation—Limit to justifiable harm.—But the section puts no limit on the harm that may justifiably be done in any case. It makes it a question of fact to be decided in accordance with the circumstances of each case. This view was evidently enacted, following the report of the English Criminal Law Commissioners, who had recorded the following opinion: "We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice, by applying the principle of law to the circumstances of the particular case." There can be no doubt but that this opinion has been embodied in the explanation, the effect of which is to leave the question of necessity as a defence to criminal liability for determination in each case. All the same the English precedents show how far the doctrine of necessity has received the sanction of English law, and how far it will receive sanction if a similar question comes up for decision in this country.

12. Dangerous method of detecting crime.—The question what injury a man may justifiably inflict upon another for the preservation of his own property is one upon which the section sheds no certain light. That any harm including death may be caused in self-defence is of course clear.[2] But the question here, is what harm he may cause voluntarily, not in defence of threatened injury to his property, but to safeguard it against possible injury. The question arose and was decided in a case in which one Dhania Daji owned some date-trees at Tithal from which the toddy was being constantly stolen. In order to detect the unknown thief, he put into certain of the pots some of the juice of the milkbush. This toddy was purchased from a boy (whether he was or was not the thief is not clear from the report of the case)[3] by some soldiers who drank it and thereupon they were seized with vomiting and purging and a burning sensation in the throat. Medical aid was immediately at hand and the use of the stomach pump relieved the sufferers. The owner was then prosecuted under Sec. 328 of the Code for administering poison or causing it to be taken with intent to cause hurt, and he was convicted by the Court whose short judgment, however, gives no reason for their view. It, however, states that "the case does not come within the provisions of Sec. 81 of the Indian Penal Code, which applies only to acts done without any criminal intention to cause harm."[4] There was no criminal intention in the present case, though there was the intention to cause harm and as that was alone sufficient to justify a conviction under Sec. 328, the case was perhaps rightly decided. But if the offence had turned on the presence of criminal intention, there can be no doubt that Dhania had no such intention.

Acts done without any criminal intention to cause harm.

Indeed, the true reason why the case is not saved by this section is that stated in the explanation, namely, the harm to be prevented was neither so great nor so imminent as to have justified Dhania in doing the act which he

1. 4 Black., Comm. 186.
2. Dhania Daji, 5 B. H. C. R. 59.
3. *Ibid.*
4. *Ibid.*

knew might cause widespread harm. In short, the trap laid was unjustifiable on the ground of its great risk. If the risk had not been so great, the act would not have been criminal. Indeed, the fixing of an electric burglar-alarm which gives a nocturnal intruder a rude shock and holds him in its grip is not an offence but a legitimate precaution which any householder might think fit to adopt. Indeed, if Dhania had mixed a less deleterious drug to attain his object, he could not have been convicted under Sec. 328.

On this principle Jardine, J., justified a kick given by a sentry on duty to Police Chief Constable while attempting to force his guard in front of a house on fire, which he was doing in the discharge of his duty, but which the sentry did not know, as the Chief Constable was not in uniform. So Jardine, J., said : "The kick would be justified under Sec. 81 of the Penal Code as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle, that the man is excused by that section, who in a great fire pulls down other people's houses to prevent the conflagration from spreading. As Boston (the accused) did not know the official character of the Chief Constable and as this ignorance was a mistake of fact and not of law, he must be dealt with as if the Chief Constable were an ordinary citizen."[1] So where the accused, a member of the Governor's Council, was tried for imprisoning and deposing Lord Pigot, Governor of Madras, on the ground that he had, by this arbitrary and unconstitutional conduct, brought public business to a standstill. Lord Mansfield in convicting the prisoner, observed : "In England it cannot happen, but in India you may suppose a possible case; but in that case it must be imminent extreme necessity. There must be no other remedy to apply to for redress : it must be very imminent, it must be very extreme ; and in the whole they do, they must appear clearly to do it with a view to preserve the society and themselves, with a view of preserving the whole."[2]

13. Self-defence.—The cases falling under this section must be distinguished from those in which the act is justified on the ground of self-defence. The two classes of cases have often been dealt with as if they were reducible to the same principle.[3] But they are entirely distinct and distinguishable, and a given case may be defended on the ground of "private defence", though it may be indefensible under this section. And there may be cases which are defensible on either ground. Such was held to be the case of one who had locked up a person found drunk and disorderly on a public way.[4]

82. Nothing is an offence which is done by a child under seven years of age.

Act of a child under seven years of age.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Privilege of infancy.
5. Offences under special laws.

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1. Boston, I. L. R. 17 Bom. 626.
2. Stratton, 21 St. Tr 1046 at p. 1224.
3. 1 Russ. on *Crimes*, pp. 847, 848.
4. Gopal Naidu, I. L. R. 46 Mad. 605 at p. 631 (F. B.).

1. Analogous law. - "Infants under the age of discretion", wrote Blackstone, "ought not to be punished by any criminal prosecution whatever".[1] What the age of discretion is among various nations is a matter of some variety. The civil law distinguishes the age of minors, or those under twenty-five years old, into three stages ; *infantia*, from birth till seven years age, *pureitia*, from seven to 14 and *pabartus*, from 14 upwards. The period of *pureitia* or childhood, was again sub-divided into two equal parts : from seven to 10½ was *actas infantiale proxima*, from 10½ to 14 *actas pubertiati proxima*. During the first stage of infancy and the next half stage of childhood *infantia proxima*, they were not punished for any crime.[2] During the other half-stage of childhood, approaching to puberty, from 10½ to 14, they were indeed punishable, if found to be *doli capaces*, or capable of mischief ; but with many mitigations, and not with the utmost rigour of the law. During the last stage (at the age of puberty, and upwards), minors were liable to be punished, as well capitally, "as otherwise".[3] The rule of the civil law as to the absolute and qualified immunity of infants has found its way into the system of most countries. So under the laws of England "under seven years of age, indeed, an infant cannot be guilty of felony,[4] for then a felonious discretion is almost an impossibility in nature ; but at 8 years old he may be guilty of felony. Also, under 14, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appears to the Court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death."[5] As regards rape English law presumes that a boy under 14 is incapable of committing that offence, but under the Code, while a boy under seven is held totally irresponsible for that or any offence, there is no presumption of non-culpability in the case of a boy under 14, it being a question of fact in each case whether the offence of rape, or indeed, any other offence has been committed.[6]

Rule of English law.

The exemption made here in favour of infants of below 7 does extend to offences under special or local laws.[7] But an infant below 12 may be convicted of an offence under the special provisions to the contrary in the Indian Railways Act,[8] and he may be sentenced to whipping,[9] the Court having the discretion of binding over the father or guardian against repetition of the offence by the infant. So an infant may be punished under other Acts which are enacted to preserve public health, order or sanitation, and in fact, any offence of which *mens rea* is not an essential ingredient.

Exemption in favour of infants extends to offences under special or local law.

2. Principle.—This section and the next lay down a rule which, owing its origin to the civil law, had long since become established in the criminal systems of all civilized countries. An infant below 7 is absolutely *doli incapax*. In the ordinary course of nature a person of such age is absolutely incapable of distinguishing between right and wrong. There may be an occasional example of exceptional precocity, but such cases must indeed be rare, and the law cannot take notice of such freaks. After attaining the age of 7 the absolute immunity of infants is qualified, and infants between 7 and 12 are criminally liable, if it is shown that they have attained the requisite degree

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1. Hawk., P. C. 2.
2. Inst., 3-20 (20).
3. 4 Black, 22,
4. 1 Hale P. C. 27.
5. 4 Black, 23.
6. Paras Ram, I. L. R. 37 All. 187.
7. Section 40, *ante*.
8. Act IX of 1890, Sec. 130.
9. Now, whipping as a form of punishment has been abolished by the Abolition of Whipping Act, 44 of 1955.

of understanding to discriminate between right and wrong. It will be seen that the age of qualified immunity has, so far as regards this country, been reduced from 14 to 12,[1] as it was considered that children born in the tropics sometimes attain the requisite understanding at that age. This fact is recognised by the Indian Majority Act,[2] which has fixed the age of 18 as the ordinary period for attaining majority which is thus 3 years less than the age of majority under English law.

3. Meaning of words.—"*Nothing is an offence which is done by a child*", i. e. so far as the child itself is concerned. If an adult employs a child below 7 years to commit an offence, he is liable, though the child is not.

4. Privilege of infancy.—An infant under 7 years can do no wrong. He can commit no crime as he is incapable of understanding the consequences of his acts. If, therefore, a child is accused of an offence under the Code, proof of the fact that he was at the time below 7 years of age is *ipso facto* an answer to the prosecution.[3] It is not then open to the prosecution to prove precocity of intellect, or any fact to rebut the presumption of innocence, which is then irrebuttable. In England, the law in this respect is slightly different, depending as it does upon the distinction there drawn between a felony and a misdemeanour. An infant under 12 is there said to be privileged only in case of non-feasance,[4] but for misdemeanour accompanied with force and violence, as a riot or battery, he is not immune.[5] So he may be, it is said, convicted of a forcible entry[6] or cheating.[7] But no cases have been recorded of the conviction of a child below 7, and the absolute rule here enacted is then practically the modern English rule, under which it is settled that an infant below 7 cannot be convicted of a felony. And, therefore, a person cannot justify taking such an infant into custody and taking bim before a Magistrate on the ground that h e had been caught stealing a piece of wood.[8]

English law.

It will be seen that, while this section speaks of "under seven" and the next section of "above seven," the two sections make no provision for an infant of 7 years. But such an infant should be dealt with under this rather than under the next section. In a case the jury having found that the accused had committed an act which would, if he were an adult, be homicide, pardon was granted because it was found that at the time of the commission of the act he was under 7.[9] He would be entitled to an acquittal under the Code.

Where an adult purchased from a child, aged 6 years, two pieces of cloth worth fifteen annas for an anna, and it appeared that the child had taken them from the house of a third person, it was held that, as the child could not steal, the receiver could not be convicted under Sec. 411 of the Code, but nevertheless, he might be convicted of criminal misappropriation, if he knew that the property belonged to the child's guardian, and dishonestly misappropriated it to his own use.[10] Though a child below 7 years is incapable of committing an offence, a person may employ it as an innocent agent for the commission of a crime, in which case, the adult will be responsible in the same way as if he had himself

Examples.

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1. Section 83.
2. Act IX of 1875.
3. Lukhini Agradanini, 22 W. R. 27 at p. 28.
4. 1 Hale P. C. 20.
5. *Ibid.*
6. 4 Bac. Aler. 591.
7. Bac. Ab. Infancy H.
8. Marsh *v.* Loader, 14 C.P. (N. S.) 535.
9. 1 Hale P. C. 27.
10. Mokbulshah, (1835) Weir 740.

committed the crime. If suppose in the case last cited the accused had asked the child to fetch him the clothes, which he had done, he would have been guilty of theft though he could not be convicted as a receiver. So again an adult abettor of a child under 7 may be convicted of abetment, though the child abetted was by law incapable of committing an offence.[1] A person may, for instance, employ a child below 7 to set fire to another's house, or to murder another by administering him poison. In such case the abettor would be punished though the child could not.

5. Offences under special laws.—The immunity of infants from liability under this and the succeeding section is not confined to offences under the Penal Code but extends to offences under special laws as well.[2] In

Examples.

the Burma case cited above a motor-bus was found unfit for plying purposes and consequently a "fit pass" was not issued to the owner which meant a refusal to register. But in spite of it the bus was found plying for hire without being registered. The owner of the bus who was only an infant 5 years old had been found plying the bus for hire without a licence under Sec. 7 of Burma Hired Motor Vehicles Rules. It was held that the conviction was had on account of Sec. 82 of the Penal Code. In *Wali Mohammad's* case,[3] two boys said to be eight and five years old respectively, were tried and convicted for throwing stones at a railway train, would ordinarily be protected under Secs. 82 and 83, I. P. C., and would not be punishable as an offence under Sec. 127, Railways Act or under any provisions of the Penal Code. But such act would be deemed to be an offence under the special provisions of Sec. 130, Railways Act and punishable under that section. *Uttam Chand's* case[4] is one of an offence under the Hoarding and Profiteering Prevention Ordinance, XXXV of 1945. It was held that the minor members of a joint Hindu family firm found guilty of the offence were entitled to protection under Secs. 82 and 83, Penal Code.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.

Act of a child above seven and under twelve of immature understanding.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Qualified privilege of children between 7 and 12.
5. Evidence.
6. Maturity of understanding.
7. Theft.
8. Rape.
9. Bigamy.

1. Analogous law.—Under the civil law the period of qualified criminal responsibility is fixed between 7 and 14, which is also the rule adopted

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1. Section 108, Expl. 3, Illus. (*a*) and (*b*).
2. *See* Ba Ba Sein, A. I. R. 1938 Rang. 400 : 40 Cr. L. J. 80 ; Emperor *v.* Wali Mohammad, A.I. R. 1936 Sind 185 : 165 I.C. 642 : 38 Cr. L. J. 83 ; L. Uttam Chand *v.* Emperor, I. L. R. (1946) Lah. 54 : A.I.R. 1945 Lah. 238 (F. B.)
3. A. I. R. 1936 Sind 185 at p. 185 : 365 I. C. 642 : 38 Cr. L. J. 83.
4. A. I. R. 1945 Lah. 233 at p. 249 (F. B.) : I. L. R. (1946) Lah. 54.

in England. But this section fixes the shorter period ending with 12 years, which was approved by the Law Commissioners who wrote : "With reference to the precocity of children in the East, the rule of the Indian Code, which fixes the age of 12 as the period after which the plea of immaturity of understanding shall not be allowed, appears to be proper."[1] The age of 12 years was the age of possible discretion under the ancient Saxon law.[2] The effect of this section as distinguished from the corresponding English rule is thus explained by the Law Commissioners : "It would seem from this (i. e. the section) that maturity of understanding is to be presumed in the case of such a child, unless the negative be proved by the defence. By the English law, in the case of a child from 7 to 14 years of age, incapacity to comit a crime is to be presumed until the contrary be proved. After 14 years capacity is to be presumed until the contrary be proved."[3]

Statement by Law Commissioners.

2. Principle.—Under English law, as already observed (in para. No. 1 above) the privilege of a child aged between 7 to 14, is absolute, while it is qualified in this country, the reason being that cases are known to occur when a child under 14 is found to have attained sufficient maturity of understanding to be able to judge the nature and consequence of his crime, though in awarding the sentence, regard would necessarily be had to his tender age.

3. Meaning of words.—"*Who has not attained sufficient maturity of understanding*" means maturity of understanding sufficient to "*judge of the nature and consequences of his conduct on that occasion*". The consequences of his conduct here spoken of do not mean the *penal* consequences, but the natural consequences which flow from a voluntary act, such for instance, as that, when fire is applied to an inflammable substance it will burn, or that a heavy blow with an axe or a sword will cause death or grievous hurt.[4]

4. Qualified privilege of children between 7 and 12.—Under civil law a person under 18 is incapable of entering into a contract. Under the Code a person below 7 is incapable of committing a crime ; and a person above 7 and below 12 may or may not be able to commit a crime according to his individual intelligence. Full criminal responsibility commences after 12, though civil liability does not commence till a person has completed his eighteenth year. The law thus presumes earlier development of the faculty to understand criminal responsibility than civil rights. And this is in accordance with the practical experience of mankind. For discrimination between right and wrong does not require the same exertion of the mind as the recognition of civil rights and duties. Lord Hale records the case of a girl of 13, who was burnt for killing her mistress ; and one boy of 10, and another of 9 years old who had killed their companions, were sentenced to death, and the boy of 10 years actually hanged.[5] And another boy 8 years old was tried at Abingdon in the fifteenth century for setting fire to two barns, and he was hanged as it was proved that he had malice, revenge, and cunning.[6] And so in another case a boy of 10 was hanged for murdering his bed fellow.[7] on the ground that after committing the act, he had actually hid himself from which it was evident that he could

Full criminal responsibility commences after 12 years of age.

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1. First Report, Sec. 117.
2. 4 Black, 23.
3. *Ibid.*, so held in Lukhini Agradanini, 22 W. R. 27 at p. 28.
4. Lukhini Agradanini, 22 W. R. 27 at p. 28.
5. Alice de Waldborough's case, 1 Hale P. C. 26 & 27.
6. Dean's case, 1 Hale P. C., p. 25, note (*u*).
7. Spigurnal's case, 1 Hale P. C. 26.

discern between good and evil and *malitia supplet aetatem*.[1] Two parish children aged 10 and 5 were left in bed together. On the parishioner's return the girl aged 5 was missing and the boy being questioned stated that the girl had been helped by him to put on her clothes and she then left, he knew not whither. Subsequently he confessed to having cut her in various places with a large knife because she had been used to fouling herself in bed and had done so that morning which was incorrect. His story was otherwise circumstantially corroborated. He was accordingly convicted, but his sentence was reprieved on his promising to enlist in the navy.[2]

5. **Evidence**—There is thus nothing against the possibility of an infant of below 12 years of age committing a crime, but in convicting an infant of such tender years the Court requires strong and unimpeachable testimony about the facts constituting the crime, and as he is deemed *ex presumptioner juris* to possess no discretion, it further requires evidence of it.[3] The second requirement is dispensed with by the section as here enacted, but the rule as to strict proof still remains, and it has been insisted on the trial of infants of tender years. It is necessary, says Lord Hale, speaking of infants between the years of 7 and 12 that very strong and pregnant evidence should be given to convict one of that age.[4] Though it has also been pointed out that in construing this section the capacity of doing that which is wrong is not so much to be measured by years as by the strength of the offender's understanding and judgment and the circumstances of a case may disclose such a degree of malice as to justify the application of the maxim *malitia supplet aetatem*.[5]

Strong and pregnant evidence to convict infant between 7 and 12.

Examples.

In the case in which these observations were made the facts found were these: The prisoner, a girl of about 10 years, had been 10 or 12 days before the act abused by her father-in-law and her husband who had attempted to strike her. She took up a *dao* (a sharp cutting instrument) and struck her husband, while he was asleep, with it on the neck causing an incised wound 2 inches long by 3/4 inch broad and from 1/4 to one inch deep, which caused his death. After the assault the prisoner ran away and concealed herself. The Court noted her presence of mind and ingenuity in Court and judging from her demeanour in Court, and her concealment after her deed, it came to the conclusion that she was *doli capax* and she was accordingly convicted of murder and sentenced to transportation, the Court, however, adding an earnest solicitation for the reprieve of her sentence in excess of 7 years.[6]

In another case, the prisoner, a girl under 12, had set fire to neighbour's house, because the latter had threatened her mother, and the question was whether the prisoner could be tried for arson. The High Court to whom the reference was addressed on the preliminary question, remarked that the age of the prisoner was no element in considering the propriety of proceeding with the trial, and that if immaturity of understanding was a fact which the prisoner had to establish in defence, in the same manner as the plea of insanity or other incapacity.[7] And in considering the question of the maturity of understanding sufficient to judge of the nature and consequence of the prisoner's conduct, all that the Court had to consider was the natural consequences which flow from a voluntary act and not the penal consequences that

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1. "Malice makes up for age."
2. York's case, Post Cr. P. 70.
3. 1 Hale P. C. 27; 4 Black, 23; *see* also Abdul Sattar, 50 Cr. L. J. 336.
4. 1 Hale P. C. 27 & 28; 1 Hawk P. C. C. 1, Sec. 1, note (1): 4 Black, 23.
5. "Malice makes up for age"; Aimona, (Mst.), 1 W. R. 43.
6. Aimona (Mst), 1 W. R. 43 at p. 44.
7. Lukhini Agradanini, 22 W. R. 27.

flow therefrom. In other words, where a child is being tried for murder all that the accused need know to be criminally responsible is that death or grievous hurt would ensue from the blow given, or, in the case of arson, that when fire is applied to a substance it will catch fire.[1]

Though a boy of 12 is physically incapable of committing the offence of rape, he can nevertheless be held guilty of an attempt to commit it.[2] The evidence adduced on behalf of the prosecution in a rape case was the statement of the victim, a girl of ten, and that of her mother. The Magistrate believed the girl and relied on the evidence of the mother and the doctor and convicted the accused. It was held that the conviction was not illegal.[3] The evidence of a witness before the committing Magistrate may properly be brought on the record of the Trial Court if in the latter he has gone back upon it but it cannot be relied upon unless there is sufficient corroborative evidence otherwise, particularly when he says that he was watching the offence being committed from the beginning to the end without bestirring himself to help the victim as in such a case he is no better than an accomplice[4] where the girl was alleged to be the victim of an indecent assault and she made no complaint about it at the time, she did ot scream or attract any attention, she said nothing about the assault upon her until questioned by her mother who felt suspicious that a sexual offence had been committed and the case stood on the uncorroborated testimony of the girl, it was held that the jury were justified in treating the evidence of the girl with great caution.[5] Where the case for the prosecution is that the offence of rape was committed on the prosecutrix on strong ground and that she resisted by scratching the legs and thighs of the accused and then ran away crying. Neither the prosecutrix nor the accused bore any marks of injury. The prosecution failed to show why the prosecutrix did disclose the cause of her crying at the first opportunity. Further there was no evidence to show that accused could completely overpower the prosecutrix. Then there is a strong suspicion that the sexual intercourse might have been with the consent of the prosecutrix.

6. Maturity of understanding.—In cases under this section the sole question that arises is : Was the accused capable of understanding the nature of his act ?[6] This may be proved by the nature of his act, his subsequent conduct and his demeanour and appearance in Court. What Sec. 83, Penal Code, contemplates is that the child should know the natural and physical consequences of his conduct. Where the accused, over 11 and below 12 years of age, picked up his knife, and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with a *lathi* would effectuate his intention. He cannot be regarded as suffering from any immaturity of understanding entitling him to the benefit of the section.[7] Instances have been given where the Courts have inferred maturity of understanding from the fact that the offender had taken pains to conceal himself

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1. Lukhini Agradanini, 22 W R. 27.
2. Nga Tun Kaing, 11 Bur. L. T. 135 : 42 I. C. 175 ; *contra* Gopala Bin Rama, (1896) Unrep. Cr. C. 865.
3. Duli Chand *v.* State, 1952 Ajmer 54 : 1952 Cr. L. J. 1575.
4. Harnath *v.* State, 1952 Ajmer 49 : 1952 Cr. L. J. 1563.
5. Amir Hussain *v.* King, 1949 Assam 13 : 50 Cr. L. J. 589.
6. Makimuddian, I. L. R. 27 Cal. 133 ; Marimuthu, 1 I.C. (Mad.) 807.
7. Ulla Mahapatra *v.* King, A. I. R. 1950 Orissa 261 at p. 263 ; I. L. R. (1950) Cut. 293.

after the act. Premeditation may evince intelligence as where the girl wife sought the favourable opportunity of attacking her husband while he was asleep.

7. **Theft**—Where a child of 9 years took a necklace valued at Rs. 2-8 from another's body and immediately after either pledged or sold it to another for five annas, the latter act of child in spite of its age showed that he was sufficiently mature of understanding to judge of the nature and consequences of his conduct on that occasion within the meaning of this section; there was thus clearly a theft and ornament in question was stolen property within the meaning of Sec. 410.[1] But if in such a case the accused had sold or pledged the necklace in the vicinity of the theft, it would show defect of intelligence rather than otherwise. And so it was held by Prinsep and Hill, JJ., in a case in which the accused, a boy aged 9, was at 3 a. m. found in the compound of the Commissioner of Patna with a brass pot offering it for sale. The pot belonged to a constable in the compound, and the boy was, therefore, convicted of its theft. But the High Court remarked that "the fact that he offered it for sale very soon after taking it, and in the same locality is remarkable, and would seem to throw some doubt whether he understood the nature and consequences of his act,"[2] to which might be added that it was still more remarkable that he should have been found offering it for sale at 3 a. m. In another case, the accused, a girl of 10, a servant of the complainant, picked up his button worth eight annas and gave it to her mother, whereupon she was convicted and sentenced to a month's imprisonment, under Sec. 381, but the High Court quashed her conviction holding that there was no finding by the Magistrate that the accused had attained sufficient maturity of understanding to judge of the nature of her act.[3]

8. **Rape.**—Of course, nature of the act complained of often offers a fair indication of the capacity and intelligence of the accused. A boy under 12 may, for instance, be conceivably capable of committing theft, arson or even murder. But he is incapable of committing rape. So in regard to rape Lord Hale has laid down a rule that a boy under 14 is under a physical incapacity to commit the offence.[4] "There is," says Lord Coleridge, C. J., "*presumptiones juris et de jure*, and Judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence."[5] And the same learned Judge went on to say that a person could not be guilty of an attempt to commit an offence which he is physically incapable of committing,[6] though in such a case the prisoners may be convicted of common assault,[7] or even an indecent assault. In India, however, the presumption of English law against the possibility of

A boy under 12 or 14 if capable of committing rape.

1. Begarayi, I. L. R. (1883) 6 Mad. 373.
2. Queen-Empress v. Makimuddin, I. L. R. 27 Cal. 133.
3. *In re* Marimuthu, 9 Cr. L. J. 392 at p. 393 : 1 I.C. 807 (Mad.), following Queen-Empress v. Makimuddin, I. L. R. 27 Cal. 133.
4. I Hale P. C. 631.
5. Groombridge, 7 C. & P. 582 ; Phillips, 8 C. & P. 746 ; Waite, (1892) 1 Q. B. 600 at p. 601.
6. Waite, (1892) 1 Q. B. 600 at p. 601 ; *per* Hawkins, J., in Williams, (1893) 1 Q. B. 320 at pp. 321, 322.
7. Waite, (1892) 1 Q. B. 600 at p. 601 ; Williams, (1893) 1 Q. B. 320 at p. 321.
8. Williams, *supra*.

the commission of rape by a boy under the age of 14 years has no application and a boy of 12 years may be convicted of attempt to commit rape.[1]

9. Bigamy.—In another case a girl of 10 years of age who had married another man during the lifetime of her first husband and who was thereupon prosecuted for bigamy, was held not to have attained sufficient maturity of intelligence to judge of the nature and consequence of her second marriage. In this case the marriage was negotiated and caused to be performed by the mother of the accused, and there was nothing to suggest that she had herself brought about her second marriage by concealing the fact of her first marriage or that she otherwise understood that what she was made to participate in was illegal or improper.[2]

84. Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

Act of a person of unsound mind.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Scope and applicability.
4. Principle to be considered while dealing with insanity.
5. Essentials to be proved.
6. Burden of proof.
7. "Who, at the time of doing it."
8. "By reason of unsoundness of mind."
9. "Incapable of knowing the nature of the act."
10. "Or that he is doing what is either wrong or contrary to laA."

AMERICAN LAW

Type of Mental Disorders

11. Personality is indivisible
12. The unconscious.
13. Repression and regression.
14. Are all criminals insane ?
15. Type of mental illness :
    - *A.* The phychoses—
        - (1) The manic-depressive phychoses.
        - (2) Schizophrenia.
    - *B.* The neuroses—
        - (1) Character neuroses.
        - (2) Symptom neuroses.
        - (3) Traumatic neuroses.
        - (4) Impulse neuroses.
    - *C* Psychopathic personality—Characteristics of "the psychopath".
    - *D.* Organic brain disorders—
        - (1) Senility.
        - (2) Paresis.
        - (3) Head injuries.
        - (4) Idiopathic epilepsy.
    - *E.* Congenital intellectual deficiency.
16. What is "unsoundness of mind".
17. Forms of mental unsoundness.
18. Distinction between medical aad legal insanity.
19. Difference between medical and legal standpoints.
20. Different kinds of insanity.
21. The legal tests of irresponsibility.
22. Times when tests are applied.
23. Delusions.
24. Test of legal insanity.
25. Implication of plea of insanity.
26. True test stated.
27. Modern criticism of the McNaughten Rules,
28. Madness.
29. Mental delusions.
30. "Run amuck."
31. Homicidal mania
32. Sympathetic affection.
33. Three classes of homicidal maniacs.
34. Dipsomania or drunkenness.
35. Somnambulism.
36. Psychosis.
37. Arteriosclerosis.
38. Insanity as a defence to criminality.
39. Defence of insanity under the American law.
40. Physical changes in a deranged mind.
41. Sensual observation impossible.
42. Evidence of insanity.
43. Family antecedents.
44. General insanity.
45. Insane impulses.
46. Uncontrollable impulse, doctrine of.
47. Partial lunacy.
48. Puerperal insanity.
49. Irresponsibility must be at the time of doing the act.
50. Pleading and proof of insanity.
51. Medical witnesses.

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1. Emperor *v.* Paras Ram Dube, I. L. R. 37 All. 187 ; Emperor *v.* Nga Tun Kaing, A.I.R. 1918 L. B 96 at p 96 : 18 Cr. L. J. 943.
2. Godi, (1896) U. B. J. 876.

52. Questions to medical witnesses.
53. Test for feigned insanity.
54. Other evidence of insanity.
55. Absence of motive.
56. Atrocity of crime.
57. Conflicting statements.
58. Mitigation of offence.
59. Absence of motive cannot prove mental incapacity.
60. Effect of drink.
61. Antecedents.
62. Duty of Court.
63. Sentence—Extenuating circumstances.

1. Analogous law.—The last two sections deal with the deficiency in will due to tender age. This section deals with a deficiency of will due to weak intellect. "The second case of a deficiency in will," wrote Blackstone, "which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an idiot or a lunatic, for the rule of the law as to the latter, which may easily be adopted also to the former, is that *furiosus furore suo puniter*".[1] "In criminal cases, therefore, idiots and lunatics are not chargeable with their own acts, if committed when under these incapacities; no, not even for treason itself. Also if a man in his fond memory commits a capital offence and before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty he loses his senses before judgment, judgment shall not pronounce, and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, say the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment of execution."[2]

Criminal Procedure Code.

These provisions are not novel to this country for they find place in the Code of Criminal Procedure.[3]

Assuming that the three compartments of the mind are those controlling cognition, emotion and the will, this section only exempts one whose cognitive faculties are affected. As such the section has been regarded as too narrow and out of date, inasmuch as it makes no provision for a case where one's emotion and the will are so affected as to render the control of the cognitive faculties ineffectual.[4]

2. Principle.—Every man is presumed to be sane. This presumption does not apply to a man whose case is governed by Sec. 84.[5]

Section 84 mentions the legal test of responsibility in case of alleged unsoundness of mind. It is by this test, as distinguished from medical test, that the criminality of the act is to be determined. This section, in substance, is the same as the McNaughten Rules. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility.[6]

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1. "A mad man is punished by his madness alone." The same meaning is conveyed by the maxims "*Furiosis nulla voluntas est*" ("A mad man has no will") and *furiousus absentis loco est* ("A mad man is like one who is absent)."
2. 1 Hale P. C. 34.
3. Sections 464, 475, Act V of 1898.
4. Kadar, I. L. R. 23 Cal. 604; Chajju Mal, (1909) P. L. R. 94; Ramzan *v.* Emperor, 30 P. R. 1918 : A. I. R. 1919 Lah. 470 : 20 Cr. L. J. 1; (Vodde) Subbigadu *v.* Emperor A. I. R. 1925 Mad. 1238 : 27 Cr. L. J. 46.
5. State *v.* Emerciano Lemos, A. I. R. 1970 Goa 1 at p. 6.
6. *Ibid.*

Jurists have given various reasons for the exemption of lunatics from criminal responsibility. It has been said that a mad man is best punished by his own madness. So it has been said that if a mad man commits an offence he shall not suffer for the act because being deprived of memory and understanding by the hand of God, he is regarded as having broken the mere words of the law, but not the law itself. The reason, however, why a mad man is exempt is that his acts being unintentional and involuntary, no Court can correct them by punishment. Being deprived of free-will, a mad man is not placed even in a worse predicament than an infant under 7 years. For while the latter can at least control and regulate his acts, the former cannot. Being a victim of his impulses, his acts are as involuntary as they are unintelligent. It is idle to talk of his possessing *mens rea* for even his mind is not his own. He is, therefore, in all ages a fit object of commiseration ; but as society has to be protected even against the attacks of maniacs, the Criminal Procedure Code provides for his detention to prevent mischief. But his detention is not his sentence.

Reasons for exempting mad men.

3. Scope and applicability.—It deals with the deficiency of will due to weak intellect. The concept incorporated in this section is as old as the hills. Jurists have given various reasons for the exemption of lunatics or of person of unsound mind from criminal responsibility. It has been said that a mad man is best punished by his own madness—*Furiosus furore suo puniter*. As has been observed by Blackstone "the second case of deficiency in will which excuses from the guilt of crimes arises also from a defective or vitiated understanding, namely, in an idiot or a lunatic, for the rule of the law, as to the latter, which may easily be adopted also to the former is that *furiosus furore suo puniter*". It has further been laid down by the jurists that a mad man has no will—*Furiosus nulla voluntus est*. He is therefore in all ages an object of commiseration, but as society has to be protected even against the attacks of a maniac, the Code of Criminal Procedure provides for his detention to prevent mischief as in Secs. 464 and 475, Cr. P. C. Such detention, however, is not his sentence.[1]

To earn exemption under Sec. 84, I. P. C., the defence has to prove insanity of the accused at the time of the offending act. In *State of Madhya Pradesh* v. *Ahmadulla*,[2] the Supreme Court cited and followed the following observations of Reading, C. J. :

> "Every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly provcd that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing—that is, the physical nature and quality as distinguished from the moral—or, if he does know the nature and quality of the act he is committing that he does not know that he is doing wrong. . . ."

To the same effect are the observations in *Dahyabhai* v. *State of Gujarat*[3] and *Bhikari* v. *State of U. P.*[4] As mentioned already there is no proof of mental disease or delusion in the accused at the time he killed Ahmedkutty.

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1. Digendra *v.* State, 74 C. W. N. 231 at p. 237.
2. A. I. R. 1961 S. C. 998.
3. A. I. R. 1964 S. C. 1563
4. A. I. R. 1966 S. C. 1.

Behaviour antecedent, attendant and subsequent to the event may be relevant in finding that the mental condition at the time of the event, but not those remote in time.[1]

There is a distinction between "medical insanity" and "legal insanity". According to medical science insanity is another name for mental abnormality due to various causes and existing in various degrees. Even an uncontrollable impulse driving a man to kill or wound comes within its scope. The legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse. The most elaborate and authoritative exposition of the English Common Law of insanity was embodied in the answers of 15 Judges given in June, 1843, to the questions put to them by the Lords in consequence of the popular alarm provoked by the acquittal of Daniel McNaughten. The learned Judges unanimously laid down that "to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the accused was labouring under such disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."[2]

Every form of insanity is not exempt.

Section 84, I. P. C., has borrowed this definition of unsoundness of mind which is recognised by law as a good excuse.[3] The section has received a strict interpretation and is held as governing only those cases where the cognitive faculties of the accused are completely impaired.[4]

According to Illustration "A" of Sec. 105, Indian Evidence Act, the onus of establishing the plea under Sec. 84 rests on the accused. In order that Sec. 84 may come into play it has to be established that an accused is of unsound mind and his cognitive faculties are so impaired that he did not know the nature of the act done by him or that what he is doing is either wrong or contrary to law.

The mere facts (*i*) that an accused is conceited, odd, irascible and his brain is not quite all right, (*ii*) that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, (*iii*) that he committed certain unusual acts in the past such as snatching away of *huqqas* from people or hurling brick-bats and giving beating to his uncle, (*iv*) that he was liable to recurring fits of insanity at short intervals, (*v*) that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, (*vi*) that he used to quarrel with his wife on certain occasions and used to lock her up inside the house whenever he used to go to work, (*vii*) that his behaviour was queer; have not been held to be sufficient to attract the application of Sec. 84, I. P. C.

It would thus appear that every person who is mentally diseased is not *ipso facto* exempted from criminal responsibility.[5]

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1. Kanna Kunnummal Ammed Kova v. State of Kerala, A. I. R. 1967 Ker. 92 at p. 95.
2. Daniel McNaughten's case, (1843) 10 Cl. Fin. 200 : 8 E. R. 718.
3. Puncha v. Emperor, A. I. R. 1932 All. 233 at p. 235 ; *see* also 33 Cr. L. J. 714 : 139 I. C. 147 ; *see* also Deo Rao v. Emperor, A. I. R. 1946 Nag. 321 : 47 Cr. L. J. 918 : 1946 N. L. J. 656 : I. L. R. (1946) Nag. 946 ; Kalicharan v. Emperor, A. I. R. 1948 Nag. 20 (2) at p. 23 : 48 Cr. L. J. 377 : I. L. R. (1947) Nag. 226 : 1947 N. L. J. 289 : 229 I. C. 303.
4. Kalicharan v. Emperor, A. I. R. 1948 Nag. 20 (2) at p. 23
5. Govardhan v. Union of India, (1951) 2 Cr. L. J. 475 at p. 476.

4. Principles to be considered while dealing with insanity.—In dealing with insanity a number of principles in this connection have to be borne is mind. They are :

(*a*) Every type of insanity recognised is no legal insanity unless the cognitive faculty of mind is destroyed as a result of unsoundness to such an extent as to render one incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law ;

(*b*) the Court shall presume absence of insanity ;

(*c*) the burden of proof of insanity is on the accused though it is not as heavy as it is on the prosecution to prove an offence ;

(*d*) every minor mental aberration is not insanity, and circumstances indicating a mere possibility of legal insanity cannot, however, be sufficient to discharge the onus resting on the accused ;

(*e*) to attract the immunity provided in Sec. 84 of the Indian Penal Code, the Court has to consider whether the accused suffered from legal insanity at the time when the offence was committed. In reaching this conclusion the circumstances which proceeded, attended, and followed the crime are relevant considerations ; and

(*f*) when a plea of insanity is raised, it is not the duty of the prosecution to establish, affirmatively, that the accused was capable of knowing the nature of the act or of knowing that what he was doing, was either wrong or contrary to law. Every person is presumed to know the law, and the natural consequences of his act. The prosecution in discharging its burden in the face of the plea of insanity has merely to prove the basic fact and rely upon the normal presumptions aforesaid. It is then that the accused is called upon to rebut those presumptions and the inferences in such manner as would go to establish his plea.[1]

Any and every type of insanity recognized in medical science is not legal insanity. Every minor mental aberration is not insanity. There can be no legal insanity unless the cognitive faculty of mind is destroyed as a result of unsoundness of mind to such an extent as to render the accused incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law.[2]

5. Essentials to be proved.—The essential ingredients of Sec. 84 of the Indian Penal Code are in the first place with the accused. Before he can be entitled to the benefit of Sec. 84, I. P. C., he must establish that at the time of committing the act, he was *non compos mentis*—not of a sound mind. If he does not succeed in this preliminary issue, the plea must fail. In the second place, even if the accused was of unsound mind

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1. Commissioner of Income-tax, Madras v. V. A. Gajapati Naidu, A. I. R. 1964 S. C. 1563 ; Bhikari v. State of U. P., A. I. R. 1966 S. C. 1 and Jailal v. Delhi Administration, A. I. R. 1969 S. C. 15 ; Renta v. State, 1971 (37) Cut. L. T. 565 at pp. 573-74.
2. Sarka Gundusa v. State,, 35 Cut. L. T. 79 at p. 81 : 1969 Orissa 102.

he must prove that the said unsoundness of mind was of a degree and nature to fulfil one of the tests as laid down in the said section, namely, that by reason of such unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what is either wrong or contrary to law.[1] A person is presumed to be responsible for his action and the natural consequence thereof, unless he affirmatively proves that he is entitled to exemption from criminal liability. In order to bring the case within the exemption under this section the accused must prove that at the time of committing the offence he was labouring under a defect of reason which had been caused by unsoundness of mind with the result that he was rendered incapable of knowing the nature of the act and that he was doing what was either wrong or contrary to law.[2] To get the benefit of the section the accused must establish any one of the three elements necessary under the section, namely, incapability of knowing (1) the nature of the act, or (2) that the act was contrary to law, or (3) that it was wrong.[3]

Proof of one of three elements to get benefit of the section.

All the ingredients of Sec. 84 must be fulfilled before the plea of insanity succeeds. The ingredients which must be proved under the section are :

(*a*) that the acccused was insane,

(*b*) that he was insane at the time when he committed the act and not merely before or after the act, and

(*c*) that as a result of the unsoundness of mind the accused was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law.

There is no rule that once insane always insane or that now sane he must have been sane before.[4]

This provision embodies the fundamental maxim of criminal law—*actus non facit reum nisi mens sit rea*—(an act does not constitute guilt unless done with a guilty intention). In order to constitute crime, the intent and act must concur, but in the case of insane persons, no culpability is fastened on them as they have no free will (*furisis nulla voluntas est*). It is necessary for the application of Sec. 84, I. P. C. to show, (1) that the accused was of unsound mind ; (2) that he was of unsound mind at the time he did the act and not merely before or after the act ; and (3) as a result of unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It is not therefore every person mentally diseased who *ipso facto* is exempted from criminal responsibility.[5]

Requisite conditions for the applicability of the section.

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1. Digendra v. State, 74 C. W. N. 231 at p. 241.
2. Kalicharan v. Emperor, A. I. R. 1948 Nag. 20 (2) at p 23.
3. Ashiruddin Ahmed v. Emperor, A. I. R. 1949 Cal. 182 at p. 183 : 5 C. W. N. 237 : 50 Cr. L. J. 255 ; Puncha, A. I. R. 1932 All. 233 : 33 C. L. J. 741 ; *see* also Baswantrao Bajirao v. Emperor, A. I. R. 1949 Nag. 66 : I. L. R. (1948) Nag. 711 : 50 Cr L. J. 181.
4. Sarka Gundusa v. State, 35 Cut. L. T. 79 at p. 81 : A. I. R. 1969 Orissa 102.
5. V. Ambi v. State of Kerala, (1962) 2 Cr. L. J. 135 at p. 140.

What must be established to attract the provisions of this section.

To attract the provisions of Sec. 84, I. P. C., it must be established that the person, at the time of doing the act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It must be clearly established that, when the act was committed, the accused was labouring under such a defect of reason as not to know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong. Merely establishing that sometime prior to the occurrence the accused had suffered from derangement of the mind and that even subsequently he had behaved in a strange manner or had been taciturn, moody or saturnine will not be sufficient to bring his case under the exemption. In *Queen-Empress* v. *Kadar Nasyer*,[1] it was made out in evidence that the accused had been suffering from mental derangement for some months prior to the day of the occurrence, that he often complained of pain in his head and that on one occasion he was seen eating potsherds. It also appeared from the evidence that, when the enquiry, preliminary to the commitment, was taken up, he was found not to be in a fit state of mind to be able to make his defence and the enquiry had to be resumed after more than a year. The murder, it was found, was committed without any sane motive.

After referring to the burden of proof under Sec. 105 of the Evidence Act, with reference to Sec. 84, I. P. C., it was observed as follows :

"This provision of our law, which is in substance the same as that laid down in the answers of the Judges to the questions put to them by the *House* of Lords in McNaughten's case shows that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. Instance of unsoundness of mind of this description would be such as these : A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life ; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land."

On the fact of the case, it was held, that it had not been shown that the accused, at the time he killed the child, was, by reason of unsoundness of mind, incapable of knowing the nature of the act. It *State of Madhya Pradesh* v. *Ahmadulla*,[2] it was affirmed that the burden of proof that the mental condition of the accused was at the crucial point of time such as is described by Sec. 84 lay on accused who claimed the benefit of this exemption. Their Lordships quoted

Supreme Court's dictum.

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1. I. L R. 23 Cal. 604 at p. 607 ; Hiranya Kumar v. State, 1969 A. W. R. (H. C.) 339 at p. 342.
2. A. I. R. 1961 S. C. 998.

with approval a passage in *Henry Perry*,[1] the decision of the Court of Criminal Appeal in England, where the learned Chief Justice said :

> "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing, that is the physical nature and quality as distinguished from the moral or, if he does not know the nature and the quality of the act he is committing that he does not know that he is doing wrong."

Judged in the light of the above principles the Madras High Court in the undernoted case held that there was no basis, on the evidence in the case, for finding that, at the time of the occurrence, the accused was of unsound mind incapable of knowing what he was doing or that he was doing wrong. The evidence made it clear that the accused perfectly understood what he was about. The Additional Sessions Judge observed that the accused looked a little saturnine ; if by that is meant that he was grave or gloomy it means little. He has been guilty of a heinous offence—patricide, and remorse must be on him. He has attempted to cover the enormity of the crime by stating that the deceased was not his father. P. W. 1 and P. W. 2 are emphatic about the sane mental condition of the accused about the time of re-occurrence.[2]

6 Burden of proof.—The doctrine of burden of proof in the context of insanity may be stated as follows : (*1*) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* ; and the burden of proving that always rest on the prosecution from the beginning to the end of the trial; (2) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Sec. 84 of the Penal Code. The accused may rebut it by placing before the Court all the relevant evidence—oral, documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings ; and (3) even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Courts as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.[3]

Burden of proof of the prosecution and of the accused.

It is for the accused to discharge the burden of proof that he did not know the nature of the criminal acts committed by him.[4]

The burden of proving the existence of circumstances bring the case under Sec. 84, I. P. C., is thrown on the accused and Sec. 105 of the Indian Evidence Act directs that "the Court shall presume the absence of such circumstances". In order that Sec. 84, I. P. C., may come into play, it is to be established that the accused is of unsound mind and his cognitive faculties are so impaired that he did not know the nature of the act done by him or that what he is doing is either wrong or contrary to law.[5]

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1. 14 Cr. App. Rep. 48.
2. *In re* Govindaswami, A. I. R. 1965 Mad. 283 at pp. 285, 286 : (1965) 2 M. L. J. 489 at pp. 492-93.
3. State v. Emerciano Lemos, A. I. R. 1970 Goa 1 at p. 6.
4. *Ibid.* at p. 4.
5. Digendra v. The State, 74 C. W. N. 231 at p. 239.

The burden of establishing the plea of insanity is, by virtue of Sec. 105 of the Evidence Act, on the accused. But, as pointed out by Subba Rao, J. (as he then was) in *Dahyabhai Chhajanbhai Thakkar* v. *State of Gujarat*,[1] the evidence of that falls short of proving insanity may still raise a reasonable doubt about the existence of the requisite intention. At page 1568, Subba Rao, J., has expressed himself in the following terms :

> "The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions : (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* ; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial ; (2) There is a rebuttable presumption that the accused was not insane when he committed the crime in the sense laid down by Sec. 84 of the Indian Penal Code ; the accused may rebut it by placing before the Court all relevent evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings ; (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, evidence placed before the Court by accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the Court could be entitled to acquit the accused on the ground that the general burden or proof vesting on the prosecution was not discharged."

This passage was considered in the subsequent decision of the Supreme Court in *Bhikari* v. *State of Uttar Pradesh*.[2] Mudholkar J., referring to the above passage, has observed as follows :

> "If upon the evidence addused in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including *mens rea* of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in Sec. 105 of the Evidence Act."

In *Fayasena* v. *Reginam*,[3] the Privy Council had to deal with burden of proof in criminal cases in an appeal from Ceylon, which is governed by Evidence Act and Penal Code similar to those of this country. The above two Supreme Court cases were referred to with approval in this case. These decisions clearly show that, though it is for the accused to establish his plea of insanity, the prosecution will not be absolved from proving the guilt of the accused beyond reasonable doubt; having regard to the plea taken by him and the evidence adduced in the case.[4]

"All persons who have reached the age of discretion (fourteen years) are presumed to be sane and criminally responsible", says Russel on *Crime* (10th Ed., p. 45) " and in cases where a person subject to attacks of insanity

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1. (1965) 2 S. C. J. 531 : (1964) 7 S. C. R. 361 at pp. 1563, 1568.
2. A. I. R. 1966 S. C. 1 at p. 3 : (1966) M. L. J. (Cr.) 561 : (1966) 2 S. C. J. 281 : (1965) 6 S. C. R. 194.
3. (1970) 1 All E. R. 219.
4. Navier Marolle, (1970) 2 M, L. J. 466 at pp. 469-70.

has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. It lies on the accused to prove that he was insane at the time of the commission of an offence, so as not to be liable to punishment as a sane person."

Same is the law in India.

Section 105 of the Evidence Act throws the burden proving the existence of circumstances bringing the case under Sec. 84, I. P. C., on the accused and directs "the Court shall presume the absence of such circumstance".[1]

There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would, therefore, be correct to say that intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden which rested upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is not for the prosecution to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every one is presumed to know the natural consequences of his act. Similarly every one is also presumed to know the law. These are not facts which the prosecution has to establish. It is for this reason that Sec. 105 of the Evidence Act places upon the accused person the burden of proving the exception upon which he relies.[2] It will be observed that the burden of establishing "unsoundness of mind is cast upon the defence".[3] This is in accordance with reason, for as Rolfe, B., told the jury in a case : "Every man committing an outrage on the person or property of another, must be, in the first instance, taken to be a responsible being. A man going about the world marrying, dealing, and acting as if he were sane, must be presumed to be sane till he proves the contrary.

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1. Kanna Kunnumanal Ammed Kova v. State of Kerala, A. I. R. 1967 Ker 92 at p. 94.
2. Bhikari v. State of Uttar Pradesh, A. I. R. 1966 S. C. 1 at p. 2.
3. Ram, 50 I. C. (Cal.) 991 ; Mantajali 55 I. C. (Cal.) 477 ; Ram Prakash, 53 P. L. R. 15 ; Hemu Bechar v. State, A. I. R. 1951 Sau. 19 : 52 Cr.L.J. 269 ; Deo Rao v. Emperor, A I.R. 1946 Nag. 321 : 1946 N. L. J. 656 ; Sankappa Shetty, A. I. R. 1941 Mad. 326 ; Kalicharan v. Emperor, A I.R. 1934 Nag. 20 (2) : I.L.R (1947) Nag. 246; Sardar Baksh v. Emperor, 35 Cr. L. J. 1398 (Lah.) ; Nga San Pe v. Emperor, 38 Cr.L.J. 397 (Rang.); Mohd. Ashraf Ghulam Mahomead v. Emperor, A. I R. 1940 Sind 161 ; Pancha v. Emperor, A. I. R. 1932 All. 233 ; State v. Koli Jerma Duda, A. I. R. 1955 Sau. 105 (D. B.) : 8 Sau. L. R. 269 : 1955 Cr. L. J. 1628.

The question therefore would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind."[1] But while it is so as a strict matter of law, since the Court has to find the *mens rea*, it is not precluded from considering the plea if the materials for it are sufficiently on record.[2]

For the purpose of obtaining the benefit of Sec. 84 the accused will have to establish the circumstances which alone will enable him to clain the said benefit.[3]

The burden of proof of insanity is on the accused. Mere possibilities cannot however be sufficient to discharge the onus. It is not easy to lay down the tests as to how insanity within the ambit of Sec. 84, I. P. C., is to be established. Insanity at the time of the commission of the act is to be established. If on the evidence it is found that the accused had guilty consciousness, the plea of insanity must be rejected. In so judging, the antecedent and subsequent states of the mind of the accused are relevant to judge the state of his mind at the time of the commission of the offence.[4]

Whether in a criminal trial it is incumbent on the accused to prove innocence.

It lies on the prosecution to prove the charge against an accused person beyond all doubt.[5] Answering the question whether in a criminal trial a situation may arise when it is incumbent on the accused to prove his innocence, Viscount Sankey, L. C., in concurrence with the other Law Lords said[6]: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception." The Lord Chancellor went on to observe: "It is not till the end of the evidence that a verdict can properly be found and . . . at the end of the evidence it is not for the prisoner to establish his innocence but for the prosecution to establish his guilt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt. . . . No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." Russell on *Crime*,[7] remarks that the above observations seem to have been somewhat modified in *Mancini* v. *Director of Public Prosecutions*,[8] by Viscount Sankey, L.C., who said: "*Woolmington's* case is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law. The only exceptions arise, as explained in *Woolmington's* case in the defence of insanity and in offences where onus of proof is specially dealt with by statutes . . *Woolmington's* case was one in which the defence to the charge of murder was that of pure

Russell's view.

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1. Layton, 4 Cox. C. C. 149.
2. King Emperor v. Tincourie Dhopi A. I. R. 1923 Cal. 460 at p. 462; *see* also Pancha v. Emperor, A. I. R. 1932 All. 233.
3. Mst. Shanti Devi v. State, A. I. R. 1968 Delhi 177 at p. 180: (1968) 70 Punj. L. R. (D.) 29.
4. Paramanada Patra v. State, 35 Cut. L. T. 261 at p. 263: A.I.R. 1969 Orissa 222; Sarka Gundusa v. State, A. I. R. 1969 Orissa 102 at p. 103.
5. Kamla Singh v. State. A. I. R. 1955 Pat. 209 at p. 212 (D. B.): 1955 Cr. L. J. 825, relying on the decision of the House of Lords in Woolmington v. Director of Public Prosecutions, (1935) A. C. 462 : 104 L. J. K. B. 433.
6. Woolmington's case, *supra*.
7. 11th Ed. Vol. I, p. 38.
8. (1942) A C. 1 : 28 Cr. App. R. 65,

accident in circumstances not alleged to amount to criminal negligence. The prisoner gave evidence to that effect and my noble and learned friend, Lord Sankey, lays it down that if the jury are either satisfied with his explanation or, upon a review of all the evidence are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional . . . the prisoner is entitled to be acquitted."[1] A proposition to the same effect, but in different language, had been laid down by Lord Reading, C. J., in connection with a charge of receiving recently stolen goods in *R.* v. *Abramovitch*, and was approved in the Woolmington decision. "The law on this subject is thus finally established and is, I think, perfectly clear." In *Chan Kan* v. *R.*,[2] the Judical Committee observed that "in cases where the evidence discloses a possible defence of self-defence the onus remains throughout on the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish his defence any more than it is for him to establish provocation or any other defence apart from insanity. Since the decision of the House of Lords in *Woolmington* v. *Director of Public Prosecutions* and *Mancini* v. *Director of Public Prosecutions*, it is clear that the rule with regard to onus of proof in cases of murder and manslaughter is of general appplication and permits of no exceptions save only in the case of insanity, which is not strictly a defence."

Accused not entitled to exemption merely by creating a reasonable doubt in the mind of the Court.

If unsoundness of mind is urged as a ground of exemption from liability, it is for the person who seeks the exemption to prove it. The accused must not leave the condition of his mind at the time of the commission of the offence in doubt, but must satisfy the Court that it was such, that he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Accused's condition, antecedent and subsequent to the commission of the crime is relevent only in so far as it might assist the Court in coming to a conclusion as to his mental capacity at the time when he committed the act. The accused cannot get the benefit of Sec. 84 by merely creating a reasonable doubt in the mind of the Court about the existence of circumstances bringing his caee within the exception.

Burden of proof resting on accused to prove insanity is not so onerous as on prosecution to prove guilt.

The burden of proof resting on the accused to prove the insanity is no doubt not so onerous as the burden of proof resting upon the prosecution to prove the fact that accused committed the act with which he is charged. As observed by Viscount Hailsham, L. C., in *Sodeman* v. *Rex*[3] :

> "the burden in case in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests on a plaintiff or defendant in civil proceedings."

As to what is the burden resting upon a plaintiff or defendant in civil proceedings, can best be stated in the words of Willes, J., in *Cooper* v. *Slade*.[4] That learned Judge referred to an ancient authority in support of what he termed :

> "the elementary proposition that in civil cases the proponderance of probability may constitute sufficient ground for a verdict."

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1. Chan Kan v. R., (1955) A. C. 106.
2. *Ibid.*
3. (1936) 2 All E. R. 1138.
4. (1858) 6 H. L. C. 746.

Applying this rule of burden of proof, if on a consideration of the prosecution evidence and the evidence led by the accused the Court comes to the conclusion that there was a probability of the accused being legally insane at the time of the commission of the crime, he would be entitled to be acquitted on the ground of insanity.

This is quite different from holding as was held in *Parbhoo* v. *Emperor*,[1] which has gone to the extent of saying that the accused is entitled to be acquitted on the ground of insanity even if a reasonable doubt is created in the mind of the Court whether he is or is not entitled to the benefit of the exception under Sec. 84.[2]

Statement of law in Supreme Court decisions.

In the *State of Madhya Pradesh* v. *Ahmadulla*,[3] it was observed by the Supreme Court that "the burden of proof that the mental condition of the accused was, at the crucial period of time, such as is described by this section lies on the accused who claims the benefit of this exemption".[4] Reading, C. J., in *Henry Perry*[5] observed : "The crux of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise it would be a most dangerous doctrine if a man could say, 'I once had an epileptic fit, and everything that happens hereafter must be put down to that'." Proceeding further the learned Chief Justice said : "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing—that is, the physical nature and quality as distinguished from the moral—or, if he does know the nature and quality of the act he is committing, that he does not know that he is doing wrong..... There is, however, evidence of a medical character before the jury, and there are statements made by the prisoner himself, that he has suffered from epileptic fits. The Court has had further evidence, especially in the prison records, of his having had attacks of epilepsy. But to establish that is only one step ; it must be shown that the man was suffering from an epileptic seizure at the time when he committed the murders ; and that has not been proved." In *State of Madhya Pradesh* v. *Ahmadulla*,[6] Ayyangar, J., observed : "In this connection the Courts below have failed to take into account the circumstances in which the killing was compassed. The accused bore ill-will to Bismilla and the act was committed at dead of night when he would not be seen, the accused taking a torch with him, access to the house of the deceased being obtained by stealth by scaling over a wall. Then again, there was the mood of exaltation which the accused exhibited after he had put her out of her life. It was a crime committed not in a subsequent mood of insanity but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who was considered to be the enemy."

Burden of proof of insanity in civil and criminal cases.

Where the defence of insanity is urged, the burden rests upon the accused to establish his insanity : this burden is no higher than the burden which rests upon a plaintiff or defendant in civil proceedings.[7] In *R.* v. *Carr-Briant*,[8] it was decided that where either by statute or at common law some matters presumed against an accused person unless the contrary is

1. A. I. R. 1941 All. 402 (F. B.).
2. V. Ambi v. State of Kerala, (1962) 2 Cr. L. J. 135 at p. 140.
3. A. I. R. 1961 S. C. 998 at p. 999.
4. *Vide* Sec. 105, Indian Evidence Act, Illustration (*a*).
5. 14 Cr App. Rep. 4 .
6. A. I. R. 1961 S. C. 990 at pp. 1001-2.
7. *Per* Viscount Hailsham, L. C., in Sodeman v. R., (1936) 2 All E. R. 1138.
8. (1943) K. B. 607.

proved, the jury should be directed that it is for them to decide that the contrary is proved, and that the burden of proof required at the hands of the prosecution in proving the case beyond a reasonable doubt and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish. This is often cited as showing that where an onus is placed on an accused person it may be discharged by proving what would be enough to support a verdict in a civil action, and that, to use the words of Willes, J, in *Cooper* v. *Slade*,[1] in "civil cases the preponderance of probability may constitute sufficient ground for a verdict".[2] The older English cases,[3] it was laid down that where insanity was urged, the burden was on the accused to prove that he was insane at the time of the commission of an offence so as not to incur criminal liablity as a sane person. Russell on *Crime*,[4] states that "the modern rule is not so strict since the case of *Woolmington* v. *Director of Public Prosecutions*,[5] in 1935 and it is not established that the prisoner need do no more than adduce evidence (or draw their attention to evidence adduced by the prosecution) which raises in the minds of the jury a reasonable doubt as to his sanity. The jury may draw the inference of insanity from direct evidence or from the appearance and conduct of the accused at his arraignment or trial."

Allahabad view.

Turning now to the Indian law, it may be taken that the preponderance of authority is for the proposition that where any general exception pleaded by an accused person, he is entitled to be acquitted if on a consideration of the evidence as a whole (including the evidence in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the general exception.[6] But a Bench of the Madhya Bharat High Court has disagreed with the decision of the Full Bench of the Allahabad High Court in *Prabhoo* v. *Emperor*,[7] and has held that the accused must affirmatively prove the circumstances bringing his case within the exception in this section and applying this rule of burden of proof, if on a consideration of the prosecution evidence and the evidence led by the accused the Court comes to the conclusion that there was a probability of the accused being legally insane at the time of the commission of the crime, he would be entitled to be acquitted on the ground of insanity.[8]

Madhya Bharat view.

Nagpur view.

The Nagpur High Court took substantially the same view and said that the accused must establish his insanity and while recognising that his burden is not higher than that of a plaintiff or defendant in a civil litigation, merely creating a doubt about sanity is not the degree of proof required by the law having regard to the definition

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1. (1858) 6 H. L. C. 746 at p. 772.
2. *Per* Lord Goddard, L. J, in R. v. Dunkir, (1957) 3 W. L. R. 330 at p. 334.
3. R. v. Stokes, (1884) 3 C. & K. 185 ; R. v. Layton, (1849) 4 Cox. 149 ; R. v. Oliver Smith, (1910) 6 Cr. App. R. 19.
4. 11th Ed., Vol. I, p. 109.
5. (1935) A C. 462 : 25 Cr. App. R. 72.
6. Prabhoo v. Emperor, A. I. R. 1941 All. 402 at p. 410 (F. B.) : I. L. R (1941) All. 843 : 1941 A. L. J. 619 : 197 I. C. 525 : 43 Cr. L. J. 177 ; *see* also Emperor v. U. Damapala, A. I. R. 1937 Rang. 83 (F. B.) : 38 Cr. L. J. 524 ; Narayana Raut v. Emperor, A. I. R. 1948 Pat. 294 (D. B.) : 49 Cr. L. J. 406 ; Kamla Singh v. State, A. I. R. 1955 Pat. 209 (D. B.) · 1955 Cr. L. J 825 ; Nitai Naik v. State, A. I. R. 1957 Orissa 169 (D. B.) : I L. R. (1957) Cut. 408 : 23 Cut. L. T. 203 : 1957 Cr. L J. 875.
7. A. I. R. 1941 All. 402 (F. B.) : 43 Cr. L. J. 177.
8. Kashiram v. State, A. I. R. 1957 M. B. 104 at pp. 105, 106 (D B.) : 1956 Madh. B. L. R. 1275 : 1957 Cr. L. J. 370.

of "proved" in Sec. 3 of the Indian Evidence Act: it, therefore, held that the accused must establish facts required for an affirmative finding about insanity.[1] But this view has been overruled by the Supreme Court in the case of *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*.[2] In *In re Pappathi Ammal*,[3] Ramaswani, J., spoke about the McNaughten Rules regarding the defence of insanity and observed: "In one respect, however, the apparent rigour of the Rules has been relaxed, or at all events the law has been clarified to the advantage of the accused. The McNaughten Rules require that the defence of insanity must be clearly proved. It has since been laid down that the burden of proof which rests on the accused is not as heavy as that which rests on the prosecution, but may be stated as not being higher than that which rests on a party in civil proceedings It may therefore be discharged by evidence satisfying the jury that on a balance of prohabilities he was insane within the meaning of the McNaughten Rules."[4] His Lordship then summarised the law relating to the plea of insanity thus: "The law in India regarding the defence of insanity may be summed up as follows[5]: "The defence of insanity is raised mostly in cases where the accused has been charged with offences under Secs. 302 or 304, Indian Penal Code. Insane individuals seem to display a marked propensity for the commission of the atrocities of crimes. Their objects of attack have usually been those whom they had loved and cherished The authors of the Penal Code, in dealing with this class of criminal, merely enacted the rule of English law as laid down in *McNaughten's* case."

McNaughten Rules.

Plea of insanity—Law summarised.

The following propositions were laid down in that case: (*a*) Notwithstanding the accused did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is, nevertheless, punishable, according to the nature of the crime committed, if he knew at the time of committing such crime, that he was acting contrary to law. (*b*) and (*c*) Every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved and to establish a defence on the ground of insanity it must clearly be proved that at the time of committing the act the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing what was wrong. (*d*) A person under an insane delusion as to existing facts must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exist were real. (*e*) It is for the jury to decide as to whether the accused was insane or not at the time he committed the crime.

Section 84 of the Indian Penal Code provides:

> "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."

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1. Ramhitram Ramadhar v. State of M. P., A. I R. 1956 Nag. 187 at p. 190 D. B.): 1956 N. L. J. 304.
2. A. I. R. 1964 S. C. 1563 at p. 1568.
3. A. I. R. 1959 Mad. 239 at p. 243.
4. R. v. Carr-Briant, 1943 K. B. 607 : 29 Cr. App. Rep. 76 : (1936) W. N. 190.
5. *See* R. K. D ss, *Law of Lunacy* Ch. VIII. p. 112 and foll. J. D. Mayne, *The Criminal Law of India*, 3rd Ed., pp. 403-426 ; Gour, *Penal Law of India*, 6th Ed., pp. 310-334.

It is necessary for the application of the section to show that (*a*) the accused was of unsound mind, (*b*) he was of unsound mind at the time he did the act and not merely before or after the act, (*c*) as a result of unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.[1]

Burden of proof of insanity lies on accused.

If unsoundness of mind is urged as a ground of exemption from liability, it is for the person who seeks the exemption to prove it. The accused must not leave the condition of his mind at the time of the commission of the offence in doubt, but must satisfy the Court that it was such that he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Accused's condition, antecedent and subsequent to the commission of the crime is relevant only in so far as it might assist the Court in coming to a conclusion as to his mental capacity at the time when he did the act.

Temporary derangement of mind not sufficient to attract this section.

The mere fact that on former occasions, the accused had occasionally been subject to insame delusion or had suffered from derangement of the mind or that subsequently he had at times behaved like a mentally deficient person is *per se* insufficient to bring his case within Sec. 84. Uncontrollable impulse co-existing with the full possession of the reasoning powers is no defence in law nor is moral insanity, i. e. existence of delusion which indicate a defect of insanity such as will relieve a person from criminal responsibility, any defence in law.

It is not mere eccentricity or singularity in manner that will suffice to establish the plea of insanity ; it must be shown that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question. If there is evidence of premeditation and design or evidence that the prisoner after the act in question tried to resist arrest, the plea of insanity may be negatived.

There is a clear distinction between legal insanity and medical insanity.

Distinction between legal insanity and medical insanity.

Courts are concerned with the legal and not with the medical view of the question. A man may be suffering from some form of insanity in the sense in which the term is used by medical men but may not be suffering from unsoundness of mind as described in Sec. 84. If the fact showed that the accused knew that he had done something wrong, it did not matter how, though he might be insane from the medical point of view, he could not be exonerated under Sec. 84. The Indian cases embodying these principles are : *Kalicharan* v. *Emperor*,[2] *Ashiruddin Ahmad* v. *Emperor*,[3] *Puncha* v. *Emperor*,[4] *Hemu* v. *State*,[5] *In re Sankappa Shetty*,[6] *Subbigadu* v. *Emperor*,[7] *In re Govindaswami Padayachi*,[8] *In re Rajagopala Ayyangar*,[9] *Baswant Rao* v. *Emperor*,[10] *Kulandi Thevar* v. *Emperor*,[11] *Kashiram* v. *State*,[12] *Chenna Basappa* v. *State of Mysore*,[13] *Nitai Naick* v. *State*,[14] *Kherajmal* v. *State*,[15] *Hagroo* v. *State*,[16] *Emperor* v. *Gedka Goala*.[17]

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1. R. A. Nelson, *Indian Penal Code*, 5th Ed., p. 141 and foll. V. B. Raju, I. C. S., *Penal Code*. pp. 281 to 302 ; S. K. L. Ratan, *Culpable Homicide* (M. L. J.), p. 163 ; Ratanlal, *Law of Crime*, 16th Ed., p. 165 and foll.
2. A. I. R. 1948 Nag. 20 (2) : 48 Cr. L. J. 377.
3. A. I. R. 1949 Cal. 182 : 50 Cr. L. J. 255.
4. A. I. R. 1932 All. 233.
5. A. I. R. 1951 Sau. 19 : 52 Cr. L, J. 369,
6. A. I. R. 1941 Mad. 326.
7. A. I. R. 1925 Mad. 1238.
8. A. I. R. 1952 Mad. 174.
9. A. I. R. 1952 Mad. 289,
10. A. I. R. 1949 Nag. 66.
11. A. I. R. 1950 M. W. N. Cri. 95 : A. I. R. 1950 Mad. 592.
12. A. I. R. 1957 M. B. 104 : 1957 Cr. L. J. 370.
13. A. I. R. 1957 Mys. 68 : 1957 Cr. L. J. 985.
14. A. I. R. 1957 Orissa 168 : 1957 Cr. L. J. 875.
15. A. I. R. 1955 Sau. 13 : 1955 Cr. L. J. 63.
16. A. I. R. 1953 Nag. 255.
17. A. I. R. 1937 Pat. 363 ; *In re* Pappathi Ammal, A. I. R. 1957 Mad. 239 at pp. 244-45.

The question as to whether accused was mad at the time of occurrence so as to attract the application of Sec. 84, I. P. C., is a question of fact to be decided on merits in each case on the facts of that case. Such decision has to be made with reference to the law on the subject as indicated in the above decisions. Madness can be of different types and forms and acts of mad man do not necessarily follow a set pattern and conform to a normal standard. The act of one man may be different from act of another man oven under similar circumstances. If a man was mad at the time of occurrence, though he was sane at the time of trial, he may not be able to put forward at the trial, pleas describing how he really felt and the state of his mind in the same way as an accused who was not mad at the time of occurrence.[1]

English law.

It is noteworthy that in Engand the burden of proof under Sec. 2 (2) of the Homicide Act on an accused person charged with murder raising a defence of diminished responsibility due to abnormality of mind has been held to be not as heavy as the burden of proof on the prosecution ; the accused's burden was only that of establishing preponderance of probability and if it was in his favour, the verdict should be culpable homicide only.[2] In conclusion it is submitted that the proposition enunciated in *Prabhoo* v. *Emperor*,[3] and other authorities cited along with that Full Bench decision correctly reflects the warrant of authority and harmonises with the cardinal principles of criminal jurisprudence in India as well as in England. Section 105 of the Indian Evidence Act provides the prosecution with an additional support to establish its case beyond reasonable doubt but with an option to the defence to deprive the prosecution of this support and thus to make it stand exclusively on the strength of its own evidence leaving the presumption under Sec. 105 out of consideration. This section in substance lays down three propositions : (1) the prosecution shall be judged on the assumption that no exception existed ; (2) the presumption is rebuttable ; and (3) the fact, if any, sufficient to rebut the presumption has to be proved by the defence. That being so, the moment that presumption is rebutted by the defence, the onus under Sec. 105 has to be taken as discharged. The defence has not affimatively to prove beyond doubt that the prisoner was of unsound mind and that by reason of unsoundness of mind was incapable of knowing the nature of the act. The defence has only to demolish the aforesaid presumption laid down against the prisoner under Sec. 105 and not to prove beyond reasonable doubt the opposite of the presumption.[4]

Conclusion.

The burden of proof that the mental condition-of the accused was, at the crucial point of time, such as is described by this section lies on the accused who claims the benefit of this exemption.[5]

It is now well-settled that in order to succeed in a plea of insanity, the accused has to establish, firstly, that at the time of committing the offence he was of unsound mind, and secondly, that the unsoundness of mind was of such a degree that he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. It is also undisputed that the burden of proof in the matter rests upon the defence. The real question is what is the nature or the extent of the burden of proof which rests upon the defence in order to succeed in the plea of insanity.

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1. *In re* Padala Suryanarayana, A. I. R. 1965 A. P. 28 at p. 31.
2. R. v. Daubar, (1957) 2 All. E. R. 737.
3. A. I. R. 1941 All 402 (F. B.).
4. Kamla Singh, v. State, A. I. R. 1955 Pat, 209 at pp. 213, 214 (D. B.) : 1955 Cr. L. J. 825.
5. State of Madhya Pradesh v. Ahmadulla, A. I. R. 1961 S. C. 998 at p. 999 : (1961) 1 Cr. L. R. 389 : 1961 Jab. L. J. 1060.

The burden of proof which rests upon the defence in order to succeed in a plea of insanity under Sec. 84, I. P. C., is not so onerous as the burden which rests upon the prosecution of affirmatively proving the guilt of the accused, but that the burden is discharged if the defence establishes facts and circumstances which might lead to a reasonable inference that at the time of the commission of the offence the accused was of unsound mind, the unsoundness of his mind being of the nature or extent mentioned in Sec. 84, I. P. C.

It is not enough for the defence to rely upon a mere possibility that the accused may have been of unsound mind at the time when he committed the offence ; but what is required is that regard being had to the previous history of the accused, his behaviour before or at the time of the commission of the act and his subsequent conduct, coupled with other circumstances, the Court should be in a position to hold that there was reasonable probability that at the time when the offence was committed the accused was suffering from unsoundness of mind of the nature of degree mentioned in Sec. 84, I. P. C.

It is manifest that the enquiry in the case should be directed on the following lines. It has be seen what are the circumstances relevant to the defence of insanity that have been established from the materials on the record, and then it should be decided whether the circumstances which have been established give rise to a reasonable probability that at the time when the crimes were committed, the accused was suffering from unsoundness of mind of such a degree that he was incapable of knowing either the nature of his acts or that what he was doing was wrong or contrary to law.

It is true that standing by itself the absence of motive is not sufficient indication of legal insanity, but there can be no doubt that this is an important factor which must be taken into consideration, along with the other facts and circumstances which have been established for the purpose of determining the true state of appellant's mental condition at the time when the crime was committed.[1]

Section 84 of the Penal Code and Sec. 105 read with Sec. 4 of the Evidence Act, however, place a heavy burden on the defence before the act can be excused. The effect of Sec. 4 of the Indian Evidence Act interpreting the words "shall presume" is that the Courts shall regard the absence of unsoundness of mind as proved, unless and until it is disproved. The mere fact that the accused's mind was partially deranged, or that he was subject to some uncontrollable impulse due to insanity would not do. So long as the accused was not insane as to make it impossible for him to know the nature of the act or to realise that his act was wrong or contrary to law, he would be guilty of the offence committed by him. The evidence ought to be sufficient for a categorical finding that at the time when the accused committed the act he was of unsound mind to such an extent that he was incapable of knowing what he was doing was wrong or contrary to law.

In order to find whether the accused was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law, a court may rely not only on the defence evidence but also on what is elicited from the prosecution witneses as well as on circumstantial evidence consisting of the previous history of the accused if any on record and his subsequent conduct and also of course on the surrounding circumstances including an absence of motive. The fact that the prosecution evidence raises a mere vague suspicion that the accused might have been

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1. Etwa Oraon v. State, A. I. R. 1961 Pat. 355 at pp. 357, 358, 359 : 1961 B. L. J. R. 185 : 1961 Pat. L. R. 9.

of unsound mind of a very minor type is not by itself sufficient to discharge the onus of proof which lies on the accused.

The legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse. Indeed nothing short of the particular degree of insanity as laid down in Sec. 84, I. P. C., would bring the case within the exception. All other forms of insanity and all other minor aberrations of mind which are recognised by the medical science as amounting to madness are excluded in the eye of law. At one time there was considerable divergence of opinion between medical and legal opinions. According to medical science insanity is another name for mental abnormality due to various causes and existing in various degrees. Even an uncontrollable impulse driving a man to kill or wound comes within its scope : but a man whom the medical science would pronounce as insane does not necessarily take leave of his emotions and feelings. such as fear, frustration, revenge, etc. Such persons though insane, would refrain from committing any acts of violence or mischief if more powerful men are present. In the words of Bramwell, B., "there are mad men who would not have yielded to their insanity, if a policeman had been at their elbow".

Even eccentricity or unsoundness of mind of a very minor type is not sufficient. It is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a mad man as is to be exempted from punishment, but where a man is totally deprived of his understanding and memory and does not know what he is doing, any more than a wlid beast, he will properly be exempted from punishment of the law.[1]

Reasons for placing burden of proof of insanity on accused.

The reason for placing the burden of proof of insanity on an accused pleading it in defence is this : "All persons who have reached the age of discretion (fourteen years) are presumed to be sane and criminally responsible, and in cases where a person subject to attacks of insanity has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. [2][Under the Penal Code the act of a child under seven years of age (Sec 82) or of a child above seven and under twelve years of age of immature understanding can never amount to an offence.] It therefore lies on the accused to prove that he was insane at the time of commission of an offence, so as not to be liable to punishment as a sane person."[3]

Some of the important clues to ascertain mental condition of accused.

It is well settled that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. The burden of proof that the mental condition of the accused at the crucial point of time, namely at the time of the commission of the offence, was such as defined in Sec. 84, I. P. C., lies on him.[4] Speaking generally, the previous history of the accused, the pattern of the crime, the circumstances under which it had been committed, the manner and

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1. State v. Durga Charan Barik, A. I. R. 1963 Orissa 33 at pp. 35, 36 : I.L.R. (1962) Cut. 806 : 29 Cut. L. T. 290 ; *see* also State of Madhya Pradesh v. Ahmadulla, A.I.R. 1961 S C. 998 : 1961 Ker. L.R. 389 : 1961 Jab. L. J. 1060 ; Puncha v. Emperor A. I. R. 1932 All. 233 at p. 236.
2. *See* also Russell on *Crime*, 11th Ed., Vol. I, p. 109.
3. Bhattacharya's. *Insanity and Criminal Law*, p. 54 ; Mayne's *Criminal Law of India*, 4th Ed., Pt. II, p. 179 and Deorao v. Emperor, A. I. R. 1946 Nag. 321 at p. 330 : I. L. R. (1946) Nag. 946 ; State v. Chhotelal, A. I. R. 1959 M. P. 203 at p. 205 ; 1959 M. P. C. 240 : 1959 M. P. L. J. 336 : 1959 Cr. L. J. 718.
4. *Vide* State of Madhya Pradesh v. Ahmadulla, A. I, R. 1961 S. C. 998,

method of its execution, the behaviour of the accused before and after the commission of the crime, furnish some of the important clusses to ascertain whether the accused was of unsound mind at the time of the commission of the crime and was incapable of knowing the nature of the act.[1]

Examples.

The mere fact that the appellant did not abscond after the commission of the crime and made open confession of his guilt to several persons cannot lead to the conclusion that he was of unsound mind and incapable of knowing the nature of his act.

The facts in *Seat Ali* v. *Emperor*[2] were that the accused had murdered his wife, who believed herself to be possessed of evil spirits and had repeatedly pressed her husband to kill her. The accused had made a clear confession of his guilt to 6 or 7 persons. A plea, under Sec. 84, Penal Code, was taken up on behalf of the accused. That plea was not accepted. It was held that the mere fact that the accused had killed his wife under a superstitious belief and had made open confession of his guilt to several persons did not lead to the inference that he was of unsound mind at the time of the commission of the murder and did not know the nature of his act.[3]

7. **"Who at the time of doing it."**—In order to rely on the defence of insanity under this section it must be shown that the accused was insane at the time of the commission of the offence. His insanity—antecedent and subsequent —would of course be relevant to prove his mental state at the time of the offence, but this alone is directly relevant to the case.[4] The section only deals with what constitutes an offence and what does not. It, therefore, only speaks of mental irresponsibility at the time of the act. His subsequent incapacity does not affect his crime, though it affects his trial, and the contingency has been therefore provided for in the Criminal Procedure Code.[5]

Where the accused was charged with the murder of his wife, with causing hurt to his child aged an year and a half, and with attempting to commit suicide. The learned Sessions Judge found that the accused did commit the acts alleged, but, nevertheless, acquitted him on ground that he was, at the time of the commission of the acts, by reason of unsoundness of mind incapable of knowing the nature of the acts or that he was doing what was wrong or contrary to law ; in other words, on the ground of the general exception embodied in Sec. 84, I. P. C. Now the only question before the High Court was whether the accused acted as he did at a time when, by reason of unsoundness of mind, he was incapable of knowing the nature of his acts or that what he was doing was wrong or contrary to law. It was held that "of this we are constrained to observe there is no evidence whatsoever. No such plea was specifically taken by the accused himself, and in none of his statements does he go to the extent of saying that he was at any time actually insane. What he alleged was physical weakness which made him moody and silent and at times affected his mind. We have no evidence of his state of mind at the actual time of the commission of the acts and the presumption of sanity remains unweakened by any evidence of earlier insanity. On the contrary such evidence as there is, is that the accused was never insane. . . As for the deceased's statement that the accused stabbed her for no reason whatsoever, it only means that she had given him no reason, and it would be dangerous to hold that because a monstrous crime of this nature was committed for no

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1. *Vide* Ramdulare Ramadhin Sunar *v.* State, A. I. R. 1959 M. P. 259 : 1959 Cr. L. J. 844.
2. A. I. R. 1917 Pat. 503.
3. Dasaundhi *v.* State, A. I. R. 1965 H. P. 68 at p. 71.
4. Golla, 22 I. C. (M.) 737 ; Chajju Mal, (1900) P. L. R. 94 : 4 I. C. 985 ; *In re* Govindaswami Padayachi, A. I. R. 1952 Mad. 174.
5. Section 466, Cr. P. C..

apparent reason and for no proved motive, the offender must have been insane at the time. And that without any proof whatsoever of prior insanity."[1]

There was nothing on the record on the basis of which it could be said at the moment of the act, the accused was incapable of knowing that what he was doing was wrong or contrary to law.

Held, that refusal by the High Court to interfere with an order of acquittal in such circumstances could hardly be justified under any rules as to "impelling reasons" for interference even assuming the existence of such a rule.[2]

Distinction between incapacity at the time of doing the act charged and incapacity at the time of trial.

It is not always realised that there is a distinction, having a widely differing effect, between incapacity at the time of doing the act charged and incapacity at the time of trial. While both are induced by unsoundness of mind, the former is substantive which excuses the offence under Sec. 84 of the Indian Penal Code; the latter affects procedure and merely postpones the trial under Sec. 465 of the Code of Criminal Procedure. Proved incapacity at the time of doing the act gives a clean bill for all time, but incapacity to make a defence may disappear on a future date when the trial must be resumed. A person incapable of making his defence cannot be tried. Incapacity continuing from the time of doing the act, as much as incapacity supervening thereafter and persisting at the time of trial, will only result in postponement of the proceeding. But if there is no present incapacity, the trial takes place at which the plea of incapacity at the time of doing the act charged becomes a relevant plea, the proof of which lies on the defence under Sec. 105 of the Evidence Act, whatever the standard of that proof may be.

Section 465, Cr. P. C., says that if a person appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence the Court concerned is required to try in the first instance the fact of such unsoundness and incapacity. If as a result of the enquiry the Court is satisfied that the accused is so incapable, then all further proceedings are required to be postponed.[3]

8. "By reason of unsoundness of mind."—This is equivalent to *non compos mentis*; the words "lunacy or madness" have been avoided as they may differ in degrees and kind. The unsoundness of mind here spoken of may be temporary or permanent, or due to any cause. An idiot, a person *non compos mentis* by sickness, a lunatic or a person naturally mad or one whose reason is clouded by alcohol is a person so unsound, provided that his unsoundness makes him blind to the nature or criminality of an act.

It is undoubtedly true that a man does not commit murder of his wife unless his mind is agitated. But the agitation of the mind does not necessarily lead to an inference that it had affected his mental capacity so as to lead to an inference that the mind was unhinged or had become unsound.[4]

9. "Incapable of knowing the nature of the Act."—As pointed out by Mayne "the words 'incapable of knowing the nature of the act' may refer to two different states of mind, which are distinguished in the answers of the Judges, and in the English Draft Code of 1879, by the words 'nature' and the 'quality'. A man is properly said to be ignorant of the nature of his act when he is ignorant of the properties and operation of the external agencies which he brings into

Two different states of mind.

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1. State of Kerala *v.* Madhavan Pillai, A. I. R. 1958 Ker. 80 at p. 81 : 1957 Ker. L. J. 765 : 1957 Ker. L. T. 761.
2. State of Madhya Pradesh *v.* Ahmadulla, A. I. R. 1961 S. C. 998 at p. 1001 : 1961 Jab. L. J. 1060.
3. The Superintendent and Remembrancer of Legal Affairs, Government of West Bengal *v.* Durga Charan Barman, (1961) 1 Cr. L. J. 811 at pp. 812-13.
4. State of Maharashtra *v.* Gourishankar Kawadu Shende, A. I. R. 1966 Bom. 179 at p. 183.

play. As if, for instance, an idiot should fire a gun at a person, looking upon it as a harmless firework. He is ignorant of the quality of his act if he knows the result which will follow, but is incapable of appreciating the elementary principle which make up the heinous and shocking nature of the result, as if, for instance, the idiot was unable to perceive the difference between shooting a man and shooting an ape. Both of these states of mind are no doubt intended by the authors of Penal Code to be included under the words they have used. This ground of exemption will hardly ever be found to exist, except in the case of idiots, or of lunatics whose insanity is so complete as to sweep away substantially all the reasoning power which distinguishes a man from a beast. But it seems to me most important to point out that a person in this condition might have that consciousness, which is equally possessed by the lower animals, that the act which he intended to do was wrong in the sense of being forbidden, and one for which he might be punished. This, however, would not render him liable under the words of the second clause if he was incapable of knowing the nature of the act which he really did and for which alone he could be indicted. A good illustration is to be found in the case, mentioned by Sir James Stephen, of the idiot who cut off the head of a man whom he found sleeping, because, as he explained, it would be such fun to watch him looking about for his head when he awoke. It is probable that the idiot was quite aware that the man was entitled to the possession of his head and expected that if he was detected, he would be well cuffed by the man, and very probably taken up by the police. It is quite certain he had no idea that his fun would be lost, because the man would never awake."[1]

Difference between this section and Sec. 83.

The phrase "incapable of knowing the nature of the act" differs from that used in Sec. 83 where the words used are "the nature and consequences of his conduct". It means nothing more than that the person doing the act was not aware that what he was doing was wrong. So the Court a in case told the jury: "The question is whether the prisoner was labouring under that species of insanity which satisfies you tha the was quite unaware of the nature, character, and consequence of the act he was committing or, in other words, whether under the influence of a delusion or of a diseased mind, he was really unconscious at the time that the act he was committing was a crime."[2]

Use of word "knowing"—Its significance.

The use of the word "knowing" is significant and implies that in order to exempt a person from criminal responsibilities, insanity must have affected his cognitive faculties. If it merely affected his emotion, or will, leaving his cognitive faculties substantially unimpaired he cannot plead exemption, though it may be a case of extenuation.[3] Such was the case of the accused who was afflicted with a form of lunacy known as *doli circular*, a malady in which lucid intervals alternated with complete insanity. It was found that at the time of committing murder he was insane but sane enough to know perfectly well that he was committing a crime. He was sentenced to transportation, but the Court directed that he should be watched and the case reported if necessary to the Local Government for the exercise of its power of clemency.[4]

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1. Mayne's *Criminal Law of India*, 3rd Ed. para. 162, p. 413, cited with approval in Baswantrao Bajirao *v.* Emperor, A. I. R. 1949 Nag. 66 at pp. 71-72.
2. Oxford, 9 C. & P. 555 ; Sec. 102, Indian Evidence Act ; Kadar Nasver, I. L. R. 23 Cal. 604.
3. Lakshman, I. L. R. 10 Bom. 512 ; Venkatasami, I. L. R. 12 Mad. 459 ; Muthuwami, 53 I. C. (Mad.) 828 : Razai Mia, I. L. R. 22 Cal. 817 ; Kadar Nasver, I. L. R. 23 Cal. 604 ; Mantajali, 55 I. C. (Cal.) 47 ; Chajju Mal, (1909) P. L. R. 94 : 4 I. C. 985 ; Anandi, I. L. R. 45 All. 329; Lachman, I.L.R. 46 All. 243; Ramzan, (1918) P. R. (Cr.) 30 : 48 I. C. 492 ; Bugwati Prasad, 71 I. C. (All.) 69.
4. Lachman, I. L. R. 46 All. 243.

10. "Or that he is doing what is either wrong or contrary to law."—With regard to the exemption under this head, Mayne said :

Mayne's view.

"*Second*.—The next ground of exemption is the most important, as it is generally the test in the very numerous cases, where mental disease has only partially extinguished reason. One familiar instance of such partial extinction is the case of delusions, which apparently leave the mind unaltered outside the special ideas which they affect. The question put by the House of Lords to the Judges seems to have been specially addressed to this form of insanity. Their answers are perfectly clear, and are embodied in the following clause of the Draft Code of 1879, which puts the law in the most satisfactory manner :

> 'A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act. Provided that insanity before or after the time he committed the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he committed the act, in such a condition of mind as to entitle him to be acquitted on the ground of insanity'."

It has been held that this statement of the law is correct.[1]

The statement of the prisoner may suggest that he was capable of knowing the nature of his act but that does not suggest that he was capable of knowing that he was doing what was either wrong or contrary to law.[2] The explicit language of this section recognise that incapacity to know the nature of the act and incapacity to know that the person is doing what is either wrong or contrary to law are different things.

AMERICAN LAW

Types of Mental Disorders

Basic concept of modern psychiatry.

To be soundly based, legal rules and legal decisions on "insanity" as a defence must rest on an understanding of psychiatric ideology. What is more, they must rest on *current* ideology. Psychiatry is a young and growing science. Concepts that were generally held twenty years ago are now largely discarded and many that are current today will be discarded or greatly modified ten years hence.

Mental disorders today are viewed primarily as failures in the individual socio adaptive capacity. This capacity may be enhanced or diminished by heredity, physical health, an environment, but most of the disorders are no longer regarded as due solely or even in large measure to hereditary predisposition or to structural changes in the nervous system resulting from exhaustion or organic disease. Rather they are regarded as functional responses to external or internal stresses.

11. Personality is indivisible.—This functional concept of psychiatric disease is founded on certain psychological postulates that have become firmly established, even though by their very nature they are incapable of strict scientific proof. The individual today is viewed as an integrated organism ; he functions as a totality. There is no longer a separation of body and mind. The old faculty psychology, in vogue when the legal "test" of criminal insanity was established,

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1. Baswantrao Bajirao *v.* Emperor, A. I. R. 1949 Nag. 66 at p. 72 : 50 Cr. L. J. 181.
2. Kamla Singh *v.* State, A. I. R. 1955 Pat. 209 at p. 215 : 1955 Cr. L. J. 825 (D. B.).

has been discarded. The intellect, the emotions and the will are not disparate functions operating in separate compartments of the brain, but are wholly interdependent, each reacting on the other. A disoder manifesting itself in one sphere of mental activity is still a disorder of the mind as a whole, and not merely of the one compartment.

Personality defiened

Personality has been defined as "the individual in action". It is the basic stuff of which the individual is made. It determines his reaction in all life situations in health and in disease. The symptoms of most serious mental diseases are largely those of release. The social controls, acquired relatively late in life are often the first to deteriorate, lying hard the underlying structure. Even in an organic disease like general paresis, the character of the irrationality is largely determined by the prepsychotic personality.

12. The unconscious.—Our basic attitudes towards religion and politics, our likes and dislikes regarding things and people, are for the most part unconsiously motivated and controlled. The controlling power of the unconscious is such that the human mind has been compared to an iceberg, with seven-eighths of its bulk below the surface. Many persons are guided less by reason than by rationalisation, that specious logic by which our unconscious deludes us into selecting from a complex of causes and motives only the most acceptable. It is essential that lawyers and Judges appreciate the role of the unconscious in the making of human choices and in anti-social behaviour.

Sigmund Freud made epochal contributions to our understanding of the unconscious. He used first hypnosis and later the technique of free association to help patients bring to the surface memories that had been repressed below the level of consciousness. Free association has become the foundation of the psychoanalytic method. The patient is taught to relex his conscious controls and to let flow any random thoughts that come to mind. As the critical censoring mechanisms are relaxed, painful events and attitudes are released from the mind. Many of these are from early childhood and many are connected with that area of behaviour which in our culture is under such rigid taboo—the sexual. This method is of the greatest importance, but unfortunately it has little practical usefulness in criminal law, because it is so very time-consuming and requires such complete subject co-operation.

Association Test.

Carl Jung, another pioneer in the study of the unconscious, developed the "word association" test which has been used to some extent in crime detection. The examiner gives the stimulus word and the subject responds with the first word that comes to mind. An analysis of these responses often reveals to remarkable degree what lies below the conscious level. Unusual delay in responding calls attention to sensitive areas meriting further exploration.

13. Repression and regression.—The human animal, when faced with a distressing situation, is prone to seek escape by resorting to certain well-recognised psychological mechanisms, of which two are especially important. These are repression and regression. Repression is a process of forgetting. It is a means of

What is repression.

defence, the painful episode or wish, often sexual or hostile, is pushed below the level of consciousness. Neurotic symptoms are frequently of this origin. Repression differs from suppression in that the latter is conscious; repression occurs unconsciously.

Regression is a similarly unconscious sliding back to an earlier, less demanding period in one's development. Faced with an overwhelmingly

What is regression.

threatening or painful situtation, the person gives up his mature level or behaviour for one characteristic of childhood or even of infancy.

14. Are all criminals insane ?—Some theorists assert that all criminals are mentally disordered else they would not engage in such dangerous behaviour. Although a strong case can be made out for this thesis, it is wholly impractical. It would reduce the concept of mental disorder to a point where it has no discriminating significance. Many types of crime, especially petty crime, cannot be attributed to mental disorder. Instead, it must be laid to defective training and bad environment.[1] Environmental factors may be even more important in determining whether a particular act will be reported to the police or prosecuted. The social stratum of the offender may be a deciding consideration in how much criminal conduct he can indulge in with immunity. Professor E. H. Sutherland's study of "white collar" crime has shown that business and professional men not infrequently resort to criminal practices and that such practices are to a high degree accepted tolerantly by their associates and treated leniently by the Courts.[2]

Importance of environmental factors.

On the other hand, it is true that the most striking characteristic that large numbers of criminals have in common is emotional immaturity.

Freedom of Will v. *Determination.*—"We can no longer rest content," Mr. Justice Frank further has said, "with the adequacy of the conception of criminal intent as an expression of full and free choice between doing a prescribed act or not doing it." But how far we should go in discarding free will as an obsolete concept is still a moot question. Many theorists in the psychological sciences now accept strictly deterministic philosophy, in which there is no room for any supposed freedom of will. This view of course is openly at variance with religious ethics, on which our traditional penal philosophy is based. One of the best attempts to resolve the dilemma is that of Frich Fromm, in his book, *Man for Himself* : "The view that it is our character which determines our decisions is by no means fatalistic. Man, while like all other creatures subject to forces which determine him, is the only creature endowed with reason, the only being who is capable of understanding, can take an active part in his own fate and strengthen those elements which strive for the good. Man is the only creature endowed with conscience. His conscience is the voice which calls him back to himself, it permits him to know what he ought to do in order to become himself, it helps him to remain aware of the aims of his life and of the norms necessary for the attainment of these aims. We are therefore, not helpless victims of circumstances ; we are, indeed, able to change and to influence forces inside and outside ourselves and to control, at least to some extent, the conditions which play upon us."[3]

Freedom of will.

15. Types of mental illness. – Psychiatric clincial entities are as discreet as other disorders. Mental illnesses may be classified in various ways. The following list is not intended to be schematic, but merely tabulates the most commonly recognised forms of disorder :

Commonly recognised forms of mental disorders.

A. The psychoses—
   (1) Manic-depressive
   (2) Schizophrenic.
B. The neuroses (also called psychoneuroses)—
   (1) Character neuroses.
   (2) Symptom neuroses [including anxiety states, hysteria, obsessive-compulsive disorders (psychasthenia), and neurasthenia].
   (3) Traumatic neuroses.

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1. The close correlation between delinquency and crime rates and the amount of neighbourhood social disorganisation is shown in such studies as Shaw and McKay, Social Factors in Juvenile Delinquency, Report on the causes of Crime, Nat Commission on Law Observance and Enforcement, Vol. II (1931).
2. Sutherland, Is "White Collar Crime" Crime 10 Am. Socilolog. Rev. 132 (1945). *See* also Wallerstein and Wyle, *Our Law-Abidingker Lawbreaker*, *Probition*, April, 1947.
3. Fromm, *Man for Himself* (1947) p. 233.

C. Psychopatic personality (including some so-called "sexual psychopaths").

D. Organic brain disorders—

(1) Senility.

(2) Paresis.

(3) Head injuries.

(4) Epilepsy.

E. Congenital intellectual deficiency ("feeble-mindedness").

A THE PSYCHOSES

Mood illnesses.

(1) *Manic-Depressive psychoses.*—The manic-depressive illnesses are psychoses; that is, they constitute one of the major forms of mental disorder. They are affective disorders-mood illnesses. Victims have a fixation of mood which has nothing to do with external events. The manic patient is hyper-active. He is abnormally optimistic, impulsive, distractible, boastful and quarrelsome; his sex urge is increased. The depressed patient is slowed up in his activities, he is markedly indecisive: all his appetites are at low ebb. His despondency over his supposed troubles and grievances is overwhelming—so much so that every depressed patient is a suicide risk. Of two hundred suicides occurring in New York State hospitals during a ten-year period, 48 per cent were diagnosed as manic-depressives. These two contrasting moods are rather clearly phases of the same disorder. Instances have been seen where the mood has alternated from one to the other and back again. Sometimes a mild depression precedes a period of excitement. Or short periods of depression may appear in the middle of a manic excitement.

Heredity plays an important part in mood disease.

Heredity seems to play an important part in this disease. Studies have shown that while the expectancy rate of the disease in the general population is O. 4, in double ovum (dissimilar) twins where one is affected it is 26.3 in the other, and in single ovum (similar) twins the expectancy rate of the disease in the other member of the pair is 9·57.

Involutional melancholia.

Is a special form of depressive illness occurring late in middle life. It is marked by depressive symptoms centreing about defective physical functions. The complaint may be bizarre—that the circulation of the blood has stopped, or that the stomach lining has been eaten away. All the manic-depressive disorders occur about twice as frequently in women as in men; in the involutional depressions, the disproportion is the same or even greater.

Manic-depressive psychosis does not often produce criminal acts, although it may. In severe depressions, the patient, concluding that suicide is the only way out, may also conclude that it would be an act of mercy to kill his family at the same time. Infanticide may occur in puerperal depressions following child-birth. The exuberant enterprise and optimism of the manic may lead him to sink large sums of money into rash business ventures and promotion schemes and also to contract loans or use trust funds which may lead to charges of fraud or embezzlement. He may also get into fights with those who oppose his wild ideas. Women in a relatively mild manic state, called submania or hypomania, may buy thousands of dollars worth of clothes on a single buying spree, and if their euphric mood leads them to do so on credit, or to write cheques without having sufficient bank balances, they may be charged with obtaining by false pretence or passing worthless cheques. The manic's gay abandon may also lead to intemperance and dissipation. He may plunge into a season of uninhibited "playboy" carousing, brawling and philandering which may end in criminal charges as well as in the destruction of

his home, his career and his reputation. Judges and lawyers often fail to appreciate the serious condition of these individuals, because on the witness stand their mental processes are quick and they are often extremely persuasive. Even mildly manic patients belong in a mental hospital.

(2) *Schizophrenia.*—The term schizophrenia, indicating a splitting of the mind, today has largely replaced the older term "dementia praecox". The concept embraces sufficiently diverse clinical entities so that it might be better to refer to the schizophrenias or the schizophrenic-reaction types. They have in common the bizarre thought content and odd behaviour of the patient, his seeming detachment from the world of reality, the presence of delusions (false belief), illusions (false interpretations of stimuli), and hallucination (perception of non-existent external stimuli) The patient also lacks awareness and understanding of his illness and is disorganised in his social relationship to others.

Causes of schizophrenia.

The causes of schizophrenia are not known. Perhaps Adolf Meyer's view is as sound as any that the schizophrenic process is the progressive maladaptation of the individual to his environment. There is also evidence that the disorder has its source in the early years of infancy, perhaps in a lack of warm and genuine mother-love.

There are technical distinctions among paranoid schizophrenia, paranoia and the paranoid states, but they are not of practical significance. Paranoid thinking marked by suspiciousness and delusions of persecution —play an important part in many cases of schizophrenia. There are often hallucinations of hearing accusing voices, of being shot at with electric currents, cosmic rays, or gases, etc. Occasionally, the patient is driven in desperation to kill in supposed self-defence or retaliation agninst such persecution.

Catatonic schizophrenics.

Whose special form of disorder is characterised by excitement, turmoil and marked disorganisation of thought and behaviour, may commit serious criminal acts. "They display a sweeping abandonment of conventional behaviour with the breaking through of deeply repressed crude factors. Indecent exposure, outrageous sexual proposals or attacks, brutal assaultiveness, gross destructiveness, threats, murder, etc. may be carried out with reckless abandon."[1]

B THE NEUROSES

Neuroses (or psychoneuroses, for the terms are synonymous) develop in individuals predisposed by their constitutional make-up, or, what seems even more important, by their early childhood environment and training, where they encounter emotionally charged situations with which they cannot cope. Although the symptoms that develop seem inimical to the person's own happiness and welfare, they serve some unconscious purpose : the soldier's hysterical blindness keeps him out of battle ; the maiden-lady's anxiety symptoms avoid conscious recognition of forbidden sexual feelings.

Neuroses have been termed "part reactions," because they do not involve a change in the whole personality, as do the psychoses. Nor is reality changed ; the word appears to the neurotic essentially as it does to others.

(1) *Character neuroses.* - There are two main forms of neurosis—character neurosis and symptom neurosis. Characrer neurosis involves subtle and persistent distortions of character, of which the patient has little or no awareness. The character neurotic acts out his deep-seated inner conflicts. A man with a strong latent homosexual component kills another because he is trying to deny his homosexuality by proving beyond doubt that he felt no love for his victim.[2] Another, haunted by

Two main forms of neurosis character.

1. Gaylord P. Coon, *Psychiatry for the Lawyer: The Principal Psychoses*, 31 Corn. L. Q. 327, 363 (1946).

2 For a good illlustrative case, *see* United States *v.* Parlius, (1949) 83 F. Supp. 67.

the infantile fear (of which he is wholly unconscious) that he may be castrated, exposes his penis to reduce the tension and anxiety that torments him. Still another may vent his spleen on others in malicious words or acts. The character neurotic is therefore likely to make himself an object of concern to the criminal law, which the symptom neurotic seldom does.

(2) *Symptom neuroses.*—The symptom neuroses involve symptoms of physical disfunction of which the person is quite aware, although he may erroneously ascribe it to some diseased organ. Unlike character neurotics, the symptom neurotic is generally subject to alternate periods of improvement and increased severity.

The symptom neuroses are of several types, of which the most generally recognised are anxiety neurosis, hysteria or conversion neurosis, psychasthenia or obsessive-compulsive neurosis, and neurasthenia

Anxiety states.

A neurotic condition is often manifested by chronically recurring fears or panic states, without adequate and often without any basis or reason. The term "anxiety states" is reserved for those who show anxiety overtly, as distinguished from character neurotics who rarely if ever show much overt anxiety or complain of it, because they reduce or dissipate their mounting tension and anxiety by acting out their neurotic inner conflicts

Hysteria.

There are two chief types of hysteria—episodic disturbances of consciousness amnesia, fainting, somnambulism, and dissociation), and the occurrence of signs and symptoms of organic disease without any such disease in fact. The condition may (rarely) produce multiple personalities—what is popularly called a Jekyll and Hyde condition. Most of the persons displaying such a condition are not hysterics and are quite conscious of the inconsistent and contradictory roles they are playing.

Hysterias producing the symptoms of a physical disease are known as conversion states. Practically every form of disease is simulated : paralysis of an extremity, anaesthesia, vomiting, etc. The psychosomatic disorders, the illnesses in which there is a significant emotional causative factor, can be viewed as fundamentally hysterical conversion disorders. These include migraine, colitis, gastric ulcer and certain types of eczema.

Hysterias do not usually lead to criminal conduct

Although the hysterias do not usually lead to criminal conduct, there is a significant group of criminal offenders closely akin psycharictically to those in hysterical states. Among them are many murderers. They are typically accidental or occasional offenders. They are not markedly neurotic in their everyday activities, and their life patterns have been commendably law-abiding, but they become overwhelmed and overpowered by some combination of circumstances. Not infrequently they commit suicide afterwards. Their crimes are carried out in a state of confused consciousness, or as the psychiatrists say, in a dissociated state. Their actions are almost automatic.

Often these persons are conscientious individuals who have been struggling with catastrophic personal problems for which they can find no solution. They usually possess mediocre intellectual endowment and are socially unsophisticated. Their crimes may be impulsive or premediated. After they have once started carrying them out, they develop a state of dissociation that lasts out the crime, so that they go through the various steps understandingly, but in a state of emotional numbness. Recollection of the crime is often incomplete, with a spotty amnesia that may only partially clear up under sodium pentothal or other abreactive drug. Since these individuals cannot be said to have been completely incapable of knowing the nature and quality of their acts and their wrongfulness, they are generally held to be responsible and punishable.

One rather bizzare hysterical reaction is known as the Ganser syndrome. It occurs most often in persons awaiting trial or sentence by the Court. It was apparently rather common in Germany early in this centuary, but is now rare. (This change may to some extent be due to changing fashions in doctor's diagnoses, but it should be said that it is not unprecedented for the incidence of illnesses to vary widely from one period to another.) The most prominent symptom in the Ganser syndrome is the patient's near missing in tests of intellectual function. In simple additions, subtractions, and multiplications, the correct answer is likely to be missed consistently by only one. In a true Ganser syndrome, the patient is unaware of his mistakes. Although as said it appears typically in persons awaiting trial or sentence, it does not seem to affect the intellectual function sufficiently so that the person can be said to be incapable to know right from wrong with respect to the crime charged.

Ganser syndrome.

(3) *Traumatic neuroses.*—Traumatic neuroses, the result of injuries and accidents, may in a sense be considered a separate category of neuroses, but in another sense, they are not separate at all, for the symptomatology may to a large extent be that of an anxiety neuroses or a conversion hysteria.

Whether a given traumatic experience will produce a neurosis depends upon individual constitutional differences and upon various external circumstances. Constitutional capacity may depend in part on previous experiences, upon health, upon the presence of fatigue due to hunger, cold or disease. One apparently important external factor is whether free movement was possible at the time of the trauma. "The blocking of external motor activity increases the probability of a breakdown, and foxhole waiting is more dangerous than actual warfare."[1] For the same reason, being pinned down in the wreckage of an automobile accident increases the traumatic effect of the injury.

Persons suffering from traumatic neuroses often show marked emotional instability with restlessness, crying spells, and even spells of rage. Fenichel interprets these symptoms as "discharges of excitations that were aroused in the traumatic situation but could not be discharged sufficiently."[2] Criminal conduct may occur by reason of the emotional instability or in a fit of rage attributable to the disorder, but crime is not typically associated with this disorder. It is of legal interest primarily in personal injury and workman's compensation cases.

(4) *Impulse neuroses* -- Another group of the neuroses consists of the obsessive-compulsive disorders, also known as the psychasthenias. These are the illnesses in which the patient feels compelled to repeat some particular act over and over. There are probably no disorders that more clearly illustrate the tremendous power of the unconscious. These persons are acutely aware of their disorder and they do their best to resist, but sooner or later they feel compelled to perform their obsessive "rituals of action and thought". Dynamically, obsessions, compulsions and phobias are similar. They are symbolic substitutes for feelings and thoughts that the individual cannot endure.

Psychasthenia.

Impulse neuroses differ from the obsessive compulsive in that they involve morbid acts performed in the hope of achieving pleasure, whereas compulsive acts are painful and are performed in the hope of getting rid of pain. The compulsive neurotic feels forced to do something he does not like to do. But the impulsive neurotic at the moment of his excitement feels the impulse as ego-syntonic, as something he wants to do to achieve pleasure, even though he may feel guilty about what he is doing. Most crimes that cannot be effectively resisted because of a neurosis are in this category—e. g. true kleptomania, and pyromania. Many sex offenders, including most exhibitionists, also fall into this category. In the future, psychiatric studies will very likely show that many other habitual criminals, such as burglars and auto thieves, are also, victims of morbid impulses. In jurisdictions recognising

1. Fenichel, *The Psychoanalytic Theory of Neurosis*, (1945), p. 117.
2. *Ibid.*

"irresistible impulse" as a defence, a person committing a criminal act by reason of an impulse neurosis should be held not guilty by reason of insanity.

Neurasthenia

A last type of neurosis is neurasthenia. The term means "nerve weakness" and dates from the time, almost a century ago when psychiatric symptoms were thought necessarily to have a physical basis. The condition is characterised by excessive fatigability, irritability, complaints of head pressure, poor memory, insomnia, and many physical symptoms. A high proportion of the cases occur in generally inadequate individuals. The diagnosis is no longer frequently made. This type has no criminal importance.

Criminality.

Lurid fiction has tended to give the public an exaggerated notion of the importance of compulsive disorders in causing crime. On the other hand, the importance of deeply buried neurotic conflicts in explaining criminal conduct has probably been underrated. Also, a neurotic or even a psychotic condition may result from the commission and detection of a crime; arrest and imprisonment awaiting trial may produce hysterical reactions in individuals who had never exhibited such reactions before The neuroses are typically borderline disorders, a few neurotics are insane within the legal tests of responsibility, a few are clearly sane, and a large number are abnormal to a degree that punishment will have little or no effect, and yet are punishable under the legal test.

Treatment.

Neurotic criminals tend to be better material for effective psychiatric treatment than many other disorderd offenders. They frequently have some insight into their distorted attitudes and behaviour, and are ready to reach out or help. They do no tend to project the blame on society. Good results have been reported with various treatment methods. Psychoanalysis has been responsible for some good results, but it is too expensive and too prolonged to be available to many. Hypnoanalysis and sedative drugs have been used to break down unconscious resistance and make treatment less prolonged Even electroshock therapy and lobotomy have been employed. There seems to be no rationale for the former. So little is still known of the mechanisms of lobotomy and of its results that it is to be resorted to only with great caution. Perhaps real benefit is to be expected in neurotic criminals in whom the compulsive behaviour component is controlling.

C. PSYCHOPATHIC PERSONALITY

Psychopaths.

The term "psychopath" is a vague one—so much so that some authorities have urged that it be abandoned. Roughly, it is used to refer to groups of mentally abnormal individuals who do not fit into the categories of neurosis, psychosis or intellectual deficiency. They do not usually exhibit pronounced mood disturbances ; they do not have delusions or hallucinations ; they are not intellectually retraded. Yet they are in constant difficulties because of abnormal, frequently ante-social behaviour. Anomalies in their character, emotions, moral sense or sexual make-up render them incapable of conforming to social standards or of making satisfactory social adjustment. They are largely unable to put themselves in the other persons' position and assess the situation from that stand-point. They must have immediate gratification of wants even at the expense of long-term advantage.

Moral insanity.

More than a century ago, pioneers in psychiatry such as Dr. Benjamin Rush in America and James Cowles Pritchard in England described a form of disorder characterised by defect in the normal sense without impairment of intellectual powers. This "moral insanity" seems to be a form of what is now called psychopathic personality. The modern term also includes the "constitutional psychopathic "inferiors," a term popular a generation ago, reflecting the influence of German psychiatry, with its emphasis on the importance of constitutional factors as against environmental.

Characteristics of "The Psychopath."—A study of psychopaths in the Army summarised their characteristics in (A) acting ; (B) feeling ; and (C) thinking :

(A) In their actions.

Psychopaths are characterised by "(1) Inability to withstand tedium, frequent change. (2) Lack of sense of responsibility taking the fun where it is found. (3) Blow up under pressure. (4) Maladjustment to law and order. (5) Recidivism."

(B) In feeling.

"(1) Emotional deficiency, narcissistic, callous, inconsiderate, no remorse and projects blame on others ; (2) Hair trigger emotions, exaggerated display, irritable and impulsive. (3) Amoral (social and sexual). (4) Worry, but do nothing about it."

(C) In thinking.

"(1) Defective judgment ; lives for the present rather than for the future. (2) Inability to profit from experience. Able to realise the consequences intellectually, but not to evaluate them."[1]

Classification.

Any attempt to define the characteristics of "the psychopath" is probably an over-generalisation. The term covers a number of types, and they exhibit varying characteristics. Modern writers in psychiatry have attempted to classify the psychopathic personalities into sub-groups. The American Psychiatric Association has made a tripartite classification : (1) with patrologic sexuality, manifested by homosexuality, erotomania, sexual perversion, sexual immaturity ; (2) with pathologic emotionality, manifested by schizoid personality, cyclothymic personality, paranoid personality, emotional instability ; (3) with social or normal tends, manifested by anti-sociality, pathological mendacity, moral deficiency, vagabondage, misanthropy.

Tripartite classfication.

Another tripartite classification is that of Dr. K. Henderson : (1) aggressive psychopaths, in whom episodic acts of unbridged aggressions constitute the central problem ; (2) inadequate psychopaths, who are passive, shiftless, and unreliable and whose propensities to criminal conduct are largely limited to petty thieving, burglary, swindling, pathological lying, etc. ; (3) creative psychopaths, consisting of relatively rare types of genius coupled with childish emotionality, immaturity and impracticality of attitude.[2]

Classification in England.

In England, Sir Norwood East has suggested as useful for criminal cases the following classification : psychic inferior personalities ; ethical aberrant personalities ; alcohol and drug addicts ; sexual perverts ; schiozoid, cycloid and paranoid personalities.[3] Numerous other classifications have been offered by other writers. They agree, however, in grouping under the general term psychopathic personality disorders manifested primarily by aberrant social conduct and non-conformity to social standards

Many persons diagnosed as psychopathic personalities probably should be considered as suffering from neurotic character disorders. The differentiation between the two conditions is not always clearly defined—an unfortunate medico-legal situation, leading to confusing and sometimes misleading statements by

1. Caldwell, *Constitutional Psychopathic State (Psychopathic Personality)* ; Studies of Soldiers in U. S Army, 3 J. Crim. Psychopath, 171 (1941). Cleckely, in an excellent study, lists sixteen characteristics marking the mentally abnormal recidivists for whom the term "psychopath" perhaps should be reserved : (1) Superficial charm and good "Intelligence" ; (2) Absence of delusions and other signs of irrational "thinking" ; (3) Absence of "nervousness" or psychoneurotic manifestations ; (4) Unreliability ; (5) Untruthfulness and insincerity ; (6) Lack of remorse or shame ; (7) Inadequately motivated anti-social behaviour ; (8) Poor judgment and failure to learn by experience ; (9) Pathologic egocentricity and incapacity for love ; (10) General poverty in major affective reactions ; (11) Specific loss of insight ; (12) Unresponsiveness in general inter-person relations ; (13) Fantastic and uninviting behaviour with drinks and sometime without ; (14) Suicide rarely carried out ; (15) Sex life impersonal, trivial and poorly integrated ; (16) Failure to follow any life plan. H. Cleckely, *The Mask of Sanity*, (1950), p. 335. *See* also Lindner and Seliger, *Handbook of Correctional Psychology*, (1947), p. 395.
2. Henderson, *Psychopathic States* (1939).
3. East, *Society and the Criminal* (1st Am. Ed. 1951), 187.

experts in Court. The differentiation is particularly difficult in cases of "pathologic emotionality." Certain unhappy, harassed individuals, struggling against unconscious anxieties and conflicts created during the early years of life, probably, should be classified as neurotic characters rather than psychopathic personalities. When their anxiety reaches a certain pitch, they seek relief by committing some anti-social act. One of the chief diagnostic criteria of this kind of neurotically determined criminality is the repetitiveness of the behaviour Many habitual criminals are such in the sense that they repeatedly follow the same pattern of behaviour. It has been shown that certain recidivist burglars or automobile thieves are as clearly acting out a neurotically motivated pattern of behaviour as are arsonists, kleptomaniacs or sex offenders—groups that today are rather generally regarded as having a high incidence of psychologic morbidity.

Some investigators assert that these neurotic or psychopathic delinquent actually seek detection and punishment, to relieve their own guilt feelings. But this is probably only rarely true ; the psychopathic criminal is likely to be reckless of consequences, but he is probably not often actually courting punishment.

Causation.

The more dynamically oriented psychiatrists today do not believe that psychopaths are born that way. Of course, constitutional endowment predisposes the individual toward or away from the development of a psychopathic personality, just as it may with any mental condition. But actually to develop the condition, they believe that the organism must be subjected to certain special noxious influences. The noxious influences consist of virtual emotional starvation during the first years of life.[1]

In the cases of markedly hostile or aggressive psychopaths, one finds in their background not only this emotional starvation, but often, in addition a sadistically cruel parent. The child, in an instinctive effort to survive in a cold and cruel world, develops a primitive sort of aggression, an abnormal degree of selfishness, an emotional isolation, a lack of loyalty and warmth, a lack of truthfulness and sincerity and a tendency to demand immediate gratification to desires despite the danger of future penalties.

Psychopaths become less actively anti-social as they advance into middle life. Whether this is due to loss of vigour, or to a late development of emotional maturity, is uncertain.

Criminality.

The anti-social behaviour of the psychopathic and the neurotic differs from that of the ordinary criminal in that it is not really purposeful ; its ends are not readily intelligible to others ; it is primarily harmful to the actor himself. However, psychopathic personality or neurosis is an important factor in various crimes, in which the psychopath "acts out" his aggressive reactions against society. Yet the traditional tests of criminal insanity are not broad enough to include such disorders. Many confidence men fall in this category, and so do many swindlers who never get

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1 There are many studies supporting this thesis Children raised in an orphange have been found to have markedly different personality characteristics from an essentially similar group who had spent their first three years in foster homes. "The extreme deprivation experience of the institution children has apparently resulted in quasi-constitutional fixation at the most primitive level of conceptual and emotional behaviour." Goldfarb, *Effects of Psychological Deprivation in Infancy and Subsequent Stimulation*, 102 Am. J. of Psychiatry 18 (1945). An analysis of over 5,000 children in New York led to the same conclusion : the psychopathic behaviour pattern is produced by emotional deprivation during the infantile period due to a lack, or a serious break in parent-child relationship. Such deprivation may exist in economically secure homes, "with rapidly changing servants, and contact with parents due to business and social obligations, too scant to permit any real identification". Lauretta Bender, *Psychopathic Behaviour Disorders in Children*, in Lindner and Seliger, *Handbook of Correctional Psychology*, (1947) 360. Valuable articles by authors also appear in this book. *See* also Karl Menninger, *Recognizing and Renaming "Psychopathic Personalities,"* Bull. of the Menninger Clinic, Vol. 5 (1941), p. 150.

into Criminal Courts because they confine their operations to relatives and friends who prefer not to prosecute. Their superficial charam and glib intelligence often arouse sympathy and forbearance where ordinary criminals would get short shrift. Many alcoholics, drug addicts, vagabonds, pathological liars and various kinds of inadequate personalities belong in the psychopath group. So do many sex perverts so many that statutes frequently undertake to deal specially with so-called "sexual psychopaths".[1]

Treatment of punishment.

Most of the psychopathic personalities belong in that large and challenging group of persons who are not "insane" within the meaning of the criminal tests of responsibility but who are certainly not normal. At the other extreme, a few are so nearly normal that both the public and the criminal himself would regard it is an injustice to treat him as anything else. But most fall between those two extremes. They are poor material for psychiatric treatment. and at the same time they are unaffected by the usual criminal penalties. Their inability to face their own inadequacies, their general pattern of irresponsibility and superficial relationship with others, and particularly the insistence on immediate gratification of impulses, make any kind of treatment difficult. Ideally, the State should provide a special institution combining some of the features of a prison and of a mental hospital, where such individuals can receive training and medical treatment. The imposition of a criminal sentence may add force to psychiatric treatment and may help the individual to adjust to his environment. By the same token, in the less dangerous types of cases, a court's making psychiatric treatment a condition of probation sometimes makes the psychopath come to grips with his problem. An aggressive therapist may be able to strengthen his patient's ability to conform to social standards. Various treatment centres are trying group psychotherapy. The experience with this complex treatment method in Army Disciplinary Barracks and Rehabilitation Centres during World War II certainly was encouraging. Group therapy is not only economical, since as many as fifteen patients can be treated by one psychotherapist, but there is special value in the dynamics of group interaction ; hearing one's basic attitudes discussed and condemned by one's fellows may make more impression than being censured by father-figures such as Judges.

"Sexual psychopaths."

Since 1937, at least twenty States have enacted laws to deal specially with "sexual psychopaths," or "psychopathic persons" who have shown a lack of power to control their sexual impulses. The statutes will be discussed in Chapter 4. Here we shall discuss the make-up of this supposed group.

Actually, "sexuual psychopath" is largely a legal term ; psychiatrically, sex offenders cannot be treated as one separate and homogeneous group. On the contrary, there is as much difference between the average rapist and the average exhibitionist as between the safe-cracker and the shop-lifter. Isolated sex offencess may be committed by person who are really not sex deviates at all. They often have poorly organised egos, and under stress or under the influence of alcohol their defences momentarily collapse. Then three are the confused adolescents who are overwhelmed by the sudden trust of their sexual drive and who become involved in various types of sexual offence as a kind of instinctual grouping.

Sexual offences may be symptomatic of intellectual deficiency.

Sexual offence may be symptomatic of intellectual deficiency, of some form of of psychopathic personality or neurosis, or of psychosis. In fact, nearly every variety of mental disorder may have sexual misconduct as a sympton. The defective's sex crime is usually of a minor character, although he may commit rape or murder. And the defective is likely to repeat his crime unless apprehended

1. See *post*, pp. 27-31 and 195

and placed under custody. Psychopaths, as already said, include persons with pathologic sexuality of one sort or another. Neurotics sometimes are led by their feelings of sextual inadequacy and their wish for superiority to commit a sex crime, even a sex murder. The hysterical type of neurotic, however, tends to be more of a nuisance than a menace, contending himsel with exhibitionalism, sending indecent letters, etc. The senile, arteriosclerotic characteristically becomes involved in pedophilia, the postencephalitic in impulsive aggressive attacks, the schizophrenic in unsolicited amorous advances both homosexual, in and hetersexual, and the manic in exhibitionistic displays. But there is no constancy in this symptomtology. To complicate the picture still further, offences that seem to have no sexual implication may actually be sexually motivated. Thus, larceny or arson may actually indicate kleptomania or pyromania.[1]

Prostitution as cause of sexual offences.

Prostitution, the most common of sex offences, is primarily a socio-economic rather than a psychiatric problem, but studies of prostitutes have shown a significant incidence of intellectual deficiency and schizophrenic psychoses. The incidence of deficiency seems to be decreasing, however ; the statement frequently made early in this century that 50 per cent. of prostitutes were feeble-minded is certainly not true today. On the other hand, one is increasingly aware today that many prostitutes are socially and emotionally immature, and unable to adjust themselves to authority. Overtly strict parental authority may cause a hostile attitude towards all authority leading to various forms of anti-social behaviour including prostitution.

Exhibitionism, or indecent exposure, is a neurotic type of offence. It occurs only among males and not often among Negro males. The act is less a conscious striving after pleasure than a compulsive need to reduce anxiety and tension. Freud called attention to the significance of castration anxiety in many men, rising during childhood and consciously repressed and forgotton. A man dominated by this unconscious fear feels the need to demonstrate the integrity of his genitals by publicly exposing them to a strange female. Scoptophilia, commonly called yoyeurism or peeping, which may be considered the counterpart of exhibitionism, is closely allied to it. Both types of activity are not infrequently found in the same individual.

Pedophillia (sex relations with children)

Pedophillia (sex relations with children) is one of the more serious sex offences. Many young pedophillics are insecure, immature and shy individuals who lack the courage to make sexual advances to contemporaries. At the other extreme is the senile group, constantly growing as the life span is increased. Many of them have begun to experience potency difficulties and they fear having to perform satisfactorily for a sexually experienced, and possibly critical, adult female. Some have entered their "second childhood" and feel again a genuine compatibility with children. But the pedophillics also include some fearfully marked satistic individuals who brutally carry out forced relation with children. Many of these are psychotic. Perhaps more than almost any other group of offenders, proper disposition by the Courts of convicted pedophillics calls for a complete psychiatric evaluation.

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1. A study of 102 sex offenders at Sing Sing Prison stated :

   "There is no distinct line between sex offenders and other law violators..... sex offenders have been found to suffer from no single category of mental pathology ; the same varying symptoms of basic difficulties are also found in thieves, murders, burglars and extortionists. Moreover, as police and probation records disclose, men who are primarily sex offenders often commit other types of crime and *vice versa*.

   "Sex offenders are in a separate classfication only because of society's concern about their particular type of acts, not because of their anti-social behaviour." New York State, Governors Report on the Study of 102 Sex Offenders of Sing Sing Prison (1950).

Bestiality, sex relations with animals.

Bestiality, sex relations with animals, is more common than generally supposed. It occurs most frequently among boys on isolated farms. Among city dwellers it is rare and is confined almost exclusively to mental defectives.

Mouth-genital contacts.

Mouth-genital contacts are among the deviations that the law prohibits — although the statutes are usually so circumspectively phrased that if they dealt with any other subject, they would be held void for vagueness. Such legal prohibitions are based on cultural moves rather than on any objective evidence of undesirable social consequences. Nor can such conduct be said to be unnatural or to evidence mental abnormality, for it occurs in most animal species. Making such conduct criminal creates what Jeremy Bentham (1748-1832) called "imaginary offences," i. e. "acts which produce no real evil, but which prejudice, mistake or the ascetic principle have caused to be regarded as offences."

Statutory rape (sexual intercourse with a girl under the age of consent).

Statutory rape (sexual intercourse with a girl under the age of consent) and incest may some times be evidence of mental abnormality, but for the most part they are, like prostitution, primarily social in origin. They usually occur in groups with low cultural standards and in over-crowded neighbourhoods. Where the age of consent has been raised to eighteen, or even twenty-one (as in Tennessee), statutory rape is not likely to carry any implication of abnormality whatever.

Forcible rape has several basic motivations. It may be committed as the explosive expression of a pent-up sexual impulse. Or it may be committed as an irrational effort to deny the existence of a strong homosexual urge. It may be the act of a mentally ill person in whom the normal sexual aggressiveness takes an abnormally exaggerated form and manifests itself in a brutal sexual attack. Many of the latter type of individuals suffer from a deep-seated hatred focused particularly on women. There is also a type of rapist who is paradoxically, not primarily a sex offender. This is the aggressive, anti-social criminal who commits crimes of violence, and is likely to commit rape in the course of a robbery or burglary as merely one more act of pillage.

There is no support for the common belief that sex offenders tend to be recidivists. Some exhibitionists and some pledophillics have records of repeated arrests for the same type of crime, but there is little repetiveness among other types of sex offenders. The Uniform Crime Reports, issued by the Federal Bureau of Investigation, lists rape twenty-fourth and "other sexual offence" twenty-fifth in order of recidivism among twenty-six offences listed.[1]

D. ORGANIC BRAIN DISORDERS

The organic brain disorders involve morbid structural changes in the brain. This excludes the schizophrenic, manic-depressive, neurotic and psychopathic disorders.[2] It includes disorders caused by old age (senile dementia) and blood vessel disease, syphillis of the brain, brain infections ot inflammations such as encephalitis, and head injuries.

(1) *Senility.*—The most common organ in brain disorders are those associated with the aging process. As the span of life is prolonged, the number of such cases is increasing. There have been cases of persons who develop clinical symptoms of

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1. Uniform Crime Reports for the United States and its Possessions, U. S. Dept. of Justice, Vol. 22, No. 2, 1951.
2. There are psychiatrists who maintain that some if not all of these disorders involve physical lessons, although they are not detectable by present methods. Until such lessons are demonstrated, however it seems sounder to regard these conditions as reactions to psychologically harmful environment.

deterioration in their forties. Others appear to retain their mental vigour well past the Biblical three score years and ten. Heredity seems to be a weighty factor; children of long lived ancestors tend to live long themselves.

The intellectual deterioration produced by senility and arteriosclerosis usually develops gradually, although it may manitest itself suddenly and progress rapidly. Infections or severe emotional shock may serve as precipitating factors. The usual symptoms are that the patie t tires more readily, his initiative decreases, and he begins to have memory difficulties, specially with names and recent events. There is also the common tendency to reminisce. The developing inability to remember is very likely to cause the patient to resort to confabulation. This is not quite purposeful lying, but more an attempt to bluff one's way through, rather than admit that one cannot remember. The deterioration of memory is likely to be accompanied by deterioration in critical judgment, and the patient is often able to convince himself of the truth of his inventions.

Since it is the most recently acquired knowledge that is lost first, a senile person may be able to carry on a conversation about old events with apparent clarity, and yet not have the slightest knowledge of what season of the year it is. The lawyer or the Judge who must evaluate the mental condition of an aged person must be careful not to be deceived by superficial articulateness.

As the condition progresses, the patient is likely to become emotionally unstable and increasingly irritable. He may start laughing or crying without cause, have temper outbursts and fits of jealousy or suspicion. Judgment becomes increasingly poor. Insomnia may become marked, and rest may be disrupted by delusions and hallucinations. It is not uncommon for the patient to develop peculiarities such as hoarding of trinkets and useless objects. Personal tidiness and social manners suffer.

There may be periods of amnesia, in which the patient gets lost. Senile men may get into sexual misadventures, particularly with children. There may also develop a childlike susceptibility to suggestion, which makes the patient an easy dupe for confidence men and swindlers, who use him as an accomplice.

Arteriosclerosis.

It may be difficult to distinguish senile from arteriosclerotic dementia. The two occur in combination more frequently than does the anatomatically pure form of either alone. Without opportunity for prolonged observation before trial, it is difficult for an expert to make a differential diagnosis. Clinically, senile psychoses occur later in life, are gradually progressive, and are commonly manifested by paranoid symptoms. Arterioscleretic psychoses usually develop suddenly, show less intellectual deterioration and less constancy in symptoms ; hardening of the arteries at the radial pulse and in the eye will be observable by fundus examination.

Lowering moral standards leading to sexual offences, alcoholic excesses and dishonest practices seem to be somewhat more frequent among arteriosclerotic than among senile patients.

(2) *Paresis.* – General paresis a form of cerebral syphilis. It usually takes a decade or more after the syphilitic infection is acquired for the symptoms of paresis to manifest themselves. Inadequately treated cases of syphilis show as great a tendency to develop the disease as do totally untreated cases, or even greater. Where mental disorder caused by syphills is suspected, Kahn and Wasserman blood and spinal fluid tests should be administered. Since the advent of penicillin, which kills the organism producing psyphilis, and the introduction of fever thereby, paresis has ceased to be the hopeless condition it was prior to the First World War.

It seems that a head injury can precipitate general paresis in a syphilitic individual who would not otherwise develop it.[1] On the other hand, accidental injury may itself be the first overt manifestation of a prior existing disease. Post-mortem investigations have disclosed that a significant number of pedestrians killed by automobiles had marked otosclerosis, indicating a high degree of hearing loss : this may well have been an important factor in producing the accident.

Paresis may first manifest itself in many different ways, depending on the particular brain area most heavily infected initially and on the personality make-up of the patient. Organic brain disease is characterised primarily by phenomena or release and regression. Social inhibition, learned relatively late in life, goes first. If the disease becomes advanced enough, behaviour regresses to infantile level. Pessimistic individuals tend to develop depressed reactions ; aggressive, ambitious persons are likely to have delusions of grandeur ; the high tempered develop outbursts of temper.

Paretics sometimes commit murder but only rarely.[2] They also somtimes become involved in sexual offences. Physical alterations may result from temper outbursts. Criminal financial transactions may also occur.[3]

Encephalitis lethargica ; Sleeping sickness.

A virus infection that often occurs epidemically is encephalitis lethargica, often known as epidemic encepalitis or epidemic sleeping sickness. Childhood infections are likely to be followed by abnormalities in couduct as a sequel of the brain damage. Adult infections are more likely to result in the Parkinsonian syndrone (shaking palsy). The conduct disorders following encephalitis are characterised by diminished self-control. They often follow a neurotically compulsive, repetitive pattern. At times, they affect personality and behaviour in a way difficult to distinguish from the anti-social activities of certain psychopathic personalities. A small number of sex offenders are post-encephalitics.

(3) *Head injuries.* - Head injuries may result in brain disorders. The immediate post-traumatic psychotic reactions differ in adults and children. Adults are likely to develop hallucinatory and confabulatory experiences ; children, noisy crying and restless, uncontrolled behaviour.

Head injuries are not of great importance in criminal behaviour, although a somewhat higher proportion of criminal than of the population generally have histories of head injuries followed by unconsciousness. This is generally interpreted as indicating that the same reckless, irresponsible personality characteristics that lead to their delinquency had also previously been present and had led to their high accident rate. But it is quite likely that the head injury may itself be a significant cause of the latter criminal behaviour. Of course, these cases should not be confused with those in which the history of head injury is wholly fabricated or is used as a mere excuse for a course of criminal conduct which can be shown to have been well established before the injury.

The electro-encephalograph is an instrument of great help in evaluating the severity of organic damage after head injury. Abnormal brain wave recording long

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1. Karl M. Bowman and Abram Blau, Psychotic States following Head and Brain Injury in Adults and Children, in Samuel Brock Ed , Injuris of the Skull, Brain and Spinal Cord (1940) Ch. 13 ; J. V. Kaluder and H. C. Solomon Trauma and Dementia Paralytics, 96 J. Am. Med. Assn. 1 (1931). Some leading pathologists and syphilogists reject the possibility of a traumatic basis for general paresis. *See* R. R. Grinker and P. C. Bucy, Neurology (4th Ed 1949), p. 764.
2. A British study showed that only one per cent of the homicide convicts in Broadmoor. the English institution for the criminal insane, are paretic. Sir Norwood East. Medical Aspects of Crime (1936).
3. For a case of financial defalcation involving more than $ 400,000, due to the development of paresis in a sucessful businessman, *see* Guttmacher and Weihofen Psychiatry annd the Law (1952), Ch. 7.

after the injury indicate serious damage, particularly if there was a history of prolonged unconsciousness.

Amnesia may be associated with organic brain injury. The length of time wiped out is roughly proportional to the severity of the injury, but psychological factors may also influence the situation. If, for example, some very unpleasant incident was happening just prior to the unconsciousness, such as a fight it is very likely to be forgotten Perhaps intoxication also facilitates development of amnsia.

Amnesia may also occur as to events happening after the accident, instead of before. This is termed anteriograde, as distinguished from retrograde amenesia. A short period of confusion following the injury is the rule; it is of consequence only if prolonged.

Among the more serious common effects of head injuries are dizziness, headache, and epileptic convulsions. An important study showed that epilepsy developed in 7 per cent. of the cases of depressed skull fractures, and in 10 per cent. of those in which intracerebral haemorrhage had taken place.[1] It may be years after head injury before traumaticepilepsy develops, apparently in connection with the retraction of the scar tissue in the brain.

(4) *Idiopathic epilepsy.*—Although non-traumatic or idiopathic epilepsy reveals no demonstrable lesions in the brain, recent researchee do reveal abnormal electrical brain-waves in more than two thirds of the cases. It therefore seems proper to regard the condition as an organic brain disorder.

There are three types of epliepsy, of which one is of considerable criminal consequence. Major attacks (Grandmal) are generalised convulsions of the entire body. They are usually preceded by a warning, called the aura. This may consist of a peculiar sensation starting in the stomach and spreading upward, or of a tingling in the hands and feet, dizziness, hallucinations of voices, sounds or orders, etc. The aura last but a few seconds before unconsciousness and convulsion. During the seizure the patient frequently bites his tongue and is incontinent. The convulsion is usually followed by a period of confusions.

Three types of epilepsy.

Minor attacks (Petitmal) are momentary losses of consciousness without falling or conversions. The patient may stop in the middle of a sentence, drop what he is holding, and then resume the conversation where he left off.

Minor attacks (Petitmal).

Automatism, the state in which the patient is deprived of or released from conscious control, may replace or follow the epileptic attack. The patient may automatically carry out very complex acts while in such a state.[2] Sometimes, though not frequently, there may be a furious, aggressive outburst in which homicide or other acts of personal violence may occur. An early name for epilepsy was "the Disease of Hercules"; in a fit of rage. Hercules killed his best friends and his children. A criminal act committed during such an automatic state of confusion should certainly be held to come within the legal test of insanity.

Automatism.

The electro-encephalograph has revealed that certain individuals who have never had seizures have the brain-wave tracings characteristic of one of the forms of epilepsy. Some of these individuals suffered from severe unexplained pain and others were subject to spells of intense, unmotivated rage. No doubt further physical and chemical researches will throw new light on many types of apparently motiveless behaviour.

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1. Wilder Penfield and Murton Shaver, Incidence of Traumatic Epilepsy and Headache after Head Injury in Civil Practice, in Proceedings of the Association for Research in Nervous and Mental Diseasses, 1943, Vol. 24 (1945), pp. 620-34.
2. Wm G. Lennox, Amnesia, Real and Feigned, 10 U. Rev. 298 (1913).

Epilepsy may cause anti-social outbursts. The epileptic's tendency to irritability and to infantile emotional relation may have criminal consequences. So also may the intellectual deetrioration and impairment of judgment that sometimes develops, but the role of epilepsy in criminal behaviour is not large. Probably not over one per cent. of felony offenders are epileptic.[1] Cesare. Lombroso's Criminal Enthropological studies published in the latter part of the nineteenth century,[2] which attributed many criminal characteristics to epilepsy, are today regarded as greatly exaggerating the role of epilepsy in criminal behaviour. Defendants frequently allege a temporary loss of memory at the time of the act charged. A normal electro-encephalogram casts serious doubt on such an allegation. On the other hand an apparently unmotivated crime may be explainable as the product of an epileptic seziure where epileptic brain wave patterns are shown on the test.

Epilepsy may cause anti-social outburst.

Problem children studied by means of the electro-encephalograph have been shown to have abnormal brain-wave patterns in a significantly high percentage of cases.[3]

E. CONGENITAL INTELLECTUAL DEFICINCY

There is no universally accepted term to signate those who from birth show evidence of inferior intellectual capacity. Probably the most commonly used is feeble-mindedness, but this has been loosely used to include many kinds of thinking difficulty. Mental deficiency has also been widely used, but the word "mental" seems too broad; mentation includes emotions and will, whereas the concept we are here considering is limited to the cognitive function. Congenital intellectual deficiency seems as accurately descriptive a term as can be found.

Lawyers and Judges should strive for a realistic understanding of intellectural deficiency especially in determining whether a deficient person had sufficient capacity to know the wrongfulness of his act. It is necessary to take account of the nature of the act. Many persons with somewhat defective intelligence are incapable of appreciating the technicalities dividing shrewd practices which are not illegal from obtaining by false pretences or embezzlement, and yet are well aware of the wrongfulness of homicide.

Intellectual efficiency may arise form hereditary causes, intrauterine disorders of development, or early childhood injuries to the nervous system by infection or trauma. Where there is a family history of deficiency, it is to be presumed that it is hereditary.

Mongolism is an extreme form of intellectual deficiency, so named because one of its physical stigma is the slanting eyes of the oriental. It is an intrauterine developmental defect. A high percentage of Mongols come from mothers over forty, and from mothers of numerous prior children. One theory therefore is that Mongols are born to exhausted mothers. A more recent theory is that Mongolism is

Mongolism Cretinism

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1. Dr. Walter Bromberg reported that of 35 648 felons examined for the New York Courts from 1932 to 1941, 0·66 per cent. were diagnosed as epileptic. This study was made before the electro-encepalograph came into general use and the figure is therefore perhaps too low.
2. Gina Ferrero-Lombroso. Criminal Man, according to the Classification of Cesareer Lambroso (1911), p 16.
3. These studies revealed abnormal brain wave patterns in about half of the problem children, against 15 per cent. in normal children. L Secunda and K H. Finally, Electro-encephalographic Studies in Children Presenting Behaviour Disorders, 226 N. E. Med. J. 15 (1952); J. S. Gottlieb J R. Knatt. and M.C. Ashley, Electro encephalographic Evaluation of Primary Behaviour Disorders in Children, 153 Archives Neur. and Psych. 138 (1945).

result of the injury or shock to the foetus at about the eighth week of pregnancy. Mongols are the least troublesome of the defective group and are not involved in conflicts with the law. Few survive to maturity.

Cretinism is a form of intellectual deficiency resulting from a congenital underfunction or dysfunction of the thyroid gland. It can usually be diagnosed by the time the infant is four months old. It can be cured (with thyroid medication) if treated early. After the age of six or seven, treatment has little effect.

Many intellectually defective individuals have a wholly normal appearance. Judges or others who are canfident that they can judge a person's intelligence or character from appearance would be disappointed if their judgments were subjected to scientific tests.

Intelligence tests.

In 1905, Alfred Binet and Theodore Simon, French psychologist and physician respectively, devised a test for measuring the intelligence of school children. As revised by Professor Lewis M. Terman of Stanford University to fit the educational and cultural background of American children, this is still the most widely used intelligence test for children, and adolescents. It gives a score in mental age which, when divided by chronological age gives the intelligence quotient or I. Q. Since the maximum level of achievement on these tests is reached, on the average by age sixteen, that age is used as the divisor of the mental age for all individuals of that age or order. For adults, the Stanford-Binet has largely been replaced by the Wechsler-Belleue Intelligence Scale, which takes into account the general decline inabilities as age increases. It also puts as much emphasis on non-verbal as on purely verbal ability, and so gives a better rounded picture.

The fact that these tests employ mathematical ciphers should not mislead members of the legal profession into assuming that psychiatry has succeeded in measuring intelligence with mathematical exactness—or even that psychiatrists know precisely what it is they are measuring. None of the tests is a mechancial device; they all require skill and experience on the part of the tester. The conditions under which the tests are administered are important. So is the emotional tenseness of the subject. The tests, contrary to common assumption, do not measure pure congenital intellectual endowment, but are to a certain degree affected by the subject's environmental background. What is perhaps more important, existing tests do not adequately reveal the faulty judgment of the psychopath, or even intellectual deficits of the kind that follow prefrontal lobotomy. There are no tests at present for measuring the defective social attitudes of many criminals.

Lawyers are likely to misunderstand the significane of mental age. A defence attorney learning that his client has a mental age of ten may promptly conceive the idea of trying to bring him under the rule that children under the age of fourteen are presumed incapable of criminal intent. But such an individual is by no means a child. He has had the experiences of an adult, and even with his defective intelligence, can be expected to meke judgments and exercise control far beyond those expected of a ten-year old child. The Courts are therefore on psychiatrically firm ground in refusing to apply to adults of low mental age the rule applicable to children.

Idiots, imbeciles, morons.

The intellectual defectives are commonly grouped in three classes, idiots, imbeciles and morons. In the Binet classification, an I. Q. of less than 25 marks the idiot, 25 to 50 the imbecile, and 50 to 75 the moron. From 70 to 80 is borderline deficiency, 80 to 90 is to dull normal, 90 to 100 average, 100 to 110 superior, and above 120 is very superior. In the Wechsler classification, an I. Q. of 65 or below

is defective, 66 to 70 borderline, 80 to 89 dull normal, 90 to 109 average, 110 to 1·9 bright normal, 120 to 129 superior 130 and above very superior. The defectives on this scale are not divided into subgroups such as idiots, imbeciles and morons.

Deficiency and crime.

Only thirty years ago, it was believed that low grade intelligence was a major source of crime. Today, criminologists think otherwise. There seemed to be no significant difference between the intelligence of the criminal and the non-criminal population. As might be expected, persons committing certain types of crimes tend to have a different level of intelligence from those committing other crimes. Embezzlers, forgers and swindlers score high ; sex offenders low.

On the whole, the intellectually defective have a low energy level and are not aggressively anti-social. Where they are led into crime, it is likely to be because they are poorly equipped to make their way in a complex and sophisticated urban society. They do not foresee consequences and are easily led. Larceny is one of their most common crimes. Others are impulsive assaults, arson and vagrancy.

The dull normal group contributes a rather large body of criminals. They are certainly not insane within the meaning of existing tests, but the social wisdom of the legal rules holding them responsible may be questioned at least where they operate to send to prison persistent recidivists whose behaviour has been unaffected by repeated prison terms.

Sterilization.

Delinquent behaviour in defectives may be in part the result of unwholesome environmental influences. Such anti-social behaviour patterns may sometimes be modifiable and the individual salvaged by taking him out of his unfavourable environment and placing him in a foster home or special training school for defectives. But for that large number whose deficiency is attributable to defective heredity and who do not appear to offer promise of improvement even under the most enlightened programmes of guidance and rehabilitation, society's best defence would seem to be preventation by sterilization. In the male this requires a very simple operation which can be performed in a surgeon's-office under local anesthesia. There is no mortality and almost no discomfort. The operation (called vasectomy) is of course quite different from castration, in which both testes are removed. Salpingectomy, the comparable operation in women, is much more serious. The surgeon must enter the abdominal cavity, remove segments of the Fallopian tubes, and tie the cut ends. With modern surgical methods, mortality is almost zero. Neither operation interferes with the person's sexual life or sexual satisfaction. But capacity to procreate is ended permanently. In only a few cases have skilled skilful surgeons been able to recreate fertility in sterilized males.

More than half the States have enacted statutes authorizing the sterilization of mental defectives. Some of these statutes apply also to certain other groups, such as persons with recurrent "hereditary insanity" habitual criminals "with present moral depravity", sex offenders, syphilics, and rapists.[1]

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1. Such statutes exist in Alabama, Arizona California, Connecticut, Delaware, Georgia, Idaho, Indiana. Iowa, Kansas Maine, Michigan. Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dokota, Oklahoma, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virgina and Wisconsin. More than a third of all the operations performed under all these laws were in California. Of more than 16,000 operations performed in California, only 4,000 were carried out on the intellectually defective, the rest being on persons with other mental disorders and criminals.

Constitutionality.

The constitutionality of such statutes is not free from doubt specially where they are applied to habitual criminals or persons convicted of specified crimes such as rape without requiring any showing that the person's anti-social characteristics are transmissible to their offspring. While there is a large body of statistical data to support the thesis that heredity plays a dominant role in intellectual deficiency,[1] there is less firm scientific ground for believing that heredity plays an equally important role in mental disease generally.[2] The consensus of American psychiatry today would not favour sterilising the mentally disordered except perhaps where both husband and wife are definitely psychotic. As for sterilizing criminals, "It may be stated with confidence that no physician, biologist, eugenist, or iminologist is in a position to declare that the criminality of any individual will be transmitted."[3]

In this state of scientific knowledge, any legislative body, exercising its own wisdom, decide that certain types of mental disorder or of criminal behaviour are inheritable, and that therefore persons exhibiting such disorders or behaviour should be sterilized ? The United States Supreme Court, in the leading case of *Buch* v.*Bell*,[4] held that sterilization is not so unreasonable as to violate due process when performed upon an intellectually defective women who was a daughter of a defective mother and the mother of a defective daughter. "Three generations of imbeciles are enough," said Mr. Justice Holmes. In most of the other cases where sterilization has been upheld there has also been strong evidencc that the condition was apparently hereditary.[5] But it is not certain how far the Courts will go in upholding

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1. Statistical studies have shown that parents with high I. Q. are much less likely to produce mental defectives than parents with low I. Q. Thus only 0.1 per cent. of the children of parents with I. Q.'s of 130 were found to have I. Q. s below 70; children of parents with I.Q. of 55 have a 31 per cent. chance of having an I. Q below 70. J.A.F. Roberts, High Grade Mental Defectives in relation to Differential Fertility, 93 J. Mental Sci. 289 (1947). According to another English investigator, nearly 60 per cent. of the children of two subnormal parents were subnormal and over 40 per cent. of the children of one subnormal parent were subnormal. D. C. Jones, A Survey of Subnormal Types, 93 J. of Mental Sci. 278 (1947). A New Hampshire study showed that of the children of discharged female patients of the State School for defectives, 65 per cent. were subnormal or mentally defective; of the children of male patients, 58 per cent. were defective. B.S. Johnson, Study of Cases Discharged from Laconia State School, 1924-34, 50 Am. J. of Ment Def. 437 (1946). *See* also D. S. Fearweather, Mental Deficieney, in Recent Advances in Psychiatry (1950); Elliot Slater, Genetics in Psychiatry, 90 J. of Men. Sci. 171 (1944). Several studies indicate that high grade defectiveness is more likely to run in families than low grade defectiveness. S. L. Halperin, Human Heredity and Mental Deficiency, 51 Am. J. of Ment. Def. 153 (1946).
2. The most extensive studies on the relation of heredity to mental disease have been made by German scientists. Even before the Nazi regime, many German writers enthusiastically advocateds sterilization to combat all kinds of mental disease and other undesirable characteristics. *See* Otto L. Mohr, Heredity and Disease (1934). The Nazis sterilized some 375,000 persons prior to Word War II. In this country, studies by Kallman at Columbia University and others on single-ovum and double-ovum twins have also shown the powerful force of heredity in nearly all types of mental disease Franz J. Kallnan the Genetic Theory of Schizophrenia, 103 Am. J. Psychiatry 309 (1946). But most American psychiatrists today are psychoanalytically rather than biologically oriented and they tend to avoid the baffaling complexities of tracing hereditary strains.
3. East *Society and its Criminals* (1st Am. ed., 1951) p. 128.
4. (1927) 274 U. S. 200 : 47 Sup. Ct. 584 : 71 L. Ed. 1000.
5. Smith *v.* Command, (1925) 221 Mich. 409 : 204 N. W. 140 ; Clayton *v.* Board of Examiners of Defectives, (1930) 120 Neb. 680 : 234 N. W. 630 ; State *v.* Troutman, (1931) 50 Ida. 673 : 299 Pac. 668 ; *In re* Main, (1933) 182 Okla. 65 : 19 P. 2d 153.

sterilization where the evidence of inheritability is less convincing. No case has yet sanctioned as reasonable the assumption, for example, that the children of a man three times convicted of stealing are likely to inherit a tendency to steal, and that it is therefore constitutional to prevent his procreating children by sterilizing him.[1]

In addition to substantive requirements of the due process clause that an invasion of personal liberty must be found reasonable to be held constitutional, procedural due process requires that a person's rights be determined in a fair and orderly way, upon adequate notice and opportunity to be heard. Even if a statutory definition of the classes subject to sterilization is not unreasonable, procedural due process requires that an individual be given a fair hearing on whether he in fact comes within the class mentioned. Under the typical statutory procedure, if the superintendent upon examination of the patient is of the opinion that the operation should be performed, he petitions an administrative board to conduct a hearing. The patient is served with a copy of the petition and is usually allowed to appear at the hearing and to be represented by an attorney. This satisfies the reqirements of procedural due process. In most States, and appeal is allowed from the board's decision to the Courts, but a judicial hearing or review is not constitutionally essential.[2]

The equal protection clause may provide another consitutional objection. The leading case in *Skinner* v. *Oklahoma*[3] in which the United States Supreme Court held that a statute was discriminatory which subjected to sterilization persons three times convicted of falonies involving moral turpitude, but had been once convicted of stealing chickens and twice of robbery. The Court elluded to the highly technical distinction between larceny and embezzlement and held that "sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks."

Of course, the Legislature may draw reasonable distinctions. A law applicable to the intellectually defective, and not including those suffering

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1. *See* Davis *v.* Walton, (1929) 74 Utah. 80 : 276 Pac. 921 (statute authorised sterilization of persons with habitual sexual criminal tendencies, upon a finding, *inter alia*, that by the law of heredity he was the potential parent of socially inadequate offspring likewise afflicted ; held, evidence that a prison inmate was convicted for robbery and was usually sexually active was insufficient to bring him within the statute.

2. State *v.* Schaffer, (1928) 126 Kan. 607 : 270 Pac. 601 ; Smith *v.* Command, (1925) 221 Mich. 409 : 204 N. W. 140. *In re* Hendrickson, (1942) 12 Wash. 2d 678 : 123 P. 2d 322. But statute that requires service of process on the person only of the sterilization order which may be issued by the board without a hearing, and which thus puts the entire responsibility of initiating an appeal from such order on the persons ordered to be sterilized, where such person is being held in an institution because of mental incapacity has been held to violate procedural due process. *In re* Hendrickson, *supra*. Notice to the next-of-kin has been held insufficient if the person himself had no notice and no chance to defend himself. Brewer *v.* Talk, (1933) 204 N. C. 186 : 167 S. E. 638.

3. (1942) 316 U. S. 535 : 62 Sup. Ct. 1110 ; 86 L. Ed. 1655.

from other types of metal disorder, is valid.[1] But a law applicable to mental defectives who are unable to support their offspring and whose offspring are likely to become ward of the state has been held to violate equal protection in that it creates an unreasonable and unconstitutional discrimination against the indigent.[2] Whether a law is unreasonable which applies only to inmates of state institutions is a point on which the decided cases disagree.[3]

Other constitutional objections have sometimes been urged, but without much success. In two federal cases of about forty years ago sterilization was held to constitute cruel and unusual punishment,[4] but this seems unsound. Most of the statutes do not purport to have a punitive purpose. Sterilization is performed not as part of the punishment for crime, but as a protection to society, just as commitment to a hospital may be. A sterilization law is not an *ex post facto* law even when it provides for sterilization of persons three times convicted and is applied to a person some of whose convictions occurred before the law was passed.[5] Nor are such laws open to objection on the score that they violate constitutional provisions guaranteeing "the inherent right—life, liberty and the pursuit of happiness".[6]

Malingering.

The attitude of lawyers and judges towards the legal test of criminal irresponsibility and towards any proposals for revising the test is often coloured by the fear that it is too easy fot malingerers to stimulate insanity and thus escape their jusr

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1. Smith *v.* Command, (1925) 221 Mich. 409: 201 N. W. 140; State *v.* Troutman, (1931) 50 Ida. 673: 299 Pac. 668. A law limited in its application to person suffering from recurrent heredity insanity is not unreasonably discriminatory. *In re* Main, (1933) 162 Okla. 65: 19 P. 2d 153. The New Jersey Court held a law objectionable for singling out epileptics, saying that if the Legislature can benefit the next generations by sterilizing the epileptics of this one, "it both may and should pursue the like course with respect to other diseases inimical to the welfare of society," such as pulmonary consumption and syphilis. Smith *v.* Board of Examiners, (1913) 85 N. J. L. 46: 88 Atl. 963. But what the Legislature "may and should" do is irrelevant on the issue of constitutionality; the Court's only legitimate concern is with whether the classification adopted by the Legislature is so wholly capricious and unreasonable as to violate equal protection. Sterilizing epileptics but not the tubercular can hardly be called wholly capricious classification.

2. Smith *v.* Command, *supra*. The rule of this case should not be extended to other than financial incapacity. Although the sterilization laws were originally promoted almost wholly by the idea of preventing transmission of hereditary defects, they may be defended perhaps equally well, on what may be called an environmental basis that defectives are unqualified to rear children properly; that improperly reared children are likely to became criminal or public liabilities; and that therefore it is reasonable to deny parenthood to those who are incapable of assuming the responsibilities attached thereto. In some States (e. g., Iowa) the statutes are today administered largely on an environmental basis.

3. That such a distinction is valid Smith *v.* Command, *supra*; State *v.* Troutman, *supra*; State *v.* Schaffer, (1928) 126 Kan. 607; *contra* Haynes *v.* Lapeer, Circuit Judge, (1918) 201 Mich. 138: 166 N. W. 938; *In re* Thompson, (1918) 103 Misc. 23: 169 N. Y. Supp. 638, aff'd sub-nom. Osborn *v.* Thompson, 185 App. Div. 902: 171 N.Y. Supp. 1094.

4. Davis *v.* Berry, (1914) 216 Fed. 413: Mickle *v.* Henrichs, (1918) 262 Fed. 687; *contra*: *In re* Clayton, (1931) 120 Neb. 680: 234 N. W. 630; Davis *v.* Walton, (1929) 74 Utah 276; State *v.* Feilon, (1912) 70 Wash. 65: 126 Pac. 75.

5. Davis *v.* Berry, *supra*. But this case held that the statute, requiring vasectomy to be performed on all persons twice convicted of felony, which provided for no actual hearing was invalid as constituting a bill of attainder.

5. *In re* Maln, (1933) 162 Okla. 65: 19 P. 2d 159; State *v.* Troutman, *supra*. *Contra* Davis *v.* Berry, *supra*.

punishment. Actually, it would in most cases be extremely difficult for an imposter to mislead a competent psychiatrist. If court-room experience seem to throw doubt on this statement, it is not so much because the science of psychiatry is insufficiently advanced to provide reliable diagnosis, as it is that legal procedure, using partisan experts stating their opinions through answers to carefully worded questions of counsel, frequently fails to present a true picture of the diagnosis.

The ordinary malinger does not realise that the various forms of mental disorder have their characteristic symptoms, and that displaying a hodge-podge of symptoms will not only fail to convince, but will rather clearly reveal his malingering. Like the students who tried to fool their biology professor by carefully gluing together the body of one bug, the wings of another, etc. the malinger may in his ignorance glue together the head of a defective, the wings of a schizopherenic and the legs of a manic, but the result may be easily identifiable by the psychiatrist as a humbug.

Feigned Amnesia.

One situation where suspicion of malingering springs to mind is where the defendant says he does not remember the facts of the crime. He remembers the quarrel, "when everything went black," and when he regained consciousness he was standing over his victim's corpse with the smoking revolver his hand. (Malingering in criminal cases rarely occurs except in homicide cases, fegining insanity which if successful is likely to mean indefinite commitment to a mental hospital, is not an appealing alternative to conviction for a crime carrying a penalty on only a few year's imprisonment). Feigned amnesia is one of the most difficult forms of malingering to detect, because there are so many disorders in which amnesia may actually occur. These include not only same psychoses but also epilepsy, alcoholism, and certain hysterical neuroses. Nevertheless, differential diagnosis may be able to eliminate all these, and the patient's ignorance may betray him into answers not typical of true amnesia. The electroencephalograph can fairly conclusively eliminate epilepsy by recording a normal brain wave pattern and can give highly significant information about the possibility of certain other disorders.[1] Skull X-rays, a negative neurological examinaion, a life history that gives no support to the likehood of psychosis, hysteria or of alcoholism, suggest the possibility of mere malingering. This suspicion may be strengthened on probing into the character of the alleged amnesia. True amnesia usually affects all areas of memory; but the malingerer is likely to "forget" only the crime. If the amnesia conveniently covers only the incriminating facts, but does not affect colourless data such as the patients own identity, it is probably feigned.

Mania.

The malingerer, in his ignorance, may be unwise enough to try playing the roll of a "raving maniac." But it is physically impossible for a sane man to maintain for any extended period shouting, jumping, and furious movement by which the

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1. "The specific medical conditions in which electroencephalography is most useful are the following: epilepsy, carebral tumour, sabdural hematoma, cerebral hemorrhage, cerebral thrombosis, eerebral trauma, cerebral-abscess, meningitis, encephalitis Schilder's disease and behaviour disorders of an epileptic or postencephalitic type. In these conditions the electroencephalogram can give exceedingly significant and even crucial information, but more usually it is in accord with the evidence from other sources. Its maximum diagnostic and prognostic value is attained when it is combined with other types of clinical and laboratory examination." Gibbs, Medicolegal Aspects of Electroencephalography, 24 Can. Bar Rev. 35 (1946).

subject tries to simulate acute mania. If, after wearing himself out, he falls into sleep, he betrays himself. The true manic not only can maintain his excited condition for longer periods, but he typically shows physical symptoms that can hardly be simulated : fever, rapid pulse, coated tongue. The peculiar "stream of consciousness" revealed by the true manice's talk is also very difficult to imitate convincingly.

Peculiar behaviour.

Another popular notion about "insanity" is that it typically involves peculiar or outlandish behaviour and the malinger may try to conform to this assumed pattern by performing a series of senseless or follish acts. But the uniformed malingerer will typically overact. He is anxious to call attention to his irrationality his conduct tends to be exhibitionistic. A true psyohotic may have some very bizarre beliefs or ideas, but they are rarely of the childish or clownish kind malingerers, favour and he does not thrust them at the investigator. On the contrary, if he reveals them, it will be casually or even because he has learned that other people do not accept them—only with great reluctance. To feign a seeming casualness or reluctance and yet be sure to get them before the investigator would require literary and hystrionic artistry of a high order.

Malingers feigning dizziness also tend to overact. For example, on a Romberg test, to determine the presence of swaing when the patient is standing with feet close together and eyes shut, the malingerer will often fall, even when given sufficient support to prevent this.

Delusions.

As with other mental pecularities, the person actully suffering from delusions has learned that others do not accept his experiences, and he is not likely to want to discuss them with strangers, but the malingerer is anxious to call attention to his alleged delusions. Most forms or mental disorder serious enough to meet the test of criminal irresponsiblity take a long tune to develop. This is true of delusions. A well organised system of delusions must have developed over a long period. If the person's part history shows no evidence of delusions, and yet he now tells of very elaborate delusional experiences, malingering is to be suspected.

Moreover, is must be remembered that delusions is always merely a symptom. To be convincing. it must occur along with the other symptoms of a recognizable pattern of disorder. If the claimed delusions are unaccompanied by other symptoms, or are accompanied by alleged symptoms that do not conform to the clinical pattern of any known form of disorder, they are probably not genuine.

Mutism Negativism.

The wary malingerer may decide that the safest form of deception is one where he will say or do nothing. He therefore is mute, or practices what the psychiatrists call "negativism" that is, doing the opposite of what he is told. But consistently to remain mute to speak to no one, to voice no wants to say nothing in one's own defence—is almost impossible for a sane man for a long period especially under the stress of a charge of crime. Where malingering is suspeced, there are ways of catching the person off guard, when he may betray himself.

Negativism is also a difficult role to play without a slip. There are various ways in which the symptom may be exhibited—not of all of them typical of mental disorder. Some that are typical will not .appeal to the malingerer, e. g. in continence and soiling one's clothes and bed. Catatonic negativism can be tested to observe certain physical reactions difficult for the

malinger to control. Catetonia simulated by fixing the muscles can be detected by tests inducing fatigue and by the use of anesthetics.

Depression involves a lowered metobolism, which in time produces physical signs that the malingerer can hardly reproduce: dropping temperature, dry skin and hair, even a dropping of the blood count. Other signs he can reproduce—if he knows enough about the subject: constipation, fixedly worried or troubled expression, a characteristic stoop in posture.

Necessity for adequate observation and examination.

Merely because psychiatry can dectect malingering in a high percentage of cases does not mean that the psychiatric testimony on the question in any given case is necessarily reliable. Many of the tests by which malingering is detectable call for a comprehensive investigation, by physical examination fairly long period of observation, and a social case history of the person's past and of his family. The difficulty of diagnosis is complicated by the fact that many malingerers are in fact not normal individuals. Although a suspect may not be insane within the criminal test as he pretends, he may have a seriously wraped, neurotic character structure. An opinion given in response to a hypothetical question, put to a witness who never examined the patient at all, or an opinion by a partisan expert hired for the purpose and based on a cursory examination or on mere observation, may be wholly inadequate, either for an opinion that the person is insane, or that he is malingering. As more and more jurisdictions are coming to realize, sound diganosis in difficult cases call for a procedure permitting a period of observation and examination by impartial experts.[1]

15. What is "unsoundness of mind."—A person of "unsound mind" is under certain circumstances held to be exempt from criminal responsibility. The Code does not define "unsoundness of mind". It assumes that the phrase will be understood But it is one of those phrases which every one professes to understand, but few will dare to explain. The term "unsoundness of mind" has been undoubtedly used here, as it has been by Sir James Stephen, as equivalent to insanity. But insanity, lunacy, unsoundness of mind, mental derangement, mental disorder, madness and mental alienation or aberration have been indiscriminately applied to those states of disordered mind in which a person loses the power of regulating his actions and conduct according to the ordinary rules of society. In all cases of real insanity, the intellect is more or less affeted—hence the term *intellectual insanity*. In a medical sense this implies a deviation of the menial faculties from an assumed normal or healthy standard. In an insane person there may be no bodily disease, but his language and habits are changed, the reasoning power which he may have enjoyed in common with others is lost or perverted, and he is no longer fitted to discharge those duties which his social position demands. Further, from perversion of reason, he may show a disposition to commit acts which may endanger his own life or the lives of those around him. It it at this point that the law interferes for his own protection, and for that of society.[2]

Unsoundness of mind explained and distinguished.

16. Forms of mental unsoundness.—Tbe law makes no distinctions between various forms of mental unsoundness, as to the test of responsibility. The general test adopted in each jurisdiction (knowledge of right and wrong, or knowledge of right and wrong

1. Mental Disorder as a Criminal Defence by Henry Weihofen, 1954 Ed., pp. 10 to 49.

2. 2 Taylor's *Medical Jurisprudence*, (4th Ed.), p. 474.

held applicable to cases of schizophrenia (usually referred to in the case by its older name, dementia praecox),[1] paranoia,[2] a senile dementia,[3] intellectual deficiency or feeble-mindedness[4] and other forms of mental desorder.

Disorders characterised by delusions if exceptions to general rule.

Disorders characterised by delusions have been regarded by some Courts as exceptions to the general rule. In the older common law, a person who was born deaf, dumb and blind (and perhaps also one born deaf and dumb merely) was presumed to be an idiot,[5] but this presumption is no longer indulged.[6]

1. State *v.* Elsea, 1952 Mo. 251 : S. W. 2d 650 (paranoid type); State *v.* Moore, (1938) 42 N. M. 135 : 26 P. 2d 19 ; State *v.* Jones, (1926) 191 N. C. 753 : 133 S. E. 81 ; Winn *v.* State, (1939) 136 Tex. Crim. 513 : 126 S W. 2d 481 ; McGee *v.* State, (1951) Tex. Crim. 238 : S. W. 2d 707.
2. Diggs *v.* State, (1916) 126 Ark. 455 : 190 S.W. 448 ; Hankins *v.* State, (1917) 133 Ark. 38 : 201 S. W. 832 ; Kelley *v.* State, (1920) 146 Ark. 509 : 226 S. W. 137 ; Travis *v.* State. (1923) 160 Ark. 215 : 254 S. W. 464 ; People *v.* Krauser, (1925) 315 Ill. 485 : 146 N. E. 593. Earlier Arkansas and Illinois cases had applied a different rule for paranoia than for other types of mental disorder. saying that while the right and wrong test is the sole test in other cases, in paranoia cases the irresistible impulse defence must be added. Bell *v.* State, (1915) 120 Ark. 530 : 180 S. W. 186 ; People *v.* Lowhone, (1920) 292 Ill. 23 : 126 N. E. 620. The later cases extend the irresistible impulse test to all types of disorder.
3. State *v.* Hadley, (1925) 64 Utah 109 : 234 Pac. 940.
4. Anderson *v.* State, (1922) 209 Ala. 36 : 95 So. 171 ; Chriswell *v.* State, (1923) 171 Ark. 255 : 283 S. W. 981 ; Ezell *v.* State, (1951) 217 Ark. 94 : 229 S.W. 2d 32 ; People *v.* Furley, (1857) 8 Cal. 390; People *v.* Keyes, (1918) 178 Cal. 794 : 175 Pac. 6; Travers *v.* U.S., (1895) 6 App. D. C. 450 at p. 464 ; Studstill *v.* State, (1849) 7 Ga. 2 ; Rogers *v.* State, (1907) 128 Ga. 67 : 57 S. E. 227 ; Godsby *v.* State, (1922) 158 Ga. 496 : 112 S. E. 467 ; McKethan *v.* State, (1947) 201 Ga. 28 : 39 S. E. 2d 15 ; People *v.* Marquis, (1931) 344 Ill. 261 : 176 N. E. 314 ; People v. Varecha, (1933) 353 Ill. 52 : 186 N. E. 2d 607 ; Wartena v. State, (1886) 105 Ind. 445 : 5 N. E. 20 ; Robinson v. State, (1887) 133 Ind. 510 ; 16 N. E. 184 ; Conway v. State, (1888) Ind. 482 : 21 N. E. 285 ; Sharp v. State, (1903) 161 Ind. 288 : 68 N. E. 286 ; State v. Bruntlett, (1949) 240 Ia. 3 : 36 N. W. 2d 450 ; State v. Flowers, (1897) 58 Kans. 702 : 50 Pac. 938 ; Bast v. Comm., (1907) 124 Key. 747: 99 S.W. 978; Maulding v. Comm., (1916) 172 Ky. 370 : 189 S. W. 251 ; State v. Tapie, (1931) 173 La. 780 : 138 So. 665 ; State v. Palmer, (1901) 161 Mo. 152 : 61 S.W. 51 ; State v. Pinski. (Mo. 1947) 356 W. 2d 785 ; State v. Sapp, (1942) 163 S. Mo. 705 : 203 S.W. 2d 425 ; State v. Schlaps, (1927) 78 Mont. 560 : 254 Pac. 858 ; State v. Mathews, (1946) 226 N.C. 639 : 39 S. E. 2d 819 ; Comm. v. Szachewicz, (1931) 303 Pa. 401 : 154 Atl. 483 ; Woodruff v. State, (1932) 164 Tenn. 530 : 51 S. W. 2d 813 ; Cox v. State, (1910) 60 Tex. Crim. 471 : 132 S. W. 125 ; Craven v. State, (1923) 93 Tex. Crim. 328: 247 S. W. 515; Mekenny v. State, (1926) 105 Tex. Crim. 353 : 288 S.W. 465 ; McCune v. State, (1951) Tex. Crim. 240 : S.W. 2d 305 ; Rogers v. State, (1905) 77 Vt. 454 : 61 Atl. 489 ; State v. Kelsie, (1919) 93 Vt. 450 : 108 Atl. 391 ; State v. Schafer, (1930) 156 Wash 240 : 286 Pac. 833 ; State v. Johnson, (1940) 233 Wis. 668: 290 N.W. 159. Virginia has coustrued its statute dealing with feeble minded differently from others tried for erime. *See* Jessup v. Comm , (1946) 185 Va. 690 : 39 S.E. 2d 638 (unsatisfactory opinion). In State v. Behler, (1944) 65 Ida. 646 : 146 P. 2d 338, the Court modified a death sentence to life imprisonment because of the defendants low intelligence.
5. "A mnn deaf and dumb from his birth is *non compos*, but not if by accident. Yet deaf, blind and dumb by casualty is *ncn compos.*" 1 Dyer 56. "But a man who is born leaf, dumb and blind, is looked upon by the law as in the same state with an idiot, he being supposed incapable of any understanding, as wanting all those senses wh ch furnish the human mind with ideas." 1 Bl. Comm 304.
6. State v. Howard, (1893) 118 Mo. 127 : 24 S. E. 41 ; Barnett v. Barnett, (1854) 1 Jones Eq. (N.C.) 221.

Epilepsy.

In most States where the question has arisen, the ordinary tests have been applied to epileptics.[1] In at least one case, however, it has been held that under a statute excepting from criminal capacity "persons who committed the act charged without being conscious thereof" an automobile driver charged with negligent homicide was not guilty where he was unconscious at the time because of an epileptic attack. The Court distinguished epilepsy from "insanity", and specically held that the defendant was not required to plead insanity in order to raise his defence of unconsciousness.[2] This raises interesting possibilities. There are other types of disorder in which the patient may commit acts without being conscious thereof. Schizophrenics, for example, are often in what psychiatrists call a dissociated state; the world is a very different place for them than for normal people. Manic-depressives, too, can be said to be "unconscious" of the facts around them—at least in the loose sense that their perceptions are distorted by their exalted or depressed mood. Is there room for a new legal principle, discrete from the "insanity" defence, based on lack of consciousness and governed by a distinct legal rule ? Psychiatrically, the distinction is unsound, and legally it seems to add a refinement that is unsubstantial and unhelpful. The legal rules govering insanity as a defence should be broad enough to deal adequately with the various types of disorder, but no sound reason appears for splitting off some disorders and treating them as if they were some thing other than mental disorders.

Temporary insanity.

Where a defendant committed the crime under the stress of strong emotion, it is sometimes contended that he was "temporarily insane". This concept of "temporary insanity" has no scientific validity. There are disorders characterised by brief periods of derangement or lack of consciousness epilepsy, for example. But in such disorders the periods, though transitory, are recurrent. And the electroencephalograph will record the abnormal brain-wave patterns characteristics of the disease even between seizures. What defence attorneys mean by temporary insanity is usually not mental disease at all, but merely a strong emotional agitation which momentarily overwhelmed consciousness in a sane person. It is entirely possible for such a condition to occur. A state of dissociation may arise in which the person carrying out a series of acts of which he later has little or no recollection. Where this can be proved, it should constitute a defence,[3] on somewhat the same rationale as applies to

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1. Taylor *v.* United States, (1895) 7 App. D. C. 27 ; Genz *v.* State, (1896) 58 N. L. J. 482 : 34 Atl. 816 ; People *v.* Magnus, (1915) 92 N. Y. Mic. 80 : 155 N. Y. Supp. 1013 ; State *v.* Anderson, (1936) 181 S. C. 527 : 188 S. E. 186 ; Simmoneek *v.* State, (1943) 243 Wis. 439 : 10 N. W. 2d. 161, and cases cited in Smith, Medico Legal Facets of Equilepsy, 31 Tex. L. R. 765 : 769 (1953).
2. People *v.* Freeman, (1943) 61 Cal. A 2d 110 : 142 P. 2d 435. Where idefendant knows he is subject to epileptic attacks or other mental disorder rendering him likely to loose consciousness at any time, and nevertheless undertakes to drive a car, he may be held criminally responsible for causing the death of another if he suddenly "black out" while driving and kills someone. State *v.* Gooze, (1951) 14 N. J. Super. 2 : 81 A. 2d 811 ; Eleason *v.* Western Casualty & Sur. Co., (1948) 254 Wis. 134 : 35 N. W. 2d 301. But here responsibility is not for what was done during the seizure ; but for consciously undertaking to drive, knowing that a seizure might occur.
3. No case has been found where this contention was successfully raised. *See* Foster *v.* State, (1944) 222 Ind. 133 : 52 N. E. 2d 358,

acts done while sleepwalking.[1] But counsel usually try to defend such cases on a theory of "temporary insanity". Where this is done, the Courts apply the conventional insanity test.[2]

Psychopathic personality, Neurosis and other "Borderline" types, Psychiatry and the law have both had difficulty in dealing with certain classes of mentally abnormal offenders who are not psychotic or definitely defective, but who are "borderline" cases or "partially insane," to use an unsatisfactory term sometimes used by lawyers. Specifically, it may be preferred to the neurotics or psychoneurotics and the psychopathic personalities. Certain dull normal individuals probably ought also to be included in this "borderline" category. There are individuals who either exhibit no intellectual impairment whatever, or at least show so little that they cannot be said to be incapable of knowing right from wrong with respect to their acts. Their actions may be impulsive, and may be attributed to emotional tension or to unconscious motivations, but their impulses are seldom absolutely irresistible. Under the traditional tests, therefore, these individuals must be held reasonable and punishable, even though it may be medically certain that punishment can have no therapeutic effect.[3] There are cases applying the usual tests to psychopathic personalities,[4] psychoneurotics,[5] kleptomaniacs,[6] and shell shock victims.[7]

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1. Fain *v.* Comm., (1879) 78 Ky. 183 ; Tibbs *v.* Comm., (1910) 138 Ky. 558 : 128 S. W. 871 : 28 L. R. A. (N. S. 665).
2. Brahman *v.* State, (1905) 143 Ala. 28 : 38 So. 919 ; People *v.* Ford, (1902) 138 Cal. 140 : 70 Pac. 1075 ; People *v.* Keyes, (1918) 178 Cal. 794 : 175 Pac. 6 ; Brittis *v.* State, (1947) 158 Fla. 839 : 30 So. 2d 363 ; Drewry *v.* State, (1951) 208 Cal. 239 : 65 S. E. 2d 916 ; State *v.* Lynch, (1943) 130 N. J. L. 253 : 32 A. 2d 183 ; State *v.* Alie, (1918) 82 W. Va. 601 : 96 S. E. 1011.
3. "While a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognised in the administration of the law when a person is on trial for the commission of a high crime." Taylor *v.* Comm., (1835) 109 Pa. 262 at p. 271. That this case still represents the law can be seen by comparing the statement of the New York Court of Appeals in People *v.* Moran, (1928) 249 N.Y. 179 : 163 N.L. 553. "The defendant is a psychopathic inferior," a man of low and unstable mentality, and, in all probability, a sufferer from epilepsy, . . . It is the law of New York, made binding upon the Court by the enactment of a statute, that a youth of that order of mentality shall suffer the penalty of death if guilty of the crime of murder." *See* also People *v.* Williams, (1922) 218 Mich. 697 : 188 N. W. 413 ; Woodruff *v.* State, (1932) 164 Tenn. 530 : 51 S.W. 2d 849.
4. Anderson *v.* State, (1922) 203 Ala. 36: 95 So. 171 ; Reedy *v.* State, (1945) 246 Ala. 363 : 20 So. 2d 528 ; People *v.* Hector, (1951) 104 Cal. A. 2d 392 : 231 P. 2d 916 (sexual psychopath); People *v.* Jenko, (1952) 410 Ill. 478: 102 N.E. 2d 783 ; Comm. *v.* Devereaux, (1926) 257 Mass. 391 : 153 N.E. 881 ; Comm. *v.* McCann, (1950) 325 Mass. 451 : 91 N.E. 2d 214 ; MacAvoy *v.* State, (1944) 144 Neb. 827: 15 N.W. 2d 45 ; State *v.* Cordasco, (1949) 2 N. J. 189: 66 A. 2d 27; People *v.* Moran, (1928) 249 N.Y. 179 : 163 N.E. 553 ; State *v.* Shackleford, (1951) 232 N.C. 297 : 59 S.E. 2d 825 ; State *v.* Leland, (1951) 190 Ore. 598 : 227 P. 2d 785 ; affd. sub-nom. Leland *v.* Oregon, (1952) 343 U.S. 790: 72 Sup. Ct. 1002: 96 L. Ed. 1302 ; State *v.* Maish, (1918) 29 Wash. 2d 52 : 185 P. 2d 486 ; commented on in Hodemaker, Irresistible Impulse as a Defence in Criminal Law, 23 Wash. L. Rev. 1 (1948); State *v.* Odell, (1951) 38 Wash. 2d 4 : 227 P. 2d 710; *see* also Comm. *v.* Taranow, (1948) 359 Pa. 342: 59 A. 2d 53.
5. Hockenberry *v.* State, (1945) 246 Ala. 369: 20 So. 2d 533 (compulsive type psychoneurosis); Comm. *v.* Neill, (1949) 362 Pa. 507: 67 A. 2d 276.
6. Kleptomania is a symptom rather than a medically recognised form of disorder. It may be associated with the Schizophrenic or organic reaction types of disorder, or with the compulsive-obsessive forms of neurosis. For legal purposes, Kleptomania may be defined as an irresistible impulse to steal. It is a defence in jurisdictions recognising irresistible impulse. State *v.* McCulloch, (1901) 114 Ia. 532 : 87 N.W. 503; State *v.* Bogossian, (1924) 198 La. 972: 200 N.W. 586. Iowa has since repudiated irresistible impulse as a defence. State *v.* Buck, (1928) 205 Ia. 1028: 219 N.W. 17; State *v.* Buckwith,

But growing awareness of the futility of applying the ordinary criminal sanction to such individuals had led an increasing number of States to provide special methods of dealing with them, especially the defective delinquents and so-called sexual psychopaths.

Intoxication.

The Courts have drawn a distinction between intoxication, the immediate effect of indulgence in alcoholic spirits, and insanity, resulting from long continued habits of imbibing alcoholics. Voluntary intoxication, it is generally agreed, is no excuse from crime;[1] and in most States this is true even though the intoxication may result in temporary insanity, rendering the person for the time unconscious of his acts, or incapable of distinguishing right from wrong.[2] In a few States, on the other hand, temporary insanity arising from the use of intoxicating liquor is regarded the same as insanity arising from any other cause; if it is so pronounced as to come within the legal test of irresponsibility it is a defence.[3] In Texas, temporary insantity produced by the use of ardent

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(1915) 242 Ia. 228: 46 N.W. 2d 20. Kleptomania is not a defence where irresistible impulse is rejected. State *v.* Riddle, (1912) 245 Mo. 451 : 150 S.W. 1044 ; State *v.* Simenson, (1935) 195 Minn. 258 : 262 N.W. 638 ; Lowe *v.* State, (1902) 55 Tex. Crim. 224 : 70 S.W. 206 ; Smith *v.* State, (1909) 55 Tex. Crim. 563 : 117 S.W. 965. Earlier Texas cases had held kleptomania a defence to larceny. Looney *v.* State, (1881) 13 Tex. App. 520: 38 Am. Rep. 646 ; Harris *v.* State, (1885) 18 Tex. App. 287.

7. People *v.* Gilberg, (1925) 197 Cal. 306 : 240 Pac. 1000. "Shell shock" is a term of World War I origin, the implication being that there was a concussion of the central nervous system. This explanation was found to be wrong except in a very few cases. Most cases are now recognised as neuroses, usually a rather simple conversion hysteria or one of the more difficult anxiety states. Stanley Cobb, *Borderland of Psychiatry* (1948), pp. 140-144.

1. Helms *v.* State, (1951) 254 La. 14 : 47 S. 2d 276 ; People, *v.* Cavazos, (1944) 25 Cal. 2d 198 : 153 P. 2d. 177 ; Martinez *v.* People, (1951) 124 Colo. 170 : 235 P. 2d 810; People *v.* Klemann, (1943) 383 Ill. 236 : 48 N. E. 2d 957; Triplett *v.* Comm., (1938) 272 Ky. 714 : 114 S. W. 2d 1108 ; State *v.* Beasley, (1944) 353 Mo. 392 : 182 S.W. 2d 541 ; People *v.* Lee, (1950) 301 N.Y. 422 : 91 N. E. 2d 870 ; State *v.* Hammonds, (1939) 216 N. C. 67 : 3 S. E. 2d 439 ; Mott *v.* State, (1951) Okla. Crim. 232 P. 2d 166 ; Walden *v.* State, (1942) 178 Tenn. 71 : 156 S. W. 2d 385 ; Cody *v.* Comm., (1943) 180 Va. 449 : 23 S. E. 2d 122 ; State *v.* Painter, 63 S. E. 2d 86 ; and cases collected in 12 A. L. R. 861 (1921) and 79 A. L. R. 897 (1932).

2. Kilpatrick *v.* State, (1925) 213 Ala. 358 : 104 So. 656 ; Weakley *v.* State, (1925) 168 Ark. 1087 : 273 S. W. 374 ; People *v.* Keyes, (1918) 178 Cal. 794 : 175 Pac. 6 ; Folks *v.* State, (1923) 85 Fla. 238 : 95 So. 619 ; State *v* Rumble, (1909) 81 Kan. 16 : 105 Pac. 1 ; Paciful *v.* Comm., (1925) 212 Ky. 673 : 279 S. W. 1062 ; Lindsay *v.* Comm., (1929) 230 Ky. 718 : 20 S. W. 2d 738 ; Rucker *v.* State, (1928) 119 Ohio 189 ; 362 N.E. 802; Mott *v.* State, 232 P. 2d 166; State *v.* Trapp, (1910) 56 Ore. 588: 109 Pac. 1094 ; State *v.* Rio, (1951) 38 Wash. 2d 446 : 230 P. 2d 308 ; State *v.* Phillips, (1917) 80 W. Va. 748 : 93 S. E. 828.

3. "If a man by drunkenness brings on a degree of madness, even for a time, which would relieve him from responsibility if it had been caused in any other way, then he would not be criminally responsible. The man is a madman, and is to be treated as such, although his madness is only temporary." Martin *v.* State, (1911) 100 Ark. 189 : 17 So. 2d 283 ; People *v.* Griggs, (1941) 17 Cal. 2d 621 : 110 P. 2d 1031 ; Britts *v.* State, (1947) 158 Fall. 839 : 30 So. 2d 363 ; Stuart *v.* State, (1873) 60 Tenn. 178,

spirits or drugs may be shown in mitigation of the penalty.[1] Formerly, intoxication was held to aggravate the offence,[2] but this is no longer law.[3]

Where the defence relies on the consequential effect of intoxication on a mind already mentally disordered, the defendant is entitled to have this clearly presented in the charge, and it is error to state the law on insanity and the law on intoxication separately.[4]

While voluntary intoxication does not excuse crime, the great majority of Courts hold that where the crime charged requires a specific intent, if the defendant was so intoxicated as to be incapable of entertaining such intent, he cannot be convicted of the crime.

Involuntary intoxication is a defence.

Involuntary intoxication is a defence. Although there are almost no cases squarely in point, the test here would seem to be similar to that in insanity cases—whether by reason of such intoxication the defendant was unable to understand and appreciate the nature and consequences of his act.[5] Intoxication is involuntary only if the intoxicant was imbibed as a result of duress, fraud or mistake. It is not sufficient that one was persuaded or advised to drink.[6]

Pathological intoxication.

Certain unstable, hysterical individuals, and certain individuals, who have had organic brain damage, may react to even moderate amounts of alcohol with sudden and violent outbursts of confused and disoriented activity, followed by deep sleep, with no later recollection of what occurred, But the person's acts at the time may show intent, planning, premeditation, and an effort to escape or to hide the crime. If medical opinion is that at the time he had the requisite criminal state of mind, the later amnesia does not affect guilt. However, the inability to remember what happened would seem to render it impossible for him to present his defence and therefore to stand trial.

Alcoholic disorders.

Insanity which is "fixed," "settled," or "permanent," and of which the use of alcoholics is but a remote cause, is distinguished by the Courts from mere drunkenness and is deemed defence to crime just like insanity arising from any other cause;[7] i. e. if so pronounced as to destroy knowledge of the nature and quality of the act, or of its wrongfulness, etc. the defendant is not responsible. The

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1. Tex. State, (1948) Penal Code, Art. 36.
2. Coke, Litt., p. 247a; United States *v.* Claypool, (1882) 14 Fed. 127; Weick *v.* Comm., (1924) 201 Ky. 632 : 258 S. W. 90; State *v.* Thompson, (1834) Wrights' Ohio, B. 617.
3. McIntyre *v.* People, (1865) 38 Ill. 514; State *v.* Donovan, (1883) 61 Ia. 369 : 16 N.W. 236; State *v.* Newman, (1925) 157 La. 564 : 102 So. 671.
4. People *v.* Cummins, (1882) 47 Mich. 334 : 11 N.W. 184; Bryant *v.* State, (1932) 122 Tex. Crim. 385 : 55 S. W. 2d 1037; *cf.* State *v.* Wilson, (1889) 104 N.C. 868 : 10 S.E. 315; Roberts *v.* People, (1870) 19 Mich. 401; *see* also State *v.* Painter, 63 S. E. 2d 86 (evidence of insanity resulting from combination of syphilis, alcohol and barbito).
5. Burrows *v.* State, (1931) 38 Ariz. 99 : 297 Pac. 1029.
6. Borland *v.* State, (1923) 158 Ark. 37 : 249 S W. 591; Choate *v.* State, (1921) 19 Okla. Crim. 169 : 197 Pac. 1060; Johnson *v.* Comm., (1923) 135 Va. 524 : 115 S.E. 673 and cases collected in (1924) 30 A.L.R. 761.
7. Alabama : Heningburg *v.* State, (1907) 153 Ala. 13 : 45 S. 246; Arkansas : Carty *v.* State, (1918) 135 Ark. 169 : 204 S.W. 207; California : People *v.* Findley, (1901) 132 Cal. 301 : 64 Pac. 472; People *v.* Griggs, (1941) 17 Cal. 2d 621 : 110 P. 2d 1031; Colorado : *See* Martinez *v.* People, (1951) 24 Colo. 170 : 235 P. 2d 810; Delaware : State *v.* Hand, (1894) 1 Marv. 545 : 41 All. 192; Florida : Cochran *v.* State, (1913) 16 Fla. 91 : 61 So. 187, at p. 190; Georgia : Peek *v.* State, (1922) 55 Ga. 49 : 116 S.E. 629; Illinois : People

distinction is sound, but a word of caution is in order. A medical witness may speak of acute alcoholism as a "disease," and the Judge and jury may understand the term in the sense here used, of a more or less permanent from the mental disorder, whereas the witness may be using it in the loose sense (quite correct, medically) of a deviation from good health. All alcoholism deviates from the norm of good health but it is more likely to be in the nature of a character defect, for which the law holds the person responsible, than a mental disorder which the law recognises as "insanity". A temporary toxic state, is legally recognised as a form of insanity even though it is not "fixed" or permanent.[1] This seems sound, both from the medical[2] and the legal[3] point of view.

Delirium tremens.

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v. Cochran, (1924) 313 Ill. 508 : 145 N.E. 2070 ; Indiana : Fisher *v.* State, (1878) 64 Ind. 435 ; Kansas : State *v.* Rumble, (1909) 81 Kan. 16 at p. 22: 105 Pac. 1 ; Kentucky : Horn *v.* Comm., (1943) 202 Ky. 587 : 167 S. W. 2d 58 ; Louisiana : State *v.* Watson, (1879) 31 La. Ann. 379 ; Massachusetts : Comm. *v.* Parsons, (1907) 195 Mass. 560 at p. 570: 81 N. E. 291; Mississippi: Kelly and Little's case, (1844) 3 S. & M. 518 ; Missouri : State *v.* Riley, (1830) 100 Mo. 493 : 13 S. W. 1063 ; Nebraska : Hill *v.* State, (1894) 42 Neb. 503 : 60 N. W. 916 ; New York : People *v.* Rogers, (1858) 18 N. Y. 9 : 72 Am. Dec. 484 ; North Carolina ; State *v.* English, (1913) 164 N.C. 497 : 80 S. E. 2 ; State *v.* Lee, (1929) 196 N.C. 714 : 146 S.E. 858 ; Ohio : Rucker *v.* State, (1928) 119 Ohio 189 : 162 N. E. 802 ; Oklahoma : Collier *v.* State, (1920) 17 Okla. Crim. 139 : 186 Pac. 963 : 12 A. L. R. 839 ; Myers *v.* State, (1947) 83 Okla. Crim. 177 : 174 P. 2d 395 ; Oregon : State *v.* Trapp, (1910) 56 Ore. 588 at p. 591 : 109 Pac. 1094 ; State *v.* Wallace, (1942) 170 Ore. 60 : 131 P. 2d 222 ; South Carolina : State *v.* McCants, (1943) 1 Spears 384 ; State *v.* Driggar, (1909) 84 S. C. 526 : 66 S. E. 1042 : 19 Ann. Cas. 1166 : 137 A. S. R. 855 ; Tennessee : Cornwell *v.* State, (1827) 8 Tenn. (1 M. & Y.) 147 ; Texas : Evers *v.* State, (1892) 31 Tex. Crim. 318 : 20 S. W. 744 : 18 L. R. A. 421 ; Truett *v.* State, (1914) 74 Tex. Crim. 284 : 163 S. W. 523 ; United States : Perkins *v.* U. S., (1915) 228 Fed. 408 : Virginia : Boswell *v.* Comm., (1871) 20 Grat. 860; West Virginia : State *v.* Kidwell, (1907) 62 W. Va. 466 : 59 S. E. 494 ; State *v.* Painter, 63 S. E. 2d 86 ; Wisconsin : Terrill *v.* State, (1889) 74 Wis. 278 : 42 N. W. 243.

1. Alabama : Parrish *v.* State, (1903) 139 Ala. 16 at p. 48: 36 So. 1012; Delaware: State *v.* Hand, (1894) 1 Marv. 545 : 41 Atl. 192 ; State *v.* Kavanaugh, (1902) 20 Del. 131 : 53 Atl. 335 ; Florida : Garner *v.* State, (1891) 28 Fla. 113 at p. 153 : 9 So. 835 ; Kansas : State *v.* O'Neil, (1893) 51 Kan. 651 at p: 678 : 33 Pac. 287 ; Kentucky : Horn *v.* Comm., (1942) 292 Ky. 587 : 167 S. W. 2d 58 ; Louisiana : State *v.* Watson, (1879) 31 La. Ann. 379 ; State *v.* Kraemer, (1897) 49 La. Ann. 766 : 22 So. 254 ; Michigan : People *v.* Taner, (1952) 217 Mich. 640 : 187 N. W. 386 ; New York : People *v.* Carpenter, (1886) 102 N. Y. 238 : 6 N. E. 584 ; Ohio : Maconnehey *v.* State, (1855) 5 O. St. 77 ; Oklahoma : McCarter *v.* State, (1918) 14 Okla. Crim. 963 : 12 A. L. R. 839 ; Mott *v.* State, 232 P. 2d 166 ; Rodhe Island : State *v.* Quigley, (1904) 26 R. I. 293 : 58 Atl. 905 : 67 L. R. A. 322 ; South Carolina : State *v.* Driggers, (1909) 84 S. C. 426 : 66 N. E. 1042 ; Texas : Kalley *v.* State, (1892) 31 Tex. Crim. 216 : 20 S. W. 357 ; West Virginia : State *v.* Kidwell, (1907) 62 W. Va. 466 : 59 S.E. 494 ; Wisconsin: French *v.* State, (1896) 93 Wis. 325 : 67 N. W. 706.

2. "Delirium tremus is not to be considered as a simple alcoholic intoxication, a sort of belated drunkenness caused by accumulation of the poison in the organism. Its clinical aspect in fact differs radically from acute intoxication." Rosonoff, *Manual of Psychiatry* (16th Ed., 1927), p. 225.

3. The reasons for regarding delirium tremens as insanity rather than as mere drunkenness are stated by Wharton as follows : "(1) that delirium remen is not the intended result of drinking in the same way that drunkenness

Drug addiction.

The same rules apply to mental aberrations resulting from the use of drugs, as from the use of alcohol. Mere temporary derangement, resulting from the voluntary taking of narcotics, is, like mere temporary intoxication or insanity resulting from drinking, no defence to crime. It is a defence only if the drug habit has produced a fixed or permanent mental disorder.[1]

The use of the harbiturates, such as harbital and phenobarbital (luminal) is mostly to induce sleep, and seems to have no criminal importance. Nor, apparently, has morijuna. The claim that this drug may drive a user to commit crimes, particularly sex crimes, has not been substantiated.

Bromide (potassium salt of bromine).

Also has a sedative effect, but continued use leads to mental deterioration, with disorientation, hallucinations and delusions of persecution.[2] There are cases where it was contended that homicide was the product of insanity due to the use of bromide.[3]

A growing number of States now have statutes providing for non-criminal commitment and thereby for alcoholics and drug addicts.[4]

18. Distinction between medical and legal insanity.—The legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse.

The most elaborate and authoritative exposition of the law of Insanity in common law is embodied in *Daniel M'Naghten's* case[5] in the answers of the fifteen Judges given in June, 1843, to the questions put to them by the Lords in consequence of the popular alarm provided by the acquittal of *Daniel M'Naghten*. The answers given by the Judges in the said case have been taken, on all hands, to be an authoritative statement of the law of England on the subject of insanity as a bar to criminal responsibility. At page 722, the learned Judges laid down *inter alia* that "every man is to be

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is, (2) that there is no possibility that delirium tremens will be voluntarily generated in order to afford a cloak for a particular crime, (3) that so far as original cause is concerned, delirium tremens is not peculiar in being the offspring of indiscretion or guilt, for such is the case with many other kinds of insanity. . . . It is the result, like many other manias, of prior vicious indulgences; but it differs from intoxication in being shunned rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt." Wharton, *Criminal Law*, (12th Ed., 1932), Sec. 65.

1. Perkins *v.* United States, (1915) 228 Fed. 408 at p. 415; People *v.* Griggs, (1941) 17 Cal. 2d 621 : 110 P. 2d 1031; Strickland *v.* State, (1911) 137 Ga. 115 : 72 S.E. 922; Pather *v.* Comm., (1926) 215 Ky. 714 : 287 S.W. 559; Milburn *v.* Comm., (1928) 223 Ky. 188 : 3 S.W. 2d 204; State *v.* Morris, (1914) 263 Mo. 339 : 172 S.W. 603; State *v.* Painter, 63 S. E. 2d 86; *see* Tex. State, (1948) Penal Code, Art. 36.
2. Ralph Brown, *The Psychology of Drugs in Modern Abnormal Psychology. A Symposium* (W.H. Milkesell, Ed. 1950), pp. 687, 706.
3. Bentaon *v.* State, (1944) 245 Ala. 625 : 18 So. 2d 428; State *v.* Lynch, (1943) 130 N.J.L. 253; 32 A. 2d 183.
4. *See* for example Conn. Gen. State, (1949), Sec. 2720 *et seq.*; Md. Ann. Code (1951), Art. 16, Sec. 52 *et seq.*; N.Y. Consol. Laws Service, Unconsol. Laws, Ch. 209, Secs. 1—5; Pa. State (Purson, permitted) titt. 50. *Mental Disorder as a Criminal Defence* by Henry Weihofen, 1954 Ed., pp. 119-129.
5. Reported in 8 English Reports, p. 718.

presumed to be sane and to possess a sufficient decree of reason to be responsible for his crimes, until the contrary be proved to their (jury's) satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Section 84, I. P. C., has incorporated this definition of unsoundness of mind. It is recognised on all hands as a good excuse. A reference in this connection may also be made to the charge to the jury delivered by Mr. Justice M'Cardie in the well-known trial of Ronald True at the Central Criminal Court, Old Bailey, in May 1922, reported in (2) the Notable British Trials, Volume on Trial of Ronald True at page 246. It has thrown some revealing light on the subject and is *inter alia* as follows: "The law assumes that a man is *prima facie* sane, he must satisfy you otherwise if he desires to escape the consequences of a serious crime. The English law is complex both in civil and criminal cases with regard to insanity. . . . The foreign codes are simpler. The language there used is broader; wider discretion is given to tribunals. Here we are concerned with the Criminal Law of England by which you and I are bound. It is plain, in my opinion, that insanity from a medical point of view, is one thing; insanity from a medical point of view of criminal law is a different thing. Doctors exist to cure physical and mental ills. Juries and Judges exist to guard the life and property and the welfare of society. There are some things which plainly are not insanity. . . . Mere eccentricity is not of itself insanity. . . . At one time in the history of the criminal law in this country, insanity was no defence. . . . The law, I am glad to think, has progressed since then, for all law must progress or it must perish in the esteem of men. We have now to ascertain the law as it stands today and that law was considered eighty years ago by a great body of Judges in 1843 in a case (M'Naghten) which has so often been mentioned before you in this Court." As to the presumption of sanity, it has been observed in Halbury's *Laws of England*[1] that "every man is presumed to be sane until the contrary is proved and this presumption holds as well in civil as in criminal cases". As to insanity, it has further been observed in Halsbury's *Laws of England*[2] that "where it can be shown that a person at the time of his committing or omitting an act, the omission of which would otherwise be criminal, was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act or omission or as not to know that what he was doing was wrong, then such a person is not in law responsible for his act." Regarding persons of unsound mind, the same principle has been reiterated after an appraisal of the above-mentioned cases, as well as some others, in Russel on *Crime*,[3] that "all persons who have reached the age of discretion (fourteen years) are presumed to be sane, and criminally responsible and in cases where a person subject to attacks of insanity has lucid intervals, the law presumes the offence of such persons to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. In the older cases it was stated that it lay on the accused to prove that he was insane at the time of commisson of an offence so as not to be liable to punishment as a sane person. But the modern rule is not so strict since the case of *Woolmington* v. *Director of Public Prosecutions* in 1935 and it is now established that the prisoner need do no more than adduce evidence which raises in the minds of the

1. 3rd (Simonds) Edition, Vol. 29, at p. 419.
2. 3rd (Simonds) Edition, Vol. 10, at p. 267.
3. 11th Ed., at p. 109.

jury a reasonable doubt as to his sanity." In the well-known case of *Woolmington* v. *The Director of Public Prosecutions*,[1] Lord Chancellor Viscount Sankey, in concurrence with the other Law Lords, said that "Throughout the web of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception." The Lord Chancellor proceeded to observe that "no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertain ed". The above observations appear to have been somewhat modified in the case of *Mancini* v. *Director of Public Prosecutions*[2] wherein Lord Chancellor Viscount Simon observed *inter alia* that "Woolmington's case was one in which the defence to the charge of murder was that of pure accident in circumstances not alleged to amount to criminal negligence. The prisoner gave evidence to that effect and my notable and learned friend Lord Sankey lays it down that if the jury are either satisfied with his explanation or upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional . . . the prisoner is entitled to be acquitted". In the case of *Chankau* v. *R.*,[3] the Judicial Committee observed that "in cases where the evidence discloses a possible defence of self-defence, the onus remains throughout onthe prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish is defence any more than it is for him to establish provocation or any other defence apart from insanity."[4]

There is clear distinction between medical and legal insanity. The courts are concerned with the legal and not with the medical view of the question. A man may be suffering from some form of insanity in the sense in which the term is used by medical man, but may not be suffering from unsoundness of mind as is described in Sec. 84. If the facts of a particular case show that the accused knew that he had done something wrong, it did not matter how though he might be insane from the medical point of view he could not be exonerated under Sec. 84, I. P. C.[5]

19. Difference between medical and legal standpoints.—This difference in view marks the difference between the medical and legal standpoints from which insanity is viewed: For while a court of law commonly looks for "some clear and distinct proof of mental delusion or *intellectual* aberration existing previously to, or at the time of, the perpetration, of the crime,"[6] a medical man recognises that there may be delusion, springing up in the mind suddenly, and not revealed by the previous conduct or conversation of the accused;[7] so the tests employed by the medical man to detect the insanity are different from those employed by the lawyer.

Test employed by medical men.

He infers insanity from the absence of motive, of any attempt to escape, and of any accomplice. The fact that the person was *conscious* of the crime is immaterial. On the other hand, the legal test of the existence of insanity is "conduct". A lawyer means by madness "conduct of a certain character" while a physician means by it "a certain disease one of the effects which is to produce such conduct".[8] The medical man says that an act without motive is the

Legal test of existence of insanity.

1. Reported in (1935) Appeal Cases, p. 462, at p. 481.
2. Reported in (1942) Appeal Cases, p. 1.
3. Reported in (1955) Appeal Cases, p. 106.
4. Digendra *v.* State, 74 C.W.N. 231 at pp. 237-39.
5. V. Ambi *v.* State of Keraia, (1962) 2 Cr. L. J. 135 at pp. 140, 141.
6. Burton, 3 F. & F. 722.
7. *Ibid.*
8. Stephen's *Criminal Law*, 87.

act of a mad man. But motive is neither an important nor a recognised test of insanity.

No general rule.

There can be no legal insanity, which alone exonerates an accused, unless the cognitive faculties of the accused are, as a result of unsoundness of mind, so completely impaired as to render him incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law. There can be no general rule and that the only proper course to adopt is to decide each case on its own peculiar facts.[1] Criminal law is not concerned with medical insanity such as a mental derangement, but all that the evidence amounts to was that the accused was suffering from insomnia which might have brought about nervousness of mind; it was held that his history before the offence and his conduct during and after the offence which are sure criteria for judging his mental state leave no doubt that whether he was mentally weak or not at the time of committing the murder he fully understood the nature of his act and his plea of insanity was rightly rejected.[2]

20. Different kinds of insanity.—As already observed, insanity not only affects the cognitive faculties but also the other compartments of the mind, viz. the emotion and the will. However, in law, insanity is understood to mean a mental condition in which, either from the existence of delusions, or from incapacity to distinguish between right and wrong with regard to any matter under action, there is no individual responsibility. It is only with insanity of this kind we are concerned. It is said that for this purpose, insane persons may be divided into four kinds: (*i*) a lunatic, (*ii*) an idiot, (*iii*) one *non compos mentis* by sickness, or (*iv*) by drink.[3] A lunatic and an idiot may be permanently so, or they may be subject to only temporary and occasional fits of the malady. A person suffering from a total alienation of the mind is called "insane" or "mad," the term "lunatic" being reserved for one whose disorder is intermittent with lucid intervals. Insanity is again sub-divided into (*a*) *dementia a nativitate*[4] and (*b*) *dementia aecidentalis vel adventitia*[5] persons drunk being spoken of as suffering from *dementia affectata*.[6] Leaving alone for the present this form of "madness" dealt with in the next section, the three other forms of madness call for notice under this section.

Four kinds of insanity.

Partial and total insanity.

A person mad from birth is, of course, wholly irresponsible for his acts and his case presents no difficulty.[7] It is only persons who do not suffer from permanent insanity, or who suffer from partial insanity which leaves still some reason and understanding, that present the greatest difficulty. Speaking of partial insanity, Hale says, that it is the condition of every man, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of reason. "Doubtless most persons that are felons of themselves and others are under a degree of partial insanity, when they commit these offences, it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon

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1. State *v.* Koli Jeram Duda, A.I.R. 1955 Sau. 105 at pp. 107, 108 (D.B.) : 8 Sau. L.R. 269 : 1955 Cr. L. J. 1628.
2. Luvana Vaghumal Kherajmal *v.* State, A.I.R. 1955 Sau. 13 at pp. 15, 16 (D.B.): 7 Sau. L. R. 40 : 1955 Cr. L. J. 63.
3. Co. Lit., 247 ; Beverey's case, 4 Coke, 124.
4. "Madness from birth."
5. "Madness which is accidental or adventitious."
6. Sib. : "Affected or pretended madness" —madness by drunkenness so called, Co. Lit., 247 : 1 Hale P. C. 32 : 1 Hawk. P.C., Cl. 1, Sec. 6.
7. Curiously such a person is called an "idiot" in law, 1 Hale P.C. 34.

circumstances duly to be weighed and considered both by the Judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human reason, or, on the other side, too great an indulgence given to great crimes."[1]

21. The legal tests of responsibility.—Of all the problems involved in the subject of mental unsoundness as a defence to crime the greatest difference of opinion and the most discussion on the part of Courts and commentators has centred about the legal "tests of insanity"—i. e. the degree of mental unsoundness which must be shown to excuse a defendant from criminal responsibility.

Existing legal tests of insanity.

Obviously, not every form of mental unsoundness will render a person irresponsible. It is sometimes stated by test writers and Courts, and frequently in statutes, that a person who is "lunatic" is not capable of committing crime.[2] In most of the Western States, a statutory provision is commonly found that: "All persons are capable of committing crimes . . . (among others) . . . idiot . . . lunatics and insane persons."[3]

Four other stages provide that "an idiot" or "a lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanour. . . . "[4]

Texas and Oklahoma provide that "no act done in a state of insanity" can be punished as an offence.[5] Such statements and statutes, however, use the terms "lunatic" and "insane" in a loose sense, and they must not be understood to mean that every person is held incapable of committing crime who is in any degree mentally deceased or defective. It is only those who are so disordered as to come within the "test" established by the law in each jurisdiction that are excused from criminal responsibility on the ground of insanity.[6] What the test for irresponsibility should be is a question upon which authorities differ.

Law summarised.

The law in this country except in New Hampshire can be summarised as follows:

A person is not criminally responsible for an offence if at the time it is committed he is mentally unsound as to lack,—

(1) knowledge that the act is wrong, or

(2) (In fourteen or more State) will power enough to resist the impulse to commit it.

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1. 1 Hale P.C. 30.
2. 3 Coke Inst. 4; 4 Bl. Comm. 24; State *v.* Crawford, (1873) 11 Kans. 32, 43.
3. Ariz. Code (1939), Sec. 43; 114 Cal. Penal Code (1947), Sec. 1367; Idaho Code (1949), Sec. 18, 201; Mont. Re Codes (1947), Sec. 94, 201; Nevada Comp. Laws (1929), Sec. 99, 952; N. Dak. Rev. Code (1943), Sec. 12, 201; S. Dak. Code (1939), Sec. 13, 20; Utah Code (1953), Sec. 76-1-41.
4. Ark. Stat. (1947). Sec. 41-108, 41-109; Colo. Stat. Ann. (1935), Sec. 48-5, 48-6; Ga. Code (1933), Sec. 26-303; Ill. Rev. Stat. (1949) C. 38, Sec. 592-594.
5. Tex. Stat. (1948), Penal Code, Art. 34; Okla. Stat. (1951) Sec. 22-1161.
6. U. S. *v.* Holmes, (1858) Feb. Cas. No. 15, 382: 1 Cliff, 98; State *v.* Arnold, (1909) 79 Kans. 533: 100 Pac. 64; Sharp *v.* Comm., (1949) 308 Ky. 765: 215 S. W. 2d 450; State *v.* Paulsgrove, (1907) 203 Mo. 193: 101 S.W. 27; People *v.* Coleman, (1910) 198 N. Y. 166: 91 N. E. 368; People *v.* Wolfe, (N.Y. Co. Ct., 1951) 102 N.Y.S. 2d 12; State *v.* Jones, (1926) 191 N. C. 753: 133 S. E. 81; Lee *v.* State, (1925) 30 Okla. Crim. 14: 234 Pac. 654; Taylor *v.* Comm., (1885) 109 Pa. 262; *Ex parte* Mckenzie, (1930) 116 Tex. Crim. 144: 28 S. W. 2d 133.

Right and wrong test.

The first part of this rule states the so-called "right and wrong test". This part of the rule is law everywhere; and it is *sole* test of irresponsibility in England[1] and in twenty-nine American States.[2] The wording of the rule varies considerably; in fully half the cases it is stated that to be excused, a defendant must be so disordered as not to know the "nature and quality" (sometimes "nature and character", "consequences", etc.) of the act, or if he did not know it, that he did not know that it was wrong.

Irresistible impulse test.

The second part states the "irresistible impulse test", which is added as a second test of irresponsibility in at least fourteen States and in the Federal Courts[3] jurisdictions, a person is excused if he is incapable of knowing the wrongfulness of the act, or even though he does know that it is wrong, if he is incapable of controlling the impulse to commit it.

In one State, New Hampshire, the Court has rejected both of these tests and has adopted the rule that :

No legal test of irresponsibility by reason of insanity.

There is no legal test of irresponsibility by reason of insanity. It is a question of fact for the jury in each case whether defendant had a mental disease, and if so, whether it was of such character or degree as to take away the capacity to form or entertain a criminal intent.

In Rhode Island, the Court has never passed upon the question of the legal test.

22. Times when tests are applied.—In all States, the question is always whether the defendant was so insane as to come within the test adopted in the particular jurisdiction, at the time of the commission of the offence. Evidence of prior and subsequent insanity may be admitted, of course, as tending to throw light upon the defendant's mental condition at the time of the act, but the question at issue is always his responsibility or irresponsibility at the time of the act.

When a plea of legal insanity is set up, the Court has to consider whether at the time of the commission of an offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Sec. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime.[4]

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1. Rex. *v.* Quarmby, (1921) 15 Crim. App. 163 ; Rex. *v.* True, (1922) 16 Crim. App. 164 ; Reg. *v.* Windle, (1952) 1 T.L.R. 1344.
2. Arizona, California Florida, Ceorgia, Idaho, Iowa, Kansas, Louisiana. Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersy, New York, North Corolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin. In six of these States (Louisiana, Minnesota, New York, North Oakota, Oklahoma, and South Dakota) the right and wrong test is established by statute. For cases, see *Digest*, p. 129.
3. Alabama, Arkansas, Colorado. Connecticut, Delaware, district of Columbia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Utah, Vermont, Virginia, Wyoming. In addition, irresistible impulse is perhaps also recognised in Montana, New Mexico and Ohio.
4. Mst. Shanti Devi *v.* State, A.I.R. 1968 Delhi 177 at p. 180 : (1968) 70 Punj.L.R. (D.) 29.

The crucial point for consideration is not whether the accused was insane prior to the date of occurrence but whether at the time the offence was committed he was labouring under such a defect of reason as not to know the nature of the act he was doing or even if he knew it, he did not know that it was wrong and contrary to law. In coming to this conclusion the relevant circumstances like the behaviour of the accused before and after commission of the offence may be taken into consideration.[1]

23. Delusions.—Although the tests above are always stated as general tests, applicable to all forms of mental disorder, it is not unusual for courts to lay down different, and sometimes, not wholly consistent rules, in cases where it is claimed the defendant committed the act under an insane delusion.[2]

24. Test of legal insanity.—It is not easy to lay down the tests as to how insanity within the ambit of Sec. 84, I. P. C., is to be established. The difficulty arises on account of the fact that proof of prior or subsequent insanity would not discharge the onus. Insanity at the time of the commission of the act is to be established. It is difficult to enter into the recesses of the accused's mind exactly at the time of the commission of the offence.

Mere ghastly character of the act or absence of motive is not enough to prove legal insanity for the simple reason that each of them is consistent with non-existence of insanity. Though no hard and fast rule can be laid down and the conclusion would vary according to the facts and circumstances of each case, certain broad tests based on objective standards are generally looked into by courts. Those are antecedent and subsequent conduct of the person accused of the offence. Such conduct is not *per se* enough, but is relevant only to show what the states of the mind of the accused was at the time of the commisson of the act.[3]

Some indication of the precise state of the offender's mind at the time of the commission of the act is often furnished by the words of the offender used while committing the act or immediately before or after the commission.[4]

Speaking generally, the pattern of the crime, the circumstances under which it was committed, the manner and method of its execution and the behaviour of the offender before or after the commission of the crime furnish some of the important clues to ascertain whether the accused had no cognitive faculty to know the nature of the act or that what he was doing is either wrong or contrary to law.[5]

Tracey's observations.

What kinds and degree of privations or perversion of understanding exempt a man from liability to legal punishment are therefore questions of some nicety. As Tracey, J., told the jury: "If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed my Lord Onslow, he is exempted

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1. Netrananda Behara *v.* State, 34 Cut. L. T. 966 at pp. 969-70 : A. I. R. 1968 Orissa 223.
2. *Mental Disorder as a Criminal Defence* by Henry Weihofen, (1954) Ed., at pp. 50-52.
3. *See* Kerala State *v.* Madhayan, A.I.R. 1958 Ker. 80.
4. Tola Ram *v.* Emperor, A. I. R. 1927 Lah. 674.
5. Sarka Gundusa *v.* State, 35 Cut. L. T. 79 at pp. 82-83 : A.I.R. 1969 Orissa 102.

from punishment; punishment is intended for example, and to deter other persons from wicked design, but the punishment of a mad man, a person that hath no design, can have example. This is on one side, on the other side, we must be very cautious; it is not every frantic and idle humour of a man, that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear, before a man is allowed such an exemption, therefore, it is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a mad man as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or a wild beast, such a one is never the object of punishment."[1]

25- Implication of plea of insanity.—A plea under Sec. 84 of the Indian Penal Code implies an admission on the part of the accused that the acts for which he was prosecuted were done by him.[2]

26. True test stated.—Section 84 of the Indian Penal Code lays down the legal test of responsibility. It is not sufficient to prove that a person was not of sound mind at the time of the commission of the offence, to attract the provisions of Sec. 84 of the Indian Penal Code. It is necessary to prove also that by reason of such insanity he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The section is based on the answers given by the Judges in the House of Lords in the famous *McNaghten's* case.[3] In Sec. 67 of Macaulay's Draft Code of 1837 there was a similar provision as regards the defence of insanity in the following terms, namely, that nothing is an offence which is done by a person in consequence of his being mad or delirious at the time of his doing it. But having regard to the provision of Sec. 84 of the Indian Penal Code, mere unsoundness of mind as found by medical men will not be sufficient to enable an accused person to plead insanity unless he is able to show that by reason of such insanity he did not know the nature of the act or that what he was doing was either wrong or contrary to law.[4]

But this statement of the law probably carries the doctrine too far, for if the prisoner, in committing the act, was deprived of the power of distinguishing between right and wrong with relation to that act, it was not necessary that he should not have known what he was doing.[5] Such a person is undoubtedly of "unsound mind" within the meaning of the section. The term then has been used to embrace the case of a person who, moved by an irrational impulse, committed the act without knowing that it was a crime. It is used here to denote mental irresponsibility arising from want of capacity, whether temporary or permanant, natural or supervening, whether arising from disease or existing from the time of birth, or whether it was the result of habitual indulgence in liquor or intoxicating drugs. But the insanity here spoken of is something more than a passing phase of a normal mind, as for instance, a temporary insanity or loss of self-control inducted by a single drinking bout or *ganja* smoking which can scarcely be designated a temporary insanity, as being momentary it may call in

Insanity is more than a passing phase of human mind.

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1. Edward Arnold, (1784) 16 St. Tr. 695 at pp. 764-65, followed in Tola Ram, 29 P. L. R. 104.
2. *In re* Jinnappa Subbappa Gabannavar, (1961) 2 Cr. L. J. 250 at p. 251.
3. (1843) 10 Cl. 8 : Find. 200 H. L. 8 E. R. 718.
4. Navier Marolle, 1970 (2) M. L. J. 466 at p. 469.
5. Earl Ferrers, 19 St. Tr. 886.

the aid of Secs. 85 and 86 but is not to be treated as insanity here described.[1] Thus, an idiot who is a person without understanding from his birth, a lunatic who has intervals of reason, and a person who is mad or delirious are all persons of "unsound mind".

Where a plea of insanity is raised under Sec. 84, the Court has to consider two issues : (1) Whether the accused has established that at the time of committing the act he was of unsound mind ; and (2) If he was of unsound mind, whether he has established the unsoundness of mind was of a degree and nature to satisfy one of the knowledge tests laid down by the section. Unsoundness of mind is a matter of inference from his previous act, subsequent act and behaviour.[2]

There are numerous degrees of insanity. It has been said that not every little cloud floating over an otherwise enlightened understanding will exempt from criminal responsibility : nor, on the other hand, will every glimmering of reason over the darkness of a troubled mind, subject the unfortunate being to the heavy pains provided for wilful wrong-doing.[3] In order to render a man irresponsible for his acts the Code prescribes two tests, namely, (*i*) that his unsoundness of mind must have reached that degree that he was "incapable of knowing the nature of the act," or (*ii*) that it had precluded him from understanding that the act he was doing was wrongful.[4] These two elements need not be simultaneously present in each case, nor indeed, are they invariably so present. For it is easy to conceive of a case in which a person may be perfectly conscious of the nature of his act, though he lacks the capacity to see that it was wrongful. A person killing another, believing that his act was done by the immediate command of God, is an example. Here, the person killing knew that his act will result in death, but he did not know that that act was wrongful. Thus, in a Calcutta case,[5] the prosecution case was that the accused sacrificed his son as *korbani* in the mosque and having done so went straight and informed his uncle. His story in his confession was this :

Two tests.

> "I have sacrificed my son Jinu aged 5 or 5½ years. On the expiry of the day of Sunday I dreamt a dream at night that I had been in heaven. As I had got up two steps I heard 'Your sacrifice (*korbani*) was of no use ; you will have to sacrifice your own son'. In the following morning I searched for a castrated goat with a view to sacrifice a castrated goat also along with the son. Thereafter I thought that I had no necessity of a goat when I would sacrifice my son. I bathed my son at about 1 *prohar* of the day and bathed myself also. I kept the knife in the mosque of our village before bathing. The son came home after he had bathed in the tank. He was playing. I called him and brought him to the mosque. I asked the son to lie down, and he lay down. I asked him to shut his eyes and he shut his eyes. I too shut my eyes. Taking the knife in my right hand and thrusting it into son's throat, I sacrificed him. He

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1. Vithoo, 7 N. L. R. 185 ; Maung Gyi, 7 L. B. R. 13 : 20 I. C. 411.
2. State *v.* Emerciano Lemos, A I.R. 1970 Goa 1 at p. 6.
3. Harkha, (1906) A.W.N. 194.
4. Bazlur Rahman *v.* Emperor, A.I.R. 1929 Cal. 1 at p. 7 ; Ans. to Qs. 2 and 3 in McNaghten's case, (1843) 10 Cl. & F. 200 : 8 E. R. 718 ; Karma Urang *v.* Emperor, A. I. R. 1928 Cal. 238 at p. 240 ; Panchu *v.* Emperor, A. I. R. 1932 All. 233 : 33 Cr. L. J. 714 ; Govindaswamy, I. L. R. (1932) Mad. 479 ; Hazara Singh, 47 P. L. R. 158.
5. Ashiruddin Ahmad *v.* King, A.I R. 1949 Cal. 182 at pp. 182-83 : 53 C.W.N. 237.

was left there. After closing the door of the mosque I spoke everything to my maternal uncle Asiruddin. Thereafter I went to the house of my brother-in-law Basiruddin and on the very day I returned home."

The only question for consideration by the jury was whether he was prevented by unsoundness of mind from knowing what he was doing was either (*a*) wrong, or (*b*) contrary to law.

It was held that "In our opinion, the whole point of his confession and his whole story to his relations show that he thought that what he was doing was right, that he was commanded by some one in paradise and because his previous *korbani* had been 'no good'. At any rate this was the point which should have been clearly put to the jury. Of the three elements necessary to be established under Sec. 84, any one of which must be established by an accused to obtain the *benefit* of the provisions, it appears that first, the nature of the act was clearly known to the accused; secondly, that he knew that the act was contrary to law, or we have said this was probably known to him. But third element on which the case really turned is whether the accused knew that the act was wrong. In our opinion the correct view is that the accused was clearly of unsound mind and that acting under the delusion of his dream he made this sacrifice believing it to be right."

The last cited Calcutta decision has been dissented from in an Allahabad case where it is pointed out that the significant word in Sec. 84 is "incapable" and the section requires that the accused should be incapable of knowing whether the act done by him is right or wrong. The section protects an inherent or organic incapacity and not a wrong or erroneous belief which might be the result of a perverted potentiality.[1] Other instances will have to be presently considered (see *post* para. 27). So much is, however, clear that in laying down the two tests the Code follows the current of English cases, in which a similar doctrine has been laid down. So the fifteen Judges consulted by the House of Lords replied: "If under the influence of his delusion, as he supposes another man to be in the act on attempting to take away his life and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment".[2] It is not every impairment of mental processes or any deviation from the recognised standards, that will earn for the accused the verdict of not guilty, in the sense that *mens rea* is absent. The test that the law insists upon is the "right and wrong test" of the McNaughten Rules as recognised in Sec. 84 of the Indian Penal Code. This test has been accepted in India as a correct guide for determining the guilt or innocence of the person who pleads insanity as a defence.[3] The accused, in a case, was proved to be subject to insane delusions to the effect that he believed at times that he was surrounded and attacked by persons from whom he tried to escape. One day he became subject to a passing delusion that the priest of a Buddhist monastery was keeping his sisters and daughters in the monastery, but for

Right and wrong test of McNaughten Rules.

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1. Lakshmi *v.* State, A.I.R. 1959 All. 534 at p. 536: 1959 A. L. J. 287: 1959 A. W. R. (H. C.) 268: 1959 Cr. L. J. 1033.
2. Daniel McNaghten's case, 1 C. & K. 130; Muhammad Hussain, 15 O. C. 321 (F. B.): 13 I. C. 641; Townby, 3 F. & F. 839.
3. Hazara Singh *v.* State, A. I. R. 1958 Punj. 104 at p. 110: I. L. R. (1957) Punj. 1914: 59 Punj. L. R. 597: 1953 Cr. L. J. 555.

this he had apologised to the priest whom he, however, later on attacked inflicting eight cuts from the effects of which he died. It being proved that the accused was a known mad man and had no conceivable motive for the crime, the Court acquitted him of murder holding that he did not know the nature of the act or that it was wrong.[1]

The test laid down in the leading case of *Daniel McNaughten's* case[2] is whether cognitive faculties of the mind are so impaired as to make the offender incapable of knowing that what he is doing is wrong.[3] It is necessary to remember that the atrocity of the crime and absence of motive are not the criterion to constitute unsoundness of mind and are only some of the features ordinarily associated with it. Periodical fits, the interval and the intensity of which are left uncertain, cannot lead the Court to assume or infer anything more than that the mind is enfeebled and that his intellectual power is impaired.[4]

27. Modern criticism of the McNaughten Rules.—The law relating to the defence of insanity in criminal proceedings is based, in England as in India, on the famous McNaughten Rules formulated in 1843. "These rules have been attacked by the medical profession and also by the lawyers, notably Fitzjames Stephen and the attack has continued to this day. The medical profession have maintained during the last hundred years that the McNaughten test is based on an entirely obsolete and misleading conception of the nature of insanity since insanity not only, or primarily, affects the cognitive or intellectual faculties but affects the whole personality of the patient, including both the will and the emotions. Stephen contended that a person who is prevented by mental disease from controlling his own conduct cannot be said, in the true sense of the words, 'to know the nature of his acts' and that he is therefore not criminally responsible under the existing law as formulated in the McNaughten Rules. This interpretation has not been accepted by the Bench and the Bar. Most lawyers take the view that the concept of an 'irresistible' or 'uncontrollable' impulse is a dangerous one since it is not practicable to distinguish between those impulses which are the product of mental disease and those which are the product of ordinary passion, or where mental disease exists, between impulses that may be genuinely irresistible and those which are merely not resisted. Such cases are not covered by the existing law and it would be undesirable to enlarge the McNaughten Rules so as to exempt them from liability."[5]

Criticism of the rule by medical men.

"In 1843 law and medicine were in agreement as to what insanity is. The basis of this agreement is the notion that the mind is divided up into compartments some of which can be diseased while the others remain intact. Since 1843 medical views as to insanity have changed. Psychiatrists now agree that the mind is a whole, a unity, and that a person cannot be mentally and emotionally diseased without his whole personality being affected. The Courts, however, continue to use the standards of over a hundred years

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1. Inga, 4 Bur. L. T. 267 : 13 I. C. 385.
2. (1843) 10 Cl. & F. 200 : 8 E. R. 718.
3. Channabasappa *v.* State of Mysore, A.I.R. 1957 Mys. 68 at p. 70 (D. B.); I.L.R. (1956) Mys. 414; 1957 Cr. L. J. 985; Baswantrao Bajirao *v.* Emperor, A.I.R. 1949 Nag. 56 : 50 Cr. L. J. 181; State *v.* Koli Jeram Dadu, A.I.R. 1955 Sau. 105: 1955 Cr. L J. 1628; Palanaswami Goundan, *In re*, A.I.R. 1952 Mad. 175 : 64 Mad. L.W. 731.
4. Channabasappa *v.* State of Mysore, A.I.R. 1957 Mys. 68 at pp. 69, 70.
5. Dr. Kenny's *Outlines of Criminal Law*, 15th Ed., p. 58 *et seq.*

ago."[1] Sir David Henderson and the late R. D. Gillespie in their text-book of *Psychiatry*, 1956 Ed. at page 712 say : "The McNaughten Rules smack of the ancient and medically out-of-date doctrine of mental faculties, the mind being regarded as divided up into a series of independent compartments, the cognitive faculty being one of the large sub-divisions. With this doctrine there flourished almost inevitably the belief in the existence of partial insanities in which one mental compartment and faculty was affected and not any other."

Interpretation by medical men not acceptable to lawyers.

"Medical views have changed but the law has not advanced *pari passu*. Medicine has come to recognise that the mind is a whole, one and indivisible. There is no mental disorder, however partial in appearance, that does not have its reverberations throughout the rest of the affected mind. Consequently the purely intellectual criterion of responsibility falls to the ground, for the intellect as intellect may be unimpaired, but an emotional disturbance will alter or impede or nullify its effect on conduct."

"Conversely, intellectual defect means deficient emotional control. There is no allowance made at all for such phenomena as are well known to psychiatrists—the intra-psychic ataxia of schizophrenia, post-hypnotic and epileptic automatisms, and the overwhelming influence of affective disorder, which may, for example, cause a depressed parent to murder his children whom he loves and whom he knows it is morally wrong to kill." The learned authors point out the difference in medical and legal criteria of responsibility : "The former concerns himself with the welfare of the individual, the latter with the safety of society. The difference, however, goes even deeper. The legal concept is of mind dominated by reason and free-will, the medical concept is of function actuated by emotion and determined by intrinsic factors."

McNaughten Rules.

The McNaughten Rules, despite criticism from time to time, still hold the field. The Court of Criminal Appeal in England would neither question the validity of the rules nor extend them to cover "the irresistible" or "uncontrollable" impulse nor enlarge them in any other respect.[2] In England itself criticism of the rules was voiced on several occasions. One of the recommendations made by the Committee appointed in 1922 by the Lord Chancellor as a sequel to the case of *Rex* v. *True*,[3] to consider what changes, if any, are desirable in the existing law, practice and procedure relating to criminal trials in which a plea of insanity as a defence is raised, was : "It should be recognised that a person charged criminally with an offence is irresponsible for the act when the act is committed under an impulse which the prisoner is by mental disease in substance deprived of any power to resist." Ten of the twelve High Court Judges who were consulted on this recommendation were opposed to any alteration in the criminal law. A Bill embodying the recommendation was introduced in Parliament but withdrawn. It was apprehended that the introduction of the concept of irresistible impulse would raise more problems than it would solve. Most crimes are committed under an impulse and the object of the law is to compel persons to control or resist such impulses, rather than to make them an excuse for escaping from criminal liability.

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1. *Murder, Madness and the Law*, by Louis H. Cohen, M.D.
2. *See* D. Kenny's *Outlines of Criminal Law*, 15th, Ed., p. 58 *et seq.*
3. (1922) 127 L.T. 561.

England and America McNaughten Rules have been animadverted by medical men, Bench and Bar.

Both in England and the United States of America, several attemp's have been made, to discredit the criterion signified by the McNaughten Rules, and the assault made on the common law test, was not confined to members of the medical profession, but it has also found support from among lawyers and Judges of repute.[1] The criticism levelled by the psychiatrists is now being taken note of and its effect is.[2] In *Durham's* case,[3] it was said at page 874 : "We find that as an exclusive criterion the right-wrong test is inadequate in that (*a*) it does not take sufficient account of psychic realities and scientific knowledge, and (*b*) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the 'irresistible impulse,' test is also inadequate, in that it gives no recognition to mental illness characterised by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted." The McNaughten test was criticised in *Smith* v. *United States*,[4] for not taking into consideration the great advances made in medical science. But the moral test was applied by the United States Court of Appeals in *Holloway* v. *United States*,[5] and the Court observed : "There is no objective standard by which such a judgment of an admittedly abnormal offender can be measured. They must be based on the instructive sense of justice of ordinary men. This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct, emotion and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. This ordinary sense of justice still operates in terms of punishment. To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame." Rejecting the view of the scientists, the same Court proceeded to observe: "The modern science of psychology is concerned with diagnosis and therapeutics and not with moral judgments. It proceeds on an entirely different set of assumptions. It does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion or impulse in the way he should go."

Discussion summed up.

The above discussion can be summed up in the Royal Commission on Capital Punishment, 1949-1953, who, after having made an exhaustive survey of legal, medical and lay opinion said at page 113 of their report : "The gravamen of the charge against the McNaughten Rules is that they are not in harmony with modern medical science, which, as we have seen, is reluctant to divide the mind into separate compartment—the intellect, the emotions and the will—but considers it as a whole and considers that insanity distorts and impairs the action of the mind as a whole." Whether the scientific advances especially in the field of psychiatry should be incorporated in the law and if so, to what extent, are questions to be answered by the Legislature. As Tek Chand, J., said in a highly instructive judgment on the defence of insanity, "the Courts in this country interpret the law as they find it, their function being *jus dicere*

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1. *Vide* Minnesota Law Review, Vol. 41, February 1957, p. 331 and University of Pittsburgh Law Review, Vol. 18, No. 2, Winter, 1957, p. 216.
2. *Vide* Anderson *v.* Grasberg, 78 N.W. 2d 450 (Minn. 1956) and Durham *v.* United States, (1954) 214 Fed. Rep. 2d 862.
3. (1954) 214 Fed. Rep. 2d 862.
4. 36 Fed. Rep. 2d. 518 at p. 549.
5. 148 Federal Rep. 2d 665.

and not *jus dare*".[1] Courts in India have also stressed the need for adopting a more progressive attitude in the application of the principle enunciated in the section, for determining the criminal responsibility of a person suffering from "mental disorders" in the light of recent advances in medical science especially in the field of psychiatry.[2] The development of psychiatry as a recognised branch of medical science should, it is submitted, cause a revison of our opinion as to what constitutes unsoundness of mind for the purpose of Sec. 84 of the Penal Code.[3]

28. Madness.—The question as to whether accused was mad at the time of occurrence so as to attract the application of Sec. 84, I. P. C., is a question of fact to be decided on merits in each case on the facts of that case. Such decision has to be made with reference to the law on the subject. Madness can be of different types and forms and acts of mad man do not necessarily follow a set pattern and conform to a normal standard. The act of one man may be different from act of another man even under similar circumstances. If a man was mad at the time of occurrence, though he was sane at the time of trial, he may not be able to put forward at the trial, pleas describing how he really felt and the state of his mind in the same way as an accused who was not mad at the time of occurrence. Allowance has to be made for this in considering his pleas with reference to the evidence. The fact that accused was in sound state of mind when D. M. O. examined him about a month after the occurrence and when trial was held or some months after occurrence does not mean that accused must have been of sound mind at the time of occurrence.[4]

29. Mental delusions.—These are cases of delusions in which there is a mistake of fact, as where a person kills another but thinks that he was breaking a jar or thinks that by doing so he is sending the person slain to heaven.[5] In such cases the rule is the same, whether the person was under a mistake of fact, or in delusion. As in the one case so in the other, the Court place him as regards responsibility, in the same situation, as if the facts with respect to which the mistake was made of delusion existed, were real.[6] The twofold test, therefore, follows the twofold functions of the human mind, namely, reason and emotion. The function of the former or the faculty of thought is performed in cognition, in perception or judgment, of the latter in moral sentiments and affections, the propensities and the passions. These two functions belong to two different compartments of mind, and one may be diseased while the other is normal.[7] The two classes, it will be seen, relates solely to the domain of reason, they exclude all cases of emotion. A Ghazi plunging his knife into the heart of a *kafir* may truly believe that the deed will secure him the peace of Heaven, but he knew that his act will result in death—indeed it was so intended and he further knew that his act was contrary to law. He may be a religious maniac, but he cannot be exempted from punishment, because his case does not fall within the exception.

Twofold tests.

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1. Hazara Singh *v.* State, A.I.R. 1958 Punj. 104 at pp. 109-10 : 1958 Cr. L. J. 555.
2. Ramdulare Ramadhin Sunar *v.* State, A.I.R. 1959 M. P. 259 at p. 261 : 1959 M. P. L. J. 334 : 1959 Cr. L. J. 844.
3. State *v.* Chhotelal, A.I.R. 1959 M. P. 203 at p. 206 : 1959 Cr. L. J. 718.
4. *In re* Padella Suryanarayana, A. I. R. 1965 A. P. 28 at p. 31.
5. Kader Nayarshah, 23 Cal. 604 at p. 607, followed in Ramzan, (1918) L. R. Cr. 30 : 48 I. C. 492.
6. Ghinua Uraon *v.* Emperor, A.I.R. 1918 Pat. 179 at p. 181 : 19 Cr. L. J. 135 : 43 I. C. 423 (S. B.).
7. Ghatu Pramanick, I.L.R. 28 Cal. 613.

Indeed, such a case is amply met by the reply of the Judges to the first question of the Lords.[1] Cases of human sacrifice and of murder of supposed witches (Sec. 302) offer other examples. So where a man sacrificed his own son to the God Mahadeo in pursuance of a vow that if the son were born he would offer Ganges water and do *puja* and because, as he alleged that though the son came, wealth had not accompanied its birth, as a protest against which he had cut his own throat, it was held that he could not but be convicted of murder, though his act may have been prompted to some extent by his religious enthusiasm or even hallucination.[2] The accused, in another case, had confessed that he had seen the deceased (a lad aged 8 years who was his brother-in-law) arrange a clandestine meeting between his wife and a young man whom he actually saw enter his wife's apartment sometime before midnight, and again leave it after a considerable interval, and in consequence of what he saw he had not had a wink of sleep until he killed him. It was held that the accused actually believed that he had ocular proof of his wife's infidelity, and that the estimate of his guilt must be made upon the basis af acutal existence of the facts in regard to which the delusion existed, and since the accused had acted under the immediate influence of such provocation, his guilt was greatly mitigated under Exception 1 to Sec. 300.[3] In another case, the prisoner killed his uncle, by hacking him on the head and neck with a sword after which he rushed about brandishing his weapon shouting "Victory to Kali", and he attempted to strike other persons including his own father, and the question was whether he was guilty of murder. It appeared that the prisoner was a young man of weak intellect. The motive actuating the offence was trivial and inadequate. When the paroxysm had passed off, during the police inquiry he appeared to be rational but immediately afterwards he developed aphasia, attempted to commit suicide, and was undoubtedly insane from that time for a period of five years. It was held that facts warranted a finding that the prisoner was suffering from a fit of melancholic homicidal mania at the time he hacked the deceased with the sword and was, by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to law, and that therefore he was not guily of murder.[4]

Where the husband and the wife went to sleep and disturbed during night by the thoughts about the unchastity of his wife, the appellant seems to have caused her death by throwing nitric acid upon her. It was held that the appellant was conscious of his surroundings and of his doings and all that oppressively weighed on his mind was the conduct of his wife as he imagined it to be. It is true that he claimed mental examination in his statement and it is also true that in the grounds of appeal he has written things suggesting that he is not quite of sound mind, but that he might well have feigned in view of the sentence passed upon him. All the same one thing is clear and that is that some considerable time before the occurrence the appellant not only brooded over the character of his wife but the brooding had such an effect on his mental faculties that the delusion about the chasuity of his wife has been described by the medical witness as taking the form of a kind of temporary insanity. But it has not been an insanity of the type which provides a defence to the appellant.

The mental state of the appellant in the case rather tends to the view that this is not really a proper case for the extreme penalty provided for the offence. The sentence of the appellant is reduced to imprisonment for life.[5]

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1. Daniel McNaughten's case, 1 C.K. 133.
2. Bashendharee Kahar, 7 W.R. 64.
3. Ghatu Pramanick, I.L.R. 28 Cal. 613.
4. Shibokeori, 10 C. W. N. 725.
5. Hazara Singh *v.* State, A. I. R. 1958 Punj. 104 at p. 106 : 59 Punj. L.R. 507.

The crucial point of time at which the unsoundess of mind has to established is the time of actual act of offence, and that the burden of provision that the accused is entitled to the benefit of exemption, is upon accused. The fact that the accused did not try to run away from the scene is not necessarily indicative of insanity in the legal sense. It does not show that he was incapable of knowing the nature of the act, or that what he was doing was wrong or contrary to law.[1]

30. **"Run amuck."**—Persons who "run amuck" probably suffer from similar insane delusions. Fancying some wrong, exaggerating the importance of some grievance, real or imaginary, the soldier takes up his gun and commences to fire at people indiscriminately. All these are cases of homicidal mania, the importance of which calls for separate notice.

31. **Homicidal mania.**—Homicidal mania or monomania is commonly defined as a state of partial insanity, accompanied by an *impulse* to perpetrate of murder because of which it is also sometimes called impulsive or paroxymal mania. There may or may not be evidence of *intellectual* aberration, but the main feature of the disorder is the existence of a destructive impulse which, like a delusion, cannot be controlled by the patient. This impulse, thus dominating over all other feelings, leads a person to destroy those to whom he is most fondly attached, or any one who may be involved in his delusion.[2] It sometimes seizes a man all of a sudden, sometimes it is long-felt but concealed and restrained : there may be merely signs of depression and melancholy, low spirits and loss of appetite as well as eccentric or wayward habits, but nothing to lead to a suspicion of the fearful struggle that may be going on within the mind. "As in suicidal mania many of those who are in habits of daily intercourse, with the patients have been first astounded by the act of murder, and then only for the first time led to conjecture that certain peculiarities of language or conduct, scarcely noticed at the time, must have been symptoms of insanity. Occasionally the act of murder is perpetrated with great deliberation, and apparently with all the marks of sanity."[3] Taylor goes on to observe that cases are sometimes rendered difficult by reason of the fact that there may be no distinct proof of the existence, past or present, of any disorder of the mind, so that the chief evidence of the disorder is the act itself.

In homicidal insanity which often leads to the murder of loved ones, one must look at the following :

Factors for consideration in cases of homicidal insanity.

(1) Previous history of the accused ;

(2) Nature and character of the crime ;

(3) Behaviour and conduct previous to the crime ;

(4) Behaviour and conduct subsequent to the crime ;

and the Court must see if the cumulative effect of all the circumstances established can lead to a reasonable inference that the accused was of "unsound mind" within the meaning of Sec. 84 at the time of the commission of the offence charged.[4]

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1. *In re* Subramaniam *alias* Allahbaksh, A.I.R. 1964 Mad. 526 at p. 527 : (1964) 1 M.L.J. 156 : 1964 M.L.J. (Cr.) 153.
2. Taylor's *Medical Jurisprudence* (4th Ed.), 564.
3. *Ibid.*, at p. 477.
4. Ramdulare Ramadhin Sunar **v.** State, A.I.R. 1959 M.P. 259 at p. 262: 1959 Cr. L. J. 814.

32. Sympathetic affection.—But medico-legal writers are agreed that there are no hallucinations or illusions in this form of insanity[1] which is simply a perversion of the moral sentiments. But inasmuch as the mental powers are seldom unaffected when the moral feeling is so disordered, the derangement of the latter necessarily implies some derangement of the former. Indeed, the perversion of moral feeling is generally observed to be a precursor of mental derangement, though not to the same extent. Homicidal mania, as such, has therefore no recognised place in this exception. And in this respect the English law is identical.[2] In other words, neither under this section, nor under the rules of English law can a person plead exemption from criminal liability merely on the ground that he was prompted by an involuntary impulse to commit the crime.[3]

33. Three classes of homicidal maniacs.—But there are cases in which the intellect is so far affected as to bring the case of the prisoner within the exception here enunciated. For this purpose homicidal maniacs may be divided into three classes : (*i*) where the propensity to kill is connected wito some absurd irrational motive, or actual delusion ; (*ii*) where it is connected with no known motive ; (*iii*) where it is committed *without interest*, without motive, and often on a person loved by the perpetrator.

Actual delusion.

Of course, this classification takes no note of crimes committed from a motive, e. g. of revenge for, in such cases, there is premeditation and cognition. They are not, therefore, cases in which there is any room for doubt as to the criminality of the perpetrator. The three degrees above described are, on the other hand, cases in which there may or may not be culpability. For instance, where a married woman killed her husband immediately after an apparent recovery from a disease which caused great loss of blood and brought on insane delusions of the senses, which had been renewed at the time of the murder, it was held that she had not been in such a state of mind at the time of the act as to know its nature or be accountable for it.[4] So in another case, a married woman, fondly attached to her children and apparently most happy in her family, poisoned two of them without any motive. It appeared that there was insanity in her family and it was held that the woman had acted in a paroxysm of insanity which deprived her of the power to perceive the consequence of her act, and she could not, therefore, be convicted.[5]

In another case the mother, who was suffering from the after-effects of delivery and religious despondency, got up one night and drowned four of her children in a cistern. She afterwards confessed that she could not sleep at night and that between 12 and 1 o'clock, a black shadowy figure appeared and suggested to her that they could be out of danger if they were in Heaven. It was further suggested to her mind that it was better for them to die young than to grow up wicked and that she could easily put them into the cistern, whereupon she acted.[6] Other cases have occurred in which the filicide confessed to having had the same sensation of darkness or a black spectre brooding over them just before the perpetration of the act.[7] In such cases not only is there no motive for the act, but there could be no possible motive having regard to the known relations between the perpetrator and the deceased. But if this were all, the section would offer no defence.

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1. *See* Somnambulism, *infra*.
2. 3 Stephen's Cr. L. 126.
3. Maung Gyi, 7 L. B. R. 13 : 20 I. C. 411.
4. Law, 2 F. & F. 836.
5. Vyse, 3 F. & F. 247.
6. Wilson, 1 Stephen's Cr. L. 91.
7. Brough, 2 F. & F. 838 ; Hayes, 1 F. & F. 666.

Besides the want of motive there were circumstances in these from which the Court was justified in inferring that the persons accused were insane and unconscious of the fact that the act committed by them was wrong.

Irresistible impulse and no known motive.

In the *second* class of cases the desire to kill is connected with an irresistible impulse, and no *known* motive. Where that is the only case, it is obviously insufficient to justify exculpation. As Bramwell, B., told the jury: "It has been urged that you should acquit the prisoner on the ground that it being impossible to assign any reason for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But the circumstances of an act being *apparently* motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might prompt the act. A morbid and restless but irresistible thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed as irresistible so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must return, therefore, to the simple question you have to determine: Did the prisoner know the nature of the act he was doing and did he know that he was doing what was wrong."[1]

Apparently motiveless action.

Partial delusions.

The fact that the prisoner was suffering from partial delusion is no ground for exoneration. If he was then possessed of sufficient sense to know that his act was wrong or that it would result in loss of human life. So where the prisoner who was sleeping in the same hut with the deceased and the latter's father and brother got up at dawn and seized an axe which was in the hut, struck the deceased, and then ran away throwing the axe in the jungle close by, and went to his house about two miles where he stayed till the next day when he was arrested, and brought before a Magistrate to whom he confessed, saying that on the night of the occurrence he had seen the deceased who was his brother-in-law, a lad of 8 years, having a private conversation with another who gave him a rupee which he carried to his wife, that another then entered the hut, where his wife was and returned after some time, whereupon he was smitten with such shame that he could get no sleep and that out of rage and a feeling of disgrace he had lost his senses when he killed his brother-in-law. It was found that the accused could not have seen what he had confessed, that the wife of the accused was but a girl of 11, and had not even attained puberty, that the accused had at the same time no other motive, that the accused was undoubtedly suffering from a delusion and he actually believed that he had ocular proof of his wife's infidelity. He was accordingly convicted of murder though it was suggested that the Government might consider the question of reducing the sentence."[2]

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1. Hayes, 1 F. & F. 666; Brough, 2 F. & F. 838; Ramzan, (1918) P. R. 30: 48 I.C. 492; Dhani Bux, 9 S. L. R. 171: 32 I. C. 671; Nga Khn Hla *v.* Emperor, (1914) U. B. R. 328: 26 I. C. 1007: 16 Cr. L. J. 95.

2. Chatu, I.L.R. 28 Cal. 613; Seat Ali, 41 I. C. 142; *see* also Ghinua Ureon *v.* Emperor, A.I.R. 1918 Pat. 179: 43 I. C. 423: 19 Cr. L. J. 135 (S. B.); Kazi Bazlur Rahman *v.* Emperor, A.I.R. 1929 Cal. 1.

Want of motive for commission of crime.

In another case the prisoner and his wife were seen walking along a road, prisoner chiding her, and then all of a sudden he fired a pistol at her and she fell, whereupon he pulled her up and they proceeded a few yards, when he pushed her down and inflicted a second wound on her throat with a knife. He then ran away till he was overtaken and arrested by an onlooker to whom he stated that he had a misfortune and had cut his finger. He would not tell what he had done with the pistol and knife but said : "I did it. I intended to do it, and that will put an end to it. I have been unhappy since Christmas." The prisoner had threatened to murder his wife before, on whom he had made a previous attack. At the same time the murder was committed without secrecy, whereupon Rolfe, B., told the jury : "The conclusion seems irresistible that the prisoner was to some extent labouring under a delusion, but he was not exempted from responsibility because he was labouring under a delusion as to his property, unless that had the effect of making him incapable of understcnding the wickedness of murdering his wife. But whether that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only. Indeed, his insanity on that point might guide them to a conclusion. As to his sanity on the point involved in his case, and, in his view of the matter, there were two circumstances in the evidence oi great importance : these were, the want of motive for the commission of the crime and its being committed under circumstances which rendered detection inevitable. They could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he had satisfied them that he was not capable, at the time, of appreciating his acts."[1]

Impulsive insanity.

In the *third* class the impulse to kill is *sudden*, instantaneous, unreflecting and *uncontrollable*. The act of homicide is perpetrated without interest, without motive, and ofen on persons who are most fondly loved by the perpetrator. This has been called impulsive insanity. "It is said that on particular occasions men are seized with irrational or irrational or irresistible impulses to kill, to steal or to burn, and under the influence of such impulses they sometimes commit acts which would otherwise be most atrocious crimes. It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred and have been acted on. Instances are given in which the impulse was felt and resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse was really *irresistible* as well as unresisted. If it was *resistible*, the fact that it proceeded from disease would be no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it his act would be murder ; it would not be the less murder if the same irritation and corresponding desire was produced by some internal disease.[2] The great object of the criminal law is to induce people to control their impulses ; and there is no reason why, if they can, they should not control insane as well as sane impules.[3] The proof that an impulse was irresistible depends on the circumstances of the particular case. The commonest and strongest cases are those of women who, without motive or concealment, kill their children after

Sudden, irresistible and uncontrollable impulse without motive.

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1. Lagton, (1849) 4 Cox. C.C. 149.
2. Laxman Dagdu, 10 Bom. 512.
3. Kader Nasver, I.L.R. 23 Cal. 604.

recovery from child-bed."[1] This is called puerperal mania and is a recognised malady, known to medical science.[2] Taylor says that in most of these cases women are fully aware of the nature of the fact, and that it is contrary to the laws of God and man; they even make efforts to resist it, but they are unable to control their actions like persons in a normal state.[3] In this form of insanity the will power is then affected. But insanity affecting emotions and the will is not entitled to exceptional treatment.

Morbid mania.

Other forms of impulsive insanity induce the person affected to other forms of crimes. The morbid mania leading to impulsive acts of incendiarism without any motive is a condition recognised by medico-legal writers,[4] though it is not recognised by law. The morbid propensity for thieving is known as kleptomania, a mania which is said to show itself in females labouring under disordered menstruation, or amongst those who are far advanced in pregnancy —the motive being a mere wish of possession. In this form of the malady, however, the person stealing is perfectly conscious of the act and of its illegality, as is evidenced by the precaution taken before and after the theft.[5] Another form of mania owing its origin to the primary disturbance of the functions of the brain from disease, is that called erotomania, in which the person affected gets possessed of uncontrollable amorous ideas, which are then as predominant as religious ideas in some cases of religious melancholia. Person of both sexes are subject to this disorder, which is said to be due to some defect in the sexual organs.[6] Persons so affected are perfectly conscious of the nature of their acts, and they are, therefore, amenable to criminal law both here and in England.

34. Dipsomania or drunkenness.—Allied to these monomanias, is the mania caused by alcoholism. Drink as a rule is no excuse for crime, as the next section lays down. But the question here to be discussed is not that raised by that section, but that which is the outcome of the present exception. That intemperance is not frequently only the sign of insanity, or one of its symptoms is now recognised; that intemperance may lead to total deprivation of self-control, or at all events delusions induced by excess, as in *delirium tremens* rendering the individual irresponsible for his actions is also possible. So it has been held that though mental incapacity produced by voluntary drunkenness is no defence under the next section, still, if voluntary drunkenness causes a disease which produces such incapacity then this section applies though the disease may be of a temporary character.[7] The accused Bheleka Aham, while proceeding towards his field one day, met a boy returning home whom, without speaking a word, he killed with a single stroke of the *dao* as he passed him. There was no motive for the crime and it appeared that the accused had exhibited symptoms of insanity since six or seven days previously. His replies to the police were incoherent and meaningless. The evidence showed that the accused was addicted to intemperate habits by excessive use of opium whereupon the Court held that accused was irresponsible for the act, as at the time he killed the boy, he was incapable of knowing the nature of his act.[8]

Mental incapacity produced by voluntary drunkenness.

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1. Stepen's *Criminal Law*, p 95.
2. 2 Taylor's *Medical Jurisprudence*, p. 589.
3. *Ibid.*, p. 590.
4. *Ibid.*, p. 591.
5. *Ibid.*, p. 593.
6. *Ibid.*, pp. 593 and 594.
7. Bheleka Aham, I.L.R. 29 Cal. 493.
8. *Ibid.*

Insanity produced by drunkenness.

Insanity whether produced by drunkenness or otherwise is a defence to the crime charged.[1] The relevant passage from Russell on *Crime*[2] has been cited with approval in Indian decisions; it may be quoted here: "There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to criminal charge as insanity induced by any other cause. . . ."

Voluntary drunkenness is no defence in England also.

The law in England is the same. Voluntary drunkenness is no excuse there. It is, on the other hand, considered an aggravation. Still, if a person addicted to drink commits a crime, the question about his intemperance is always relevant as reflecting upon intention, or upon his criminality. So in a case of attempted suicide, Jervis, C.J., said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?"[3] And so if drunkenness produces a condition of mind in which the sense of discrimination between right and wrong is obliterated, the question is relevant, for on the existence of the sense depends criminal responsibility. Excessive drinking causes the derangement of the mind known as *delirium tremens*. It commences with tremors of the hands, and the individual suffers from hallucinations and illusion sometimes of a horrid kind referring to past occupations or events. The patient acquires a predisposition to commit murder or suicide, especially the latter. In *delirium tremens* there is formed a disease of the brain, while voluntary drunkenness merely produces a temporary disturbance of its functions.[4] In countries where and amongst classes in which drunkenness is common, this form of *dementia* is frequently raised as a defence. But in order to be sufficient it must establish a condition of positive and well defined insanity. Where it lacks that degree of proof drunkenness is not an answer to a crime though it may be taken into account as an extenuating circumstance.

In cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.[5] Where the accused had failed to prove such incapacity as would have been available to him as a defence, and so the law presumes that he intended the natural and probable consequences of his act.[6] This principle has been followed in many cases.[7]

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1. Basdev *v.* State of Pepsu, A.I.R. 1956 S.C. 488 : 1956 A. L. J. 488 ; Prabhunath *v.* State, A.I R. 1957 All. 667 at p. 670 : 1957 A. L. J. 572 : 1957 A. W.R. (H C.) 494 : 1957 Cr. L. J. 1056.
2. 11th Ed., Vol. I, pp 86-87.
3. 4 Black., 26 : Litt., 247. (*See* 75 E.R. 31.)
4. Taylor's *Medical Jurisprudence*, p. 580.
5. Russell on *Crime*, 11th Ed., Vol. I, pp. 86-87.
6. Basdev *v.* State of Pepsu, A.I.R. 1956 S.C. 488 at p. 492 : 1956 S.C.R. 363 : 1956 S.C.A. 695 : 1956 S.C.J. 554 : 1956 A. L. J. 666 : 1956 Andh. L. T. 593 : 1956 M. P. L. J. 161 : 58 Punj. L. R. 569 : 1956 Cr. L. J. 919 (2).
7. *See* also Prabhunath *v.* State, A. I. R. 1957 All. 667 at pp. 670 71 : 1957 A. L. J. 572 : 1957 Cr. L. J. 1056.

35. Somnambulism.—Somnambulism is the unconscious state known as sleep-walking.[1] Dr. Glanville Williams[2] points out that "sleep-walking may in fact indicate a neurotic state, and a person who kills while sleep-walking may be as dangerous in future as one who kills in a state of clouded consciousness which occurs during the day. . . . The present medical opinion is that sleep-walking is often associated with nocturnal epilepsy; such a patient may be dangerous, and an insanity verdict would be proper." Though there is no decided case on the point, the medical authorities show that somnambulism, if proved, will constitute that unsoundness of mind which attracts Sec. 84 of the Penal Code.[3]

Somnambulism if a form of insanity.

Medico-legal writers regard somnambulism also as a form of insanity in which the mind is subject to hallucinations and illusions, though except in very extreme cases, in which there is a sudden access of insanity, the person is not likely to commit a heinous crime like murder, without recovering from the delusion. In crimes committed in this state of semi-consciousness, the person usually mistakes one person for another, or believes himself surrounded by robbers' or is haunted by imagined feeling of wrong. Taylor mentions several cases of crimes committed during sleep. In one case the prisoner suddenly awoke at midnight, and saw before him, as he believed, a frightful phantom. He twice called out "Who is that?" but receiving no reply, and imagining that the phantom was advancing upon him, he seized a hatchet which was beside him, attacked the spectre, and it was found that he had killed his wife. He was tried for murder, but acquitted on the ground that he was not at the time conscious of his actions.[4] In another, an itinerant pedlar, given to sleep-walking, and in the habit of moving about the country armed with a swordstick, was while asleep on the highroad, roused by a passerby. The pedlar suddenly awoke, drew his sword and stabbed the man who soon afterwards died. It was pleaded for him that he had committed the act believing himself to have been attacked by robbers. He was, however, convicted of manslaughter, presumably because he was conscious when he stabbed the man.[5] In another case, the prisoner, a woman, had stabbed, at night, her son-in-law sleeping in the same room with her. There was evidence of previous malice and the knife with which the wound had been inflicted bore the appearance of having been recently sharpened, and the prisoner must have reached over her daughter who was sleeping in the same bed with the deceased. These facts were held to negative the suggestion of unconsciousness, and the prisoner was convicted.[6] In one case the prisoner committed an act during sleep which was the result of voluntary drunkenness, but his act was held to have been done in a state of unconsciousness and he was acquitted. In that case the prisoner and the deceased were two soldiers and the former had been arrested for drunkenness and put to bed. The deceased went to awaken him, when the prisoner suddenly kicked out, and his boot struck the abdomen of the deceased, causing rupture of the intestines and death. The prisoner did not awake, and appeared then to be quite insensible and he was on that ground acquitted.[7]

Case of crimes committed during sleep.

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1. Modi's *Medical Jurisprudence and Toxicology*, 12th Ed., p. 399; R. C. Ray's *Outlines of Medical Jurisprudence*, 6th Ed., p. 455; M. A. Kamat's *Medical Jurisprudence*, 5th Ed., p. 375.
2. *Criminal Law*, The General Part, Sec. 95, p. 317.
3. Pappathi Amal, *In re*, A.I.R. 1959 Mad. 239 at p. 241 : (1959) 1 M. L. J. 125 : 1959 M. L. J. (Cr.) 147.
4. Bernard Schedmalzig, 2 Taylor's *Medical Jurisprudence*, p. 600.
5. Milligan, 2 Taylor's *Medical Jurisprudence*, p. 600.
6. Jackson, 2 Taylor's *Medical Juriprudence*, p. 600.
7. French, 2 Taylor's *Medical Jurisprudence*, p. 600.

36. Psychosis.—"The behaviour of a human-being has continuity, there is a marked day-to-day consistency of action and attitude in the individual. There are changes and modifications, but these are usually gradual. The signs of incoming changes can be seen early and their gradual increase and growth can be followed. And when a serious change has occurred its effects persist for a considerable time. If a reversal of the change eventuates, this reversal too is usually gradual giving progressive evidence of itself. Particularly is this true in the development of psychosis. Psychosis is characterised by a marked change in personality. The change is gradual and progressive, extending over periods of weeks and months or more. True, the onset of psychosis is more rapid in some cases than in others, but even when we speak of a sudden onset we are thinking in terms of days and weeks. 'Sudden' here means relatively rapid, but not abrupt, without warning, overnight.

"Even where there is some specific precipitating incident such as a sudden emotional or financial disaster, the psychotic act is either the consummation of days of brooding and worry, withdrawal and shutting in, or the precipitating shock falls on already shaky ground, giving but the final push to an already unstable, unbalanced personality. Once the psychotic act has been precipitated, recovery is a matter of gradual progessive building up, reintegration, reorganisation. The person is not sane one day and psychotic the next nor is he psychotic one day and sane the next.

Temporary insanity.

"Temporary insanity may be within the realm of theoretical possibility, but not of probability. If no increasing signs of abnormality are to be found in the defendant's life, no history of instability and increasing tension leading up to the alleged psychotic incident, and if, after the incident, there are no psychotic hangovers, no persisting symptoms of abnormality, then a plea of temporary insanity is suspect indeed."[1]

37. Arteriosclerosis.—The decision of Devlin, J., in *R.* v. *Kemp*,[2] may be considered to have given a new meaning to the McNaughten Rules. The celebrated formulation by the Judges in 1843 was couched in the following terms: ". . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. . . ."[3] The phrase "defect of reason from disease of the mind" was considered to apply to persons suffering from one of the recognised forms of psychosis or major diseases of the mind but not to include minor forms of mental disorder (neurosis).

Brain distinguished from mind.

In *R.* v. *Kemp*,[4] "the accused was suffering from 'a physical disease', namely, arteriosclerosis or hardening of the arteries, which had not then reached a stage at which he displayed any general sign of mental trouble. Apart from depression, not an irrational depression, produced by his poor state of health, there was no signs at all of mental trouble." An elderly man of excellent character, he suddenly made an entirely motiveless and irrational attack

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1. Cohen, *Murder, Madness and the Law*, at p. 152, cited in Ramdulare Ramadhin Sunar *v.* State, A.I.R. 1959 M.P. 259 at p. 263 : 1959 M. P. L. J. 344 : 1959 Cr. L. J. 844.
2. (1956) 3 W. L. R. 724 : (1956) 3 All E. R. 249 : (1957) 1 Q. B. 399.
3. McNaghten's case, (1884) 4 St. Tr. (N. S.) 847 : 10 Cl. & F. 200 : 8 E. R. 718.
4. (1956) 3 W.L.R. 724 : (1956) 3 All E. R. 249 : (1957) 1 Q. B. 399.

upon his wife during the night, striking her with a hammer and causing a grievous wound : The disease had led to a congestion of blood in the brain causing a temporary lapse of consciousness, and it was in this state that he made the attack. Devlin, J., distinguished "brain" from "mind"; he said: "The law is not concerned with the sense that 'mind' is ordinarlly used, the mental faculties of reason, memory and understanding." As Russell on *Crime*[1] comments, "Reason, memory and understanding, are abstractions denoting functions of the brain which is the visible tangible content of the cranium. Just as, for example, a gas engine operates to produce power, so also does the human brain operate to produce reason, memory and understanding, none of which can exist, if the material engine, the brain is destroyed, and any of which may be impaired if the brain is crippled by disease. But it is not easy to see how these functions can themselves be diseased, a puzzle which is not solved by grouping them together under the single word 'mind'." The learned Judge held that the words "disease of mind" which qualify "defect of reason" in the McNaughten Rules were not put in for any other purpose than to exclude defects of reason "caused simply by brutish stupidity without rational power".

Disease of mind.

Hardening of the arteries is a disease which is capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning and is therefore a disease within the meaning of the rules. As a learned reviewer put it, "the decision. . . renders possible the inclusion under the McNaughten rules of persons who can scarcely be regarded as suffering from mental disease or disorder at all but who are nevertheless not responsible for their conduct."[2] It is strange that a tumour, which by its presence on the brain, impairs its funetions is not a "disease of the mind"[3] while interference with the flow of blood in the brain caused by the hardening of the arteries is a "disease of the mind".[4]

38. Insanity as a defence to criminality.—The plea of insanity is a defence to criminal responsibility. It must be, therefore, established by the defence,[5] either from facts alleged or proved by the prosecution, or independently by the defence. Insanity is a medico-legal question. It comprises not only all degrees of mental disorders expressed by the terms partial insanity, impulsive insanity, moral insanity, monomania, pyromania, kleptomania and the like, but it presents considerable difficulties in investigation, and, requiring as it does highly specialised mental capacity for observation, it is a defence which is readily available, but which it is not always easy to establish. At the same time while true cases of insanity are rare, when they do occur they present problems which baffle even specialists in mental diseases.

Section does not refer to insanity in all its stages.

The present section does not refer to insanity in all its stages. It only allows such insanity to be a defence as is sufficient to deprive the person of his reason so that he is unable to "know the nature of the act". In England where all criminal trials are held by a jury, the question does not present the same difficulties. The juries are entitled to pronounce their verdict without giving their reasons. Accordingly, they no not regard the question from the same standpoint as a Judge in his country who has to discharge the double function of Judge and jury, and give his reasons for his judgment, which again, is subject to confirmation, in appeal or on revision.

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1. 11th Ed., Vol. I, p. 122, f. n. 36.
2. See *Modern Law Reviced*, Vol. XX, No. 1, pp. 55-57.
3. R. *v.* Charelston, (1955) 1 W.L.R. 317.
4. R. *v.* Kemp, (1957) 1 Q. B. 399.
5. Razai Mia, I. L. R. 22 Cal. 317 ; Bahadur, I. L. R. 9 Lah. 371 ; Ram, 50 I. C. (Cal.) 991 ; Mantajali, 55 I. C. 477 ; Bazlur Rahman, A. I. R. 1929 Cal. ! at p. 7.

When the prisoner is tried by a jury, the latter do not as a rule trouble themselves with the niceties of law or the perplexing problems that a given case may present. They usually ask themselves the question, "Could any man in his senses have done such an act ?" and their verdict depends upon the answer they are able to give to that question. Such a question, indeed, presents itself to the unaided Judge even in this country, but it is not the only question he has to answer, nor is it the sole test by which the Judges of the criminal responsibility of an accused before him. It will, therefore, be the purpose of the present discussion to present a summary of the subject so far as it has a bearing on a person's criminal responsibility.

Sections 84, 300, 302.

In a case where a plea of unsoundness of mind is taken, the Judge presiding over a trial held with the aid of a jury, is required to obtain the jury's view, not only as to whether facts have been established entitling the accused to the benefit of the protection of Sec. 84, but also as to whether the jury in fact found that the accused had committed the act charged.

The question of unsoundness of mind is essentially a question for the jury to decide. So also is the question as to whether the person charged had in fact committed the act. The Judge's finding would necessarily have to be based upon the finding of the jury.[1]

In *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*,[2] it is said that the situation in the room supports the version that the accused did not know what he was doing. It is asked why the accused should have given so many stabs to kill an unarmed and undefended woman ? It is said that it discloses that the accused was doing the act under some hallucination. On the other hand, the existence of the weapons in the room the closing of the door from inside, his reluctance to come out of the room, till the *mukhia* came, even if that fact is true, would indicate that it was a premeditated murder and that he knew that if he came out of the room before the *mukhia* came he might be manhandled. Many sane men give more than the necessary stabs to their victims. The number of blows given might perhaps reflect his vengeful mood or his determination to see that the victim had no escape. One does not count his strokes when he commits murder. It was held that, "We, therefore, do not see any indication of insanity from the materials found in the room ; on the other hand, they support the case of premeditated murder."

Consideration for Court when plea of legal insanity is raised.

When a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Sec. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime.[3]

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1. Suprintendent and Remembrancer of Legal Affairs, Government of Local Bengal *v.* Fatik Naskar, A. I. R. 1961 Cal. 436 at pp. 438, 439 : 65 C. W. N. 496.
2. A. I. R. 1961 S. C. 1563 at p. 1572 (1964) 1 S. C. W. R. 831, overruling Ramhitram *v.* State of M. P., A. I. R. 1956 Nag. 187 ; *see* also Thangavelu Asari, *In re* (1971) 1 M. L. J. 484.
3. Dahyabhai Chhaganbhai Thakkar *v.* State of Gujarat, A. I. R. 1964 S. C. 1563 at pp. 1569-70 : (1964) 1 S.C.W.R. 831.

39. Defence of insanity under the American law.—In the United States of America insanity is everywhere a defence to a charge of crime, for without a sound mind there can be no criminal intent. But the States have not adopted a single test for determining insanity. Most of the States have adopted the "right and wrong" test of the McNaughten Rules. This is the exclusive test in 29 States. An additional test, called the irresistible impulse test is applied in at least 14 States : this test considers that the "right and wrong" test is not sufficient in all cases and that a person who knew that the act he was committing was both morally and legally wrong may still be not held responsible if he lacked the power to resist the impulse to commit it. Under the irresistible impulse test, the impulse must be the product of mental disease rather than the uncontrollable passion or fury of a sane man. Also, moral and emotional insanity are not regarded as defences, whether the Courts do or do not admit irresistible impulses as a defence.[1]

40. Physical changes in a deranged mind.—It has been before stated that criminal responsibility depends upon criminal intent. In other words, wherever there is no criminal intention there is as a rule no criminal liability. Now, the absence of criminal intention may arise from a variety of causes—mistake, immaturity of understanding due to youth or absence of understanding due to insanity. Now, insanity may be temporary or permanent, total or partial. It may have, again, some bearing on a person's criminal act, or none at all. Barring certain exceptional cases to be presently considered, insanity is a disease or disorder of the mind which deprives the man of his reasoning faculties, and makes him a victim to its uncontrollable impulses. Now, as the brain is the organ of the mind, and it is invisible, the only manifestation of mental disorder is presented by the outward acts and conduct of the individual. Even when laid bare either experimentally in the lower animals, or in the human subject by the operation of disease, by accident, or by surgical measures, the passages of motion from place to place and the intimate molecular changes by which its functions are exerted cannot be observed. The utmost that can be observed is a difference in the amount of blood suffused in the vessels of the part, and the effects of injury, in the shape of paralysis or other disability, when the patient is dead, and if the brain is examined microscopically, we can, indeed, observe an extraordinary complexity and delicacy of structure, and we can often distinguish changes in this structure which we know, or reasonably infer, to be the result of the disease.[2] This is all that can be known. The disordered working of the structure cannot be seen, for the working ends with death and although we may justly infer when we see a nervecell or nerve fibre shrivelled or swollen, or distorted or disintegrated, that it must, during life, have performed its functions badly or not at all ; yet, in the absence of all exact and specific knowledge of what that function is, we are unable to connect in any rational way the changes found after death with the symptoms observed during life.

Manifestation of mental disorder is presented by the outward acts and conduct of the individuals.

We may be sure that a cell that has burst and extended its nucleus, and a fibre that is severed and broken into lengths, did not, during life, transmit motion in normal amounts or directions, and did not add thereto or subtract therefrom, and did not modify in normal ways the direction of

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1. Davis *v.* U. S., (1895) 160 U. S. 469 : 40 Law Ed. 499 ; *see* Underhill's *Criminal Evidence*, 5th Ed., Vol. 2, Chap. XXXIV, p. 1128.
2. Mercier's *Criminal Responsibility*, p. 83.

such motion as reached them. But this very general reasoning does not enable us to understand why the patient during life should have been excited or stuporous in conduct nor why he was elevated or depressed in mind. It gives us no linking of the reason why he entertained delusions, still less of the character of the delusions. We are reduced to suppose that a patient who has a delusion that he is persecuted by some unseen and incomprehensible agency, has a change of structure in a part of his brain; and that another patient who has a delusion that the whole world is his own private property, has a change of a different character in that part of his brain, or a change of the same character in another part of his brain, or a change of a different character in a different part of his brain. But this is all conjecture.

41. Sensual observation impossible.—"Our knowledge does not enable us to associate any specific kind of change with any specific kind of delusion, nor can we even say that any particular change of structure is necessarily associated with delusion at all, nor, conversely that delusion is necessarily associated with any particular structural change, not with any discernible structural change. And what is true of disorders of mind is equally true of disorders of conduct."[1] "Unsoundness of mind" cannot, therefore, be the subject of ocular inspection or demonstration. It can only be known by its outward manifestation. By the language and conduct of the man, his thoughts and emotions are read. According as he conforms to, or contrasts with, the practice of people of sound mind, the large majority of mankind, we form our judgment as to his mental soundness. For this reason evidence is admissible to show that his conduct and language at different times and on different occasions indicated some morbid condition of his intellectual powers ; and the more extended the view of his life, the safer is the judgment formed of him.

Unsoundnes of mind cannot be subject of ocular inspection or demonstration.

42. Evidence of insanity.—In all cases where legal insanity is set up, it is most material to consider the circumstances which have preceded, attended and followed the crime ; whether there was deliberation and preparation for the act ; whether it was done in a manner which showed a desire to concealment ; whether, after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection ; whether, after his arrest, he offered false excuses and made false statements.[2] The behaviour of the accused after the crime is committed would be very relevant.[3]

Where the evidence showed that the crime was deliberate and pre-meditated so as to avoid detection, the Court came to the conclusion that it was not a case where the accused had only a glimmering knowledge of what was right and wrong but that the sanction provided by the criminal law acted as a deterrent influencing, guiding and controlling his conduct and, in the words of Lord Bramwell, the accused would not have yielded to his insanity if a policeman had been at his elbow ; therefore, the accused had failed to establish his plea of insanity.[4]

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1. Mercier's *Criminal Responsibility*, pp. 83 and 84.
3. Mayne's *Criminal Law of India*, 4th Ed., p. 182, Pt. II; Deorao *v.* Emperor, A.I.R. 1946 Nag. 321 at p. 324 : I.L.R. (1946) Nag. 946 : 47 Cr. L. J. 918 : 1946 N. L. J. 656.
3. Hemu Bechar *v.* Emperor, A.I.R. 1951 Sau. 19 at p. 20 : 52 Cr. L. J. 369.
4. Ramdulare Ramadhin Sunar *v.* State, A.I.R. 1959 M. P. 259 at p. 263 : 1959 M. P. L. J. 344 : 1959 Cr. L. J. 84[4].

History of accused and his conduct are good critera for judging mental state.

Where the accused committed murder of his wife in the room where they were sleeping, and opened the rear door of his room abutting on a road and went away. The accused denied having committed the offence and pleaded utter ignorance of the murder, and that he was of unsound mind. But all that the evidence amounted to was that the accused was suffering from insomnia which might have brought about nervousness of mind.

The accused's own conduct at the time of the offence throws considerable light on his mental state. When the hue and cry was raised, he ran away from the back door and hid himself in a ruin. He discarded his blood-stained clothes and even attempted to remove the stains from his person by rubbing them with dust.

It was held that his history before the offence and his conduct during and after the offence which are sure criteria for judging his mental state leave no doubt that whether he was mentally weak or not at the time of committing the murder he fully understood the nature of his act and his plea of insanity was rightly rejected.[1] A moody and pensive temperament and at the highest some eccentricity and abnormality of behaviour, does not in the least indicate an unsoundness of mind.[2]

43. Family antecedents.—Everything relating to his physical and mental history is relevant. Evidence of insanity in his parents and immediate relatives may also be pertinent.[3] It is never allowable to infer insanity in an accused person from the mere fact of its existence in his ancestors. But when testimony direct by tending to prove insane conduct on the part of the accused himself has been given, evidence of his family antecedents is admissible as corroborative of that testimony.[4]

44. General insanity.—But the plea of general insanity though admissible, is not a complete answer to a charge. As the section lays down, in order to be effective as a defence, it must he an insanity by reason of which the person was incapable of knowing the nature of the act. So it is stated by Alison that "to amount to a complete bar of punishment, either at the time of committing the offence or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If though somewhat deranged, he is able to distinguish right from wrong *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal act."[5]

General insanity not a complete answer to a charge.

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1. Luvana Vaghumal Kherajmal *v.* State, A.I.R. 1955 Sau. 13 at pp. 13, 14, 15, 16 : 7 Sau. L. R. 40.
2. State *v.* Koli Jera Duda, A.I.R. 1955 Sau. 105 at p. 107 (D. B.) : 8 Sau. L. R. 269 : 1955 Cr. L. J. 1628.
3. Bahadar, I.L.R. 9 Lah. 371,
4. *Per* Cox, J., in United States *v.* Guitean, 10 Fed. Red. 161 ; *per* Maule, J., in Tucker, 1 Cox.C.C. 103 ; Anand, I.L.R. 46 All. 329 ; Bhagwati Prasad, 74 I.C. (Lah.) 69 ; Nge Pyau, 4 Bur. L. J. 267 : 13 I.C. 585.
5. *Principles of the Criminal Law of India*, p. 654.

The inquiry is then narrowed down to this. Was the accused not in possession of his understanding at the time of the act,[1] so that he could not discern that he was doing a wrongful act? The expression used in the section is "knowing the nature of the act," which would at first blush seem to imply that only insanity which affects the cognitive faculties is a defence to criminal responsibility. Instances of unsoundness of mind of this description would be such as these: A person strikes and in consequence of an insane delusion thinks he his breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin, and sending him to Heaven. Here he is incapable of knowing, by reason of insanity, that he is doing what is morally wrong, or he may under insane delusion believe an innocent man, whom he kills, to be a man that was going to take his life in which case by his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land.[2]

45. Insane impulse.—But insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. The question whether the exemption here made is confined only to cases of insanity affecting cognitive faculties, or extends also to those affecting emotions and will, was raised but not decided in a Calcutta case,[3] in which, however, it was held that if insanity affects a person's emotions and will, it is difficult to say that it does not affect also his cognitive faculties. But the Court was "not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases, in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear that his cognitive faculties, so far as we can judge from his acts and words are left unimpaired. To take such a view as this would be to go against the plain language of Sec. 84."[4] In this case it appeared that the accused Kader was a cultivator and had his house and property destroyed by fire since when he complained of pain in the head and spoke to himself: when the pain was particularly severe he did not answer when spoken to; that on one occasion he was seen eating potsherds. He played and went about with children much more than was to be expected from a man of his age; and it was found that he was fond of a boy Abdul whom he subsequently murdered without any sane motive. But it appeared that the accused had observed some secrecy in committing the murder. He had tried to conceal the corpse, and he had hid himself in a jungle. On these facts the Court was called upon to determine his criminal responsibility. The Court found that the accused was suffering from mental derangement of some sort, but having regard to the circumstances attending the act, it was constrained to hold that the accused was not, on that account, "incapable of knowing the nature of his act".[5] Finally, however, though constrained to uphold the conviction, the Court recommended the case to the Local Government for mercy.

Insanity if affects emotion and will power and also cognitive faculties.

The same course was adopted in another case. The accused Lakshman was suffering from fever, and feeling annoyed with the cries of his two children, aged three years and one year, he took the younger child out of the cradle and

Judicial decision.

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1. *See* Subbigadu *v.* Emperor, A.I.R. 1925 Mad. 1238 (Sanity at the trial immaterial).
2. Kader Nasyar Shah, I.L.R. 23 Cal. 604.
3. *Ibid.*; *see* also Baswantrao Bajirao *v.* Emperor, A.I.R. 1949 Nag. 66.
4. Kader Nasyar Shah, I.L.R. 23 Cal. 604.
5. *Ibid.*

cut her throat with a hatchet on the threshold of the inner room. The other child was at the door of the house. He seized her also, and cut her throat in a similar manner, and then went to bed, and fell asleep. The accused had shown no previous symptoms of insanity. He had fever since five days prior to the day of murder and on that day he had high fever ; and the Court has thus to consider the criminality of accused in the light of this section. It was conceded that if the case had to be decided by medical tests, the accused would have had to be acquitted. But the question was whether that test was legitimately applicable. It was held that it was not and the Court finally held that unless the act be shown to have been committed in a state of delirium, the accused must be found to be guilty. In other words, the criminality of the accused was to be judged by the sole test of his consciousness of the nature of this act. As, however, there was no evidence of delirium the Court confirmed the conviction, but commended him to the mercy or Government.[1]

The same view was taken in a parallel case disposed of by the High Court at Madras.[2] In that case one Venkatasami was prosecuted for the murder of a child (his brother's wife), probably, as the medical evidence showed, during the paroxysm of intermittent fever, evidently in the belief that he was surrounded by objects intending to harm him. In that belief he had previously killed a goat with a thrust, and seizing the sword which was handy, he stabbed the child probably without knowing that he was killing a person whom he loved. It appeared in evidence that the accused had acted very strangely a short time before the murder. He had abused his parents and had stabbed the goat. The rest was medical evidence which, in the opinion of the Court, did not amount to more than that there was the possibility of a sudden attack of homicidal mania. The Court held that, judging by the judicial tests which it was bound to apply, it could not find that the accused did not know that what he was doing was wrong or contrary to law within the meaning of this section.[3] The conviction was therefore maintained. But in another case one Dil Gazi had for no reason cut his wife's throat with a *dao*. It appeared that for about a month and a half previously to the deed the accused had ceased attending to his crops or his cattle, saying that the paddy would grow by itself ; he chased and abused people, and said that he wanted to die as he thought people were going to loot his house ; that he climbed up a tree saying his pillow was there, and that he cut himself on the arm with a *dao* ; that from about the same time the accused had harboured a delusion that armed men would come to his house and take away his wife, and that he was under that delusion on the evening of the occurrence. It also appeared that after the murder, the accused made no attempt to escape or offer resistance or to conceal his act. On these facts the Court said : "In view of the uncertainty that always exists as to how far a diseased state of mind extends, and in view of the difficulty, that is never absent from cases like this, of obtaining any trustworthy evidence, we find that the facts on record prove that the unsoundness of his mind prevented his knowing the nature of his act, and that it was wrong."[4] The difference between this

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1. Lakshman Dagdu, I.L.R. 10 Bom. 512.
2. Venkatasami, I.L.R. 12 Mad. 459; Mathuswami, 53 I. C. (Mad.) 828.
3. Venkatasami, *supra*, following Laxman, *supra*, followed in Kedar Nasyar, I.L.R. 23 Cal. 604; Dhani Bux, 9 S.L.R. 271 : 32 I.C. 67.
4. Dil Gazi, I.L.R. 34 Cal. 686 ; Mani Ram, I.L.R. 8 Lah. 114 ; Tola Ram, 192 I. C. (L.) 774 : I.L.R. 8 Lah. 684 ; *see* also Chandgi *v.* Emperor, A.I.R. 1932 Lah. 260 ; Mohammad Islam *v.* Emperor, A.I.R. 1931 Oudh 77 ; *In re* Sankappa Shetty, A.I.R. 1941 Mad. 326.

case and those previously cited would appear to be the presence of symptoms of a mental aberration from which the clouding of his cognitive faculties might well be inferred.

46. Uncontrollable impulse, doctrine of.—In England the opinions expressed by the Judges in *McNaughten's* case[1] are considered most authoritative expositions of law on the question how far insanity is a valid defence in a criminal case.[2] In *R.* v. *Holt*,[3] the Court of Criminal Appeal declined to extend the test laid down in *McNaughten's* case, so as to include "uncontrollable impulse".[4] In subsequent cases[5] it was held that the defence of "uncontrollable impulse" is unkown to English law and the Judges had no power to add to the rules laid down in *McNaughten's* case. The law in India is the same as in England on the subject.[6]

Stephen's interpretation.

Notwithstanding medical opinion and Sir James Stephen's interpretation,[7] the defence of irresistible impulse has frequently been rejected in charges of murder. In 1924 a committee on Insanity and Crime appointed by Lord Birkenhead, L. C., and presided over by Atkin, L. J., recommended[8] that "it shall be made clear that the law does recognise irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was by mental disease in substance, deprived of any power to resist." The recommendation, although supported by representative bodies of the medical profession, was opposed by many of the Judges and the Legislature did not adopt it.[9] The persistent refusal of English and other Courts to accept "irresistible impulse" *per se* as a defence is due to their doubts as to the cogency of evidence which seeks to establish that the prisoner's acts were uncontrollable rather than uncontrolled. English Courts have avoided the hardship caused to a prisoner pleading that he acted from uncontrollable impulse, by accepting evidence of such impulse as evidence going to establish such effect of insanity as is admittedly a defence within the McNaughten Rules. Even a crime committed in a state of automatism such as may occur in the course of an epileptic seizure could, it would seem, be excused under the head of insanity.[10] According to Russell, on *Crime*,[11] most crimes are committed under an impulse and the object of the law is to compel persons to control or resist such an impulse, rather than to make them an excuse for escaping the consequences of criminal acts.

As to the doctrine under the American law, *see* para 37, *ante*.

47. Partial lunacy.—Partial lunacy would be judged by the same tests, viz. whether the accused was so bereft of reason as not to know the nature of his act.[12]

48. Puerperal insanity.—Puerperal insanity is the condition of insanity which follows child-birth and is doubtless referable to the action on the brain by the toxemia of pregnancy. A woman with puerperal insanity may manifest the condition after child-birth, and it may take a great variety of forms, the most common of which is mania, sometimes of the homicidal type.

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1. (1843) 10 Cl. & F. 200.
2. Deorao *v.* Emperor, A.I.R. 1946 Nag. 321 at p. 330.
3. (1920) 15 Cr. App. Rep. 10.
4. *In re* Rajagopala Aiyangar, A.I.R. 1952 Mad. 289 at p. 290.
5. R. *v.* Flavell, (1926) 19 Cr. App. Rep. 141 ; R. *v.* Kopsch, (1925) 19 Cr. App. Rep. 50 ; Sodeman *v.* R., (1936) 2 All E. R. 1138.
6. Deorao *v.* Emperor, A.I.R. 1946 Nag. 321 at p. 330 : 47 Cr. L. J. 918 : 1946 N. L. J. 656.
7. H. C. L. 2, 157.
8. Cmd, 2005, 1924, p. 24
9. Russell on *Crime*, 11th Ed., Vol. I, pp. 133, 134.
10. R. *v.* Parry, (1919) 14 Cr. App. R. 48 at p. 55 ; R. *v.* Kemp, (1957) 1 Q. B. 399.
11. 11th Ed., Vol. I, p. 124.
12. Lord Ferrer's case, 9 St. Tr. 947 ; Arnold's case, 8 St. Tr. 317 : 16 St. Tr. 764 at p, 765; Bellingham's case, Collis, Add. 636 ; Oxford, 9 C. & P. 533 ; Oxford, 5 C. & P. 168 ; Oxford, 9 C. & P. 525 ; Hadfield's case, Collis 480 ; Poochee, 3 W. R. 9 ; Southey, (1865) 4 F, & F, 916.

This may express itself by suicidal or homicidal acts.[1] Where it was possible that the accused was suffering from some sort of puerperal disorder but there was no expert examination or collection of evidence in the light of medical knowledge of puerperal disorders, the Court could not hold that it was a case of puerperal insanity constituting a valid defence under this section.[2]

49. Irresponsibility must be at the time of doing the act.—In order to sustain the plea of irresponsibility it must be shown, not that the prisoner was insensible at some other time, though it is not immaterial, but that he was insensible so as to be irresponsible at the time of the commission of the crime. So, Lord Justice Clerk Hope told the jury in one case: "A man must believe, not that the crime is wrong in the abstract (for most madmen do admit murder to be wrong and punishable in the abstract) but that the *particular act*, committed under the influence of the motive which seems to have prompted it, was not an offence against the law; one may know that in the abstract the act is punishable, and yet believe that his particular act is not in the law a crime and not punishable."[3] The fact to be primarily determined is then the state of the prisoner's mind *at the time of the doing of the act*, and it is its "unsoundness" at that time that is an answer to his criminality. But how is the state of his mind at the time to be determined. Direct evidence may be forthcoming as to his overt acts, but it cannot speak of the state of his mind. It will, therefore, have to be judged not only by his contemporaneous acts, words and conduct, but also his pre-disposition and his prior and subsequent acts and conduct. As the fact to be inquired into is his mental power of cognition at the time, all facts tending to throw a light on it are relevant.[4] The usual method adopted in such inquiry is (*i*) to place the accused under medical observation, (*ii*) to let in evidence as the prisoner's antecedents, (*iii*) to observe and note his demeanour in Court, (*iv*) to see if his crime was supported by a motive, or (*v*) circumstances which postulate cognition, such as (*vi*) preparation, (*vii*) the choice of weapon, the manner of using it, (*viii*) attempts at concealment, either before or at the time of the act, or afterwards, (*ix*) the circumstances attending the commission of the crime, such as the choice of time, place and opportunity, (*x*) the assistance of an accomplice, and (*xi*) statements made immediately after the crime. These points require separate consideration.

Usual method adopted in inquiries into mental power of cognition.

50. Pleading and proof of insanity.—As has been already observed, the plea of insanity is an exception, and as such, it is a plea which must be taken and proved by the defence.[5] But this is scarcely a rule which the Courts will enforce in every case.[6] Indeed, its rigorous observance may in the very cases in which the defence is most helpless, lead to injustice. For prisoners in this country are, as a rule, undefended, and an insane is *prima facie* incompetent to his insanity. Indeed, the very plea taken, would establish

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1. Gonzales, Vanee, Helpeon and Umbergers *Legal Medicine, Pathology and Toxicology*, 2nd Ed., (U. S. A.) at p. 936; *see* also Taylor's *Principles and Practice of Medical Jurisprudence*, 11th Ed., Vol. I, p. 585; Sydney Smith and Fiddes' *Forensic Medicine*, 10th Ed., p. 391; the foregoing authorities were cited in Pappathi Ammal, *In re*, A. I. R. 1959 Mad. 239 at p. 265: (1959) 1 M. L. J. 125: 1959 Mad. L. J. (Cr.) 147.
2. Pappathi Ammal, *In re*, A. I. R. 1959 Mad. 239 at p. 245: (1959) 1 M. L. J. 125; 1959 M. L. J. (Cr.) 147.
3. James Gibson, (1844) 4 Brown 232.
4. See *In re* Govindswami Padayachi, A.I.R. 1952 Mad. 174.
5. Section 105, Indian Evidence Act (1 of 1872); Ram Sunder Das, 50 I. C. (Cal.) 991; Manta Jali, 55 I. C. (Cal.) 477; Niaz Ali, (1904) A.W.N. 2; Chandra Lal, 21 A. L. J. 776; Irapa, (1898) B. U. C. 818; Kazi Bazlur Rahman *v.* Emperor, A.I.R. 1929 Cal. 1; Mani Ram, I. L. R. 8 Lah. 124; Bagga *v.* Emperor, A.I.R. 1931 Lah. 276.
6. Tincourie, 27 C. W. N. 90; *see* also Parbhoo *v.* Emperor, A.I.R. 1941 All, 402 (F. B.).

his sanity. He is, therefore, naturally thrown on the mercy of the Court whose duty is then to afford him all possible assistance. The first thing, though perhaps not the most important thing, is to place a prisoner suspected of insanity under medical observation. But it must be remembered that a medical witness cannot be accepted to depose about the *past* condition of the prisoner's mind. That must be the subject of non-medical evidence. The medical evidence is given as of an expert,[1] and as such, it is subject to the reservations and limitations to which such evidence is usually subject.

Medical evidence.

In this connection the Civil Medical Officer is the recognised expert in all cases involving any kind of medico-legal question. But medical officers trained to general duties are usually as learned, in the subject they are called upon to depose about, as any layman, and the present writer has met cases in his practice, in which the counsel employed in the case knew more about the special subject requiring expert advice than the senior surgeon whose services were requisitioned for the purpose. So the Earl of Shaftesbury said in the *Windham* case: "He did not know that medical gentlemen (he said it with all respect), unless they had made insanity their special study, were more qualified to judge of the soundness or unsoundness of mind than any person of commonsense and practical knowledge of the world. Mere opinions and scientific speculations ought no longer to be adduced in the Courts as testimony. Whatever evidence was given by a medical man should be facts, and judgments based on these facts". In cases of insanity the testimony, to be at all useful, must be of a specialist in mental diseases, and it may be doubted if the testimony of any other medical practitioner is relevant. However, assuming that such testimoney is available, the points to which the attention of a medical witness should be directed are worthy of notice.

Lawyer's standpoint in judging criminality.

The lawyer's standpoint in judging of the criminality of an offender on the ground of insanity is different from that on the medical man, since the lawyer is merely concerned with asking himself the question whether the prisoner knew that what he was doing was wrong, whereas the medical man does not care what the prisoner thought only so long as his act was the result of an uncontrollable impulse.[2] But, as regards the absence of secrecy and accomplice both the lawyer and the medical man take the same view, since secrcy and co-operation of an accomplice are evidence of intelligence and not of lunacy.

51. Medical witnesses.—It has been held that a medical witness might give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the prisoner.[3] The question whether on given facts the prisoner should or should not be pronounced insane, is one of facts which it is for the jury to decide and not for the medical witness to depose about.[4]

Proper function of medical witness.

The proper function of the medical witness is as an expert to give his opinion as to whether the facts proved furnish proof of the existence of delusion. He may be able to say in looking to the previous habits and mode of life whether there has been any change of habits or character indicative of insanity. The Judge may, for instance, place certain facts proved or assumed and ask the medical witness, if, in his judgment, they were

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1. Section 45, Evidence Act (1 of 1872).
2. Burton, C. F. & F. 732.
3. Doe *v.* Bainbridge, 4 Cox, C. C. 454.
4. Wright, R. & R. 456; Searle, 1 M. & Rob. 75; Bainbridge *v.* Bainbridge, 4 Cox. C. 454; Baswantrao Bajirao *v.* Emperor, A.I.R. 1949 Nag. 66.

indicative of insanity on the part of the prisoner at the time of the alleged act.[1] A medical man may be questioned whether certain proved acts, appearance and conduct are in his opinion symptoms of insanity,[2] though he cannot be asked if the evidence given establish a case of insanity, for that is the very thing the Judge or the jury have to decide.[3] The expert may be asked as to the state of the prisoner's mind but not as to his responsibility, which is again a matter for the Judge or the jury to decide.[4] Where, for instance, a person is in a state of mind in which she is liable to fits of madness it is for the jury to consider whether the act done was during such a fit, though there is nothing before or after the act to indicate it.[5] In examining medical experts it must not be forgotten that the physician and the jurist view insanity in relation to criminal responsibility from different standpoints. And the examination of a medical witness must, therefore, be directed to elucidating points relevant from the standpoint of the jurist. In other words, as the jurist is concerned which only one aspect of insanity—the insanity of the *mind*—the only questions relevant would be those calculated to prove or disprove that form of insanity. Other questions are, however, not necessarily irrelevant, for, as has been seen, there may be cases in which the insanity of other faculties, emotions and the will, reacts upon t he mind and produces what may be called intellectual insanity.

Duty of the medical expert.

It is the duty of the medical expert who is called to prove insanity of the prisoner at the time of the commission of the offence but who is sane at the time of the trial, to offer to keep the prisoner under his observation. He cannot base his opinion on the summary of evidence at the trial supplied to him. A medical man, conversant with the disease of insanity, who has never seen the prisoner before the trial but who is present at the whole trial, cannot in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the offence or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law or whether he was labouring under a delusion at the time or whether by reason of any disease affecting the mind, the accused was incapable or prevented from, controlling his conduct. These are questions for the jury to decide and the questions are not mere questions upon a matter of science. There is a distinction between an appreciation of facts and an expression of opinion on questions of science. The opinion of a medical man on the state of the mind of the accused at the time of the commission of the offence is merely relevant as being helpful. It is for the Judge, or the Judge and the jury, as the case may be, to give a decision of these facts matter and the function of the medical witness is to assist, not to supersede the Judge.[6]

52. Questions to medical witness.—The following, therefore, appear to be the appropriate questions that may be put to a medical witness in case of suspected insanity :

(1) Have you examined . . . . ?

(2) Have you done so on several different occasions, so as to preclude the possibility of your examinations having been made during lucid intervals

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1. Frances, 4 Cox. C. C. 56.
2. John Wright, R. & R. 456.
3. Searle, 1 M. & R. 75.
4. Richards, 1 & F. 87.
5. *Ibid.*
6. State *v.* Koli Jeram Duda, 8 Sau. L. R. 209 : 1955 Cr. L. J. 1628 : A. I. R. 1955 Sau. 105 (D. B.).

of insanity ?

(3) Do you consider him to be capable of managing himself and his personal affairs ?

(4) Do you consider him to be of "unsound mind", in other words, intellectually insane ?

(5) If so, do you consider his mental disorder to be complete or partial ?

(6) Do you think he understands the obligation of an oath ?

(7) Do you consider him, in his present condition, competent to give evidence in a court of law ?

(8) Do you consider that he is capable of pleading to the offence of which he now stands accused ?

(9) Do you happen to know how he was treated by his friends (whether as a lunatic, an imbecile, or otherwise) prior to the present investigation and the occurrences that have led to it ?

(10) What, as far as you can ascertain, were the general characteristics of his previous disposition ?

(11) Does he appear to have had any previous attacks of insanity ?

(12) Is he subject to insane delusions ?

(13) If so, what is the general character of these ? Are they harmless or dangerous ? How do they manifest themselves ?

(14) Might such delusion or delusions have led to the criminal act of which he is accused ?

(15) Can you discover the cause of his reason having become affected ? In your opinion was it congenital or accidental ?

(16) If the latter, does it appear to have come on suddenly or by slow degrees ?

(17) Have you any reason for believing that his insanity is of hereditary origin ? If so, please specify the grounds for such an opinion, and all the particulars bearing on it as to the insane parents or relatives of the accused ; the exciting cause of his attack; his age when it set in and the type which it assumed.

(18) Have you any reason to suspect that he is in any decree feigning insanity ? If so, what are the grounds for this belief ?

(19) Is it possible, in your opinion; that his insanity may have followed the actual commission of his offence or been caused by it ?

(20) Have you any reason to suppose that the offence could have been committed during a lucid interval, during which he could be held responsible for his act ? If so, what appears to have been the duration of such lucid

interval? Or on the contrary, do you believe his condition to have been such as altogether to absolve him from legal responsibility?

(21) Does he now display any signs of homicidal or of suicidal mania or has he ever done so to your knowledge?

(22) Do you consider it absolutely necessary, from his present condition, that he should be confined in a lunatic asylum? or again—

(23) Do you think that judicious and unremitting supervision out of an asylum might be sufficient to prevent him from endangering his own life, or the lives or property of others?

53. Test for feigned insanity—The defence of insanity raises the question of feigned insanity, a subject in which the co-operation of a specialist has to be necessarily requisitioned. Indeed, it is only after prolonged and critical observation made when the prisoner feels that he is unobserved, that even a specialist can definitely say whether the insanity pleaded is natural or feigned. The principal points to consider when feigning is suspected would appear to be the following:

Principal points.

(1) When did the prisoner first exhibit signs of insanity? Before or after the commission of the crime? It is a fact taught by human experience that insanity is usually pretended *after* the commission of the crime, and that where the prisoner is shown to have done so, it may be regarded as a badge of fraud, though it is by no means conclusive, for cases have occurred when the first symptom was only noticed after the commission of the crime. And indeed cases are on record when the intellectual aberration was sudden, but in such cases it was almost invariably preceded by some great moral shock or other very obvious cause. But, as a rule, *dementia* comes on slowly, and is obviously dependent on organic changes, such as old age, apoplexy, paralysis or hemiplegia, or it is a consequence of recurrent mania or monomania. As this form of insanity consists in an entire abolition of all mental power the discovery of any connected ideas, reasoning or reflection either by language, writing or gestures, would at once show that the case was not one of real *dementia*.[1]

(2) A person feigning admits his insanity, but a person really insane will never admit it, but will on the contrary, endeavour to establish his insanity. It may be safely held that a person feigning insanity will rarely, if ever, try to prove himself to be sane; for he runs the great risk of satisfying others that he is sane, a conclusion which he really desires to avoid. But there is no better proof in general, that the insanity (supposing other evidence of it to be strong) is real, than keen and eager attempts by the accused to prove that he is sane and strong and indignant remonstrances against being held to be insane, although they would protect him against trial and punishment.[2]

(3) Insane persons sleep but little, and the sleep is disturbed. An impostor sleeps as soundly as a healthy person.

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1. 2 Taylor's *Medical Jurisprudence*, p. 509.
2. *Ibid.*, p. 508.

(4) An impostor acts his part only when he thinks he is observed. He takes rest when he thinks he is by himself. A mad man's impulses are spasmodic and continue by day and night. An impostor may, therefore, be detected by watching him unawares.

(5) The external appearance of a pseudo-lunatic is in contrast with that of a maniacal patient. There is about the eyes in mania a restlessness which cannot fail to attract attention. Especially is this noticeable when the conversation is turned on matters affecting the prisoner. A person simulating insanity will at once show by his countenance and especially by the movement of his eyes that there is an intelligent understanding of the conversation affecting him.

(6) Insanity may also be detected from handwriting. As there is no memory in *dementia*, it commonly happens that the same words are written over and over again. "No person in a state of confirmed *dementia* can write a connected sentence, because before the last part of the sentence is completed, the first is forgotten. In imbecility we may meet with every variety of mental defect, but the state of the mind is generally indicated by the expression of the thoughts in writing."[1] It is said that this often serves to detect the existence of a delusion when other means fail. But inasmuch as persons otherwise insane have been known to compose coherent writing, and since all but the most raving lunatics have lucid intervals, this test is one which is not of itself conclusive.[2]

(7) Eccentricity and unusual habits may be genuine or assumed. But mere weakness of character, mere liability to impulse, good or bad, mere imprudence, recklessness, and eccentricity, to which might be added immorality, do not constitute unsoundness of mind, unless in looking fairly at the whole evidence, there was a good reason to refer them to a morbid condition of the intellect. They may furnish evidence of unsoundness, but they do not constitute it.

54. Other evidence of insanity.—Besides medical evidence, other evidence is also admissible in proof of insanity. Such evidence may consist of facts tending to show that the act of the accused was without motive, and perpetrated under conditions and circumstances which any sane man would have guarded against. The conduct of the accused before the commission of the alleged crime is, as has been observed before, always highly relevant, for it shows not only that the accused was probably not feigning insanity, but that the act complained of must have been unintentional, because the prisoner had been bereft of reason even before the commission of the act.

55. Absence of motive.—In order to find whether the accused was by reason of unsoundness of mind incapable of knowing the nature of the act, a court may rely not only on the defence evidence, but also on what is elicited from the prosecution witnesses as well as on circumstantial evidence consisting of the previous history of the accused and his subsequent conduct in the surrounding circumstances, including absence of motive. Generally, a case in which the sanity of the accused is called in question, motivation for the crime with which he is charged assumes unusual importance because if a serious crime like murder is committed by a man, who had absolutely

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1. 2 Taylor's *Medical Jurisprudence*, pp. 538 and 539.
2. *Ibid.*, p. 540.

no rational motive to commit it, the plea of unsoundness of mind can be more easily established than in other cases.[1] The absence of motive assumes not only unusual importance, but also almost conclusive and crucial importance in a case where a mother has murdered her child, and that too, a child of such a tender age of one year. As a matter of fact, in such cases, the act speaks for itself as the act of a mad woman ; the act itself is intrinsically the chief evidence of insanity.[2] As regards motive, it should be observed that in the view of criminal law the mere absence of motive is never sufficient to exculpate a crime, but where insanity is concerned, the want of motive is regarded as some proof of the want of intention and when that fact is corroborated by evidence of an independent character of the previous insanity of the prisoner, the Court would be justified in acquitting him.[3] So where the prisoner murdered his wife and mother, at the same time wounding his child, and it appeared that he had previous attacks of insanity and the act complained of was without any motive, the Court felt constrained to acquit him in spite of the dubious testimony of the medical officer.[4]

In *State of Kerala* v. *Madhavan Pillai*,[5] as for the deceased's statement that the accused stabbed her for no reason whatsoever, it only means that she had given him no reason, and it would be dangerous to hold that because a monstrous crime of this nature was committed for no apparent reason and for no proved motive, the offender must have been insane at the time. And that without any proof whatsoever of prior insanity. The mere absence of any apparent motive on the part of the accused to kill his wife cannot establish the defence case that the accused was made at the time he committed the offence.[6]

56. Atrocity of crime.—A crime is not excused by its own atrocity. One must look outside the act itself for the evidence as to how much the accused knew about it.[7]

57. Conflicting statements.—A conflicting statement is not necessarily a sign of insanity.[8]

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1. Mst. Shanti Devi *v.* State, A.I.R. 1968 Delhi 177 at p. 180 : (1968) 70 Punj. L. R. (Delhi) 29.
2. *Ibid.*
3. Pancha *v.* Emperor, A.I.R. 1932 All. 233 at p. 237 ; *In re* Sankappa Shetty, A.I.R. 1941 Mad. 326 at p. 332 : 42 Cr. L. J. 558 : 1940 M.W.N. 963 : 194 I. C. 332 ; Hemu Bechar *v.* State, 1951 Sau. 19 at p. 20 ; Deora *v.* Emperor, A.I.R. 1946 Nag. 321 : I.L.R. (1946) Nag. 334 : 47 Cr. L. J. 918 : 1946 N.L.J. 656 ; *In re* Rajagopala Aiyangar, A.I.R. 1952 Mad. 289 ; Choteylal *v.* State, A.I.R. 1956 Bhopal 57 : 1956 M.B.L.J. (Bihar) 134: 1956 Cr.L.J. 1291; Nitai Naik *v.* State, A.I.R. 1957 Orissa 168 : I.L.R. (1957) Cut. 408 : 23 Cut. L. T. 203 : 1957 Cr. L. J. 875.
4. Sheikh Mustaffa, 1 W. R. 19.
5. A.I.R. 1958 Ker. 80 at p. 81 : 1957 Ker. L. T. 761.
6. Netrananda Behara *v.* State, 34 Cut. L. T. 966 at p. 970 : A.I.R. 1968 Orissa 223.
7. Emperor *v.* Gedkagoula, A.I.R. 1937 Pat. 363: I.L.R. 16 Pat. 333: 170 I.C. 74; Kalicharan *v.* Emperor, A.I.R. 1948 Nag. 20 (2) : 48 Cr. L. J. 377 : I.L.R. (1947) Nag. 226 : 1947 N.L.J. 289 : 229 I. C. 303.
8. *In re* Sankappa Shetty, A.I.R. 1941 Mad. 326 at p. 331 : 42 Cr. L. J. 558 : 1940 M.W.N. 963 : 52 L.W. 689 : 194 I.C. 332.

58. Mitigation of offence.—Fear complex, excitement or irresistible impulse, with loss of self-control, even if such be taken has been proved in the case, affords no defence to a crime under the Indian law and is, therefore, irrelevant except for a mitigation of the offence from murder to culpable homicide in certain circumstances.[1]

59. Absence of motive cannot prove mental incapacity.—The mere absence of a motive cannot prove a mental incapacity or disease in the offender.[2]

60. Effect of "drink."—In a case in which the intent of an accused is to be ascertained solely by inference, nothing short of incapacity need be considered. If an accused cannot himself give evidence about his state of mind, he cannot say what intent he in fact formed or did not form; and it is, therefore, only if there is material to suggest that by reason of intoxication he could not have formed a guilty intent that the inference which would otherwise naturally be drawn from the circumstances can be questioned.

It is not for an accused to prove incapacity affecting the intent and that if there is material suggesting intoxication, the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent.[3]

61. Antecedents.—It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence but some indication thereof is often furnished by the conduct of the offender while committing it, or immediately after the commission of the offence. Though, for the purpose of Sec. 84, it is the state of mind of the offender at the time of committing the offence which is relevant, antecedent and subsequent state of mind and conduct of the offender become relevant only for the purpose of showing what the state of his mind was at the time when the act was committed.[4] The evidence that the prisoner had prior to the act exhibited symptoms of insanity is relevant, though he may be perfectly sane at the time of the trial, for the question to be considered is the state of the prisoner's mind at the time of the act,[5] not his state of mind at the time of the trial, though the latter fact is also relevant for the purpose of procedure.[6] The mere facts that the conduct of the accused has been of late in some respect unusual,[7] and that his father was insane were in one case held to be insufficient to establish the exception,[8] and these facts by themselves would be insufficient to establish it in any case. But though insufficient, they are not irrelevant, and indeed, in an inquiry touching the prisoner's mind at the time of the act there can be nothing irrelevant that relates to his physical and mental history. For this purpose, evidence as to insanity in his parents and blood relations is irrelevant ant as not affording independent proof of his insanity, but

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1. Kannakunnumal Ammed Kova v. State of Kerala, A.I.R. 1967 Ker. 92 at p. 95.
2. *Ibid.*
3. Broadhurst v. Reginam, (1964) 1 All E. R. 111 at p. 123.
4. Mst. Shanti Devi v. State, A.I.R. 1968 Delhi 177 at pp. 179-80; (1968) 70 Punj. L. R. (Delhi) 29.
5. Pursoram Dass, 7 W. R. 42; Jugo Mohan, 24 W. R. 5.
6. Sections 464 and 455, Cr. P. C.
7. Hemu Bechar v. State, A.I.R. 1951 Sau. 19 at p. 20.
8. Jeeva Amtha, B. U. J. 10; Arzao Bebee, 2 W. R. 33.

as corroborative of other testimony as to the insanity of the accused. In other words, evidence of ancestral insanity is corroborative of the evidence of the prisoner's insanity. It has been observed before that the plea of insanity is one which, must be used and proved by the accused. The evidence given should be not only unequivocal but clear and distinct.[1]

Where a plea of legal insanity is set up, it is most material to consider the circumstances which have preceded, attended and followed the crime; whether there was deliberation and preparation for the act; whether it was done in a manner which showed desire to conceal; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detection.[2]

Where the accused had a fit of insanity ten years back and at that time he had run through a thick cactus hedge like an animal and that he had to be watched and attended to then; and that after some treatment the accused got completely well and he remained perfectly sane for about eight or nine years thereafter. *Held* that so far as this incident is concerned, it was very old and it could have no relevance to the question of unsoundness of mind at or about the time of this offence.[3]

Though the previous and subsequent conduct of an accused might not be determinative in judging his mental thinking process at the time of the commission of the offence, they furnish reasonable clue to understand the mind, there being no other ostensible test available to judge the exact condition of his mind at the particular point of time. A distinction has always been emphasised between medical and legal insanity. Most of the cases of medical insanities are not accepted as cases of legal insanities, for the simple reason that on a much less rigorous test there can be medical insanity requiring treatment of the mind and the body. But in case of legal insanity the Court must come to a definite conclusion that cognitive faculty of the mind was lost.[4]

Presumption of insanity.

In all cases where previous insanity is proved or admitted a presumption of sanity at the time of the commission of the act would be greatly weakened and certain considerations become very relevant. These considerations have been stated in Mayne's *Criminal Law of India*, in the following passage: "whether there was deliberation and preparation for the act, whether it was done in a manner which showed a desire to concealment, whether after the crime the offender showed consciousness of guilt and made

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1. Stokes, 3 C. & K. 185.
2. Mst. Shanti Devi *v.* State, A.I.R. 1968 Delhi 177 at p. 180 : (1968) 70 Punj. L. R. (Delhi) 29.
3. State *v.* Koli Jeram Duda, A.I.R. 1955 Sau. 105 at p. 106 : 8 Sau. L. R. 269.
4. Sindhu Bhakta *v.* State, (1965) 35 Cut. L. T. 201 at p. 205.

efforts to avoid detection whether after his arrest he offered false excuses and made false statements."[1]

Where the accused was labouring under the influence of an insane delusion that his wife had done him injury and was responsible for depriving him of his liberty, this persistent delusion coupled with his previous insanity established conclusively that the accused who was in other respects completely and utterly insane and who had "glimmering knowledge" of the nature and consequence of his act in striking his wife with an axe, was absolutely incapable of realising that it was wrong or contrary to law.[2] The last cited case was similar to that of *R.* v. *Offord*,[3] where the accused labouring under a nation that the inhabitants of a certain place and particularly one person mere continually issuing warrants against him with intent to deprive him of his liberty and life, shot the particular person it was held that the accused laboured under that species of insanity which was called monomania and was, less therefore, not liable for his act.

62. Duty of Court.—When the absence of any motive, preparation or purpose for a criminal act is admitted or evidence of some mental derangement such as melancholy or excitement, or of very extraordinary conduct has been given, or other index of disease of the brain appears in the case, the Court ought to use the means pointed out in the various provisions of law, so as to find out as much as possible about the mental state of the accused.[4] A man who pleads insanity, and who, according to the prosecution witnesses, had shown abnormality of mind on previous occasions and the medical evidence tends in the same direction, cannot be expected to look after his defence as an accused in an ordinary case. It is the duty of the Court to watch his interests with unusual degree of care and circumspection.[5] The Court may, for the purpose of the trial, presume insanity from the appearance of the accused.[6] But the Court must have legal evidence on record before it can take the plea into consideration as an answer to the charge. It is not because a man commits a very horrible murder or because he commits it while labouring under strong passions and feelings, that the world is to assme that he must have been insane when he committed the deed. Where, for instance, it appeared that the accused had, in a sudden fit of jealousy exhibited intense rage and grief, rolling on the ground in his passion, his eyes being red or bloodshot and his skin being hot, and he struck down his wife calling aloud that he had killed her and then voluntarily gave himself up to a chowkidar that he might be dealt with according to law for what he had done, the Court observed: "it may be that, if there had been substantial evidence of the prisoner's unsoundness of mind, these facts, or some of them, might have been deemed to be corroborative of it. But in themselves these facts, whether taken singly or together, are no real evidence of unsoundness of mind for there is not one

Court to have legal evidence on record before considering plea of insanity.

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1. Kashiram *v.* State, A. I. R. 1957 M. B. 104 at p. 106: 1956 M. B. L. J. 1275: 1957 Cr. L. J. 370.
2. *Ibid.* at p. 107.
3. (1831) 5 C. & P. 168.
4. Nepal, (1886) B. U. J. 229; Nga Po Tho, (1869) P. J. L. B. 249.
5. *Per* Niamatullah, J., in Panchu *v.* Emperor, A.I.R. 1932 All. 233 at p. 238.
6. Sections 464, 465, Cr. P. C.

of them which might not, in the natural course of events, have been found to exist in the case of a man who was perfectly sane, but was labouring under the influence of great grief and passion."[1]

Whether or not insanity as a defence has been suggested by the counsel for the accused or taken as a plea by the accused, the Court if it suspects the insanity of the accused from his behaviour, would be justified in eliciting information by questioning the witnesses, and if the evidence discloses the insanity of the accused at the material time then it has to be considered in wighing the criminality of the accused and in adjudging whether he was responsible for the crime or not.[2]

Presumption of law.

The law presumes every person at the age of discretion to be sane unless the contrary is proved ; so if a lunatic had lucid intervals the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed during derangement.[3] The accused has, therefore, to prove not only that he was a lunatic, but that his act was committed during lunacy and not in a lucid interval. Where partial delusion or the existence of mental disease is established, it may not be sufficient to exempt a person from criminal responsibility, though mental weakness caused by disease is an extenuating circumstance affecting the sentence. And so while a mental derangement a year prior to the act was in itself insufficient to exonerate the prisoner, still it was a fact calling for further scrutiny.[4] In order to offer a complete answer, the evidence must prove an alienation of reason perverting the moral sense.[5]

Omission to explain Sec. 84 or tell the jury that the burden of proof which rested on the accused was less onerous than the burden which rested on prosecution. *Held*, amounted to grave misdirection which vitiate jury's verdict and resulted in a serious miscarriage of justice.[6]

63. Sentence—Extenuating circumstances.—In a series of multiple murders a most lenient treatment was accorded to the accused on the basis of an inference of temporary mental derangement from the motiveless nature of the crime committed.[7] In a case,[8] in which the accused clubbed four of his children to death and attempted to murder his wife with no apparent motive, their Lordships of the Madras High Court reviewed all the previous decisions and, finding the very basis of those decisions to be unsound, held : "In cases of multiple murders of this kind where an accused is clearly not insane in the sense that he did not know what he was doing but in the present case where he clearly knew what he was about, the mere absence of motive, the apparent senselessness of the murders and the fact that he murdered persons in his own family in cold blood can, in our opinion, furnish no extenuating circumstances which we can take into consideration

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1. Nobin Chunder Banerjee, 20 W. R. 70.
2. State *v.* Koli Jeram Duda, A.I R. 1955 Sau. 105 at p. 106 (D. B.) 8 Sau. L. R. 269 : 1955 Cr. L. J. 1628.
3. Babe, (1881) B. U. J. 172 ; Irapa, (1898) B. U. J. 818 ; Sheodin, (1901) A.W.N. 132 ; Niazali, (1904) A.W.N. 2 ; Nobin Chunder Banerjee, *supra.*
4. Arzoo Bebee, 2 W. R. 33.
5. Nobin Chandra Banerjee, 13 B.L.R. 20.
6. Dahyabhai Chhaganbhai Thakkar *v.* State of Gujarat, A.I.R. 1964 S. C. 1563 at pp. 1969-70 : (1964) 1 S.C.R. 831 : (196) 1 Guj. L. R. 911.
7. Queen-Empress *v.* Lakshman Dagdu, I.L.R. (1836) 10 Bom. 512 ; Queen-Empress *v.* Kadar Nasyer Shah, I.L.R. 23 Cal. 604 : Emperor *v.* Gedkagoala, I.L.R. 16 Pat. 333 ; Kulandai Thevar *v.* Emperor, 1950 M.W.N. (Cr.) 95.
8. *In re* Rajagopala Aiyangar, A.I.R. 1952 Mad. 288 at pp. 290-91.

in mitigation of the sentence. We cannot take upon ourselves the responsibility of recommending for a comparatively short period of imprisonment a man who has once been a victim to homicidal frenzy of this description and expose other innocent persons to a similar attack after his release from prison. In cases of this kind, as it appears to us, the law must take its course, and the only sentence that a Criminal Court can pass is the extreme penalty." Their Lordships refused even to reduce the sentence of death to transportation for life.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Act of a person incapable of judgment by reason of intoxication caused against his will.

SYNOPSIS

1. Analogous law.
2. Scope of Secs. 85 and 86.
3. Principle.
4. Meaning of words.
5. Operation of drunkenness.
6. Drunkenness when a defence.
7. Drunkenness excuses intention but not knowledge.
8. Drunkenness—How far excuses intention.
9. Involuntary drunkenness.
10. Sentence.

1. Analogous law.—In laying down that drunkenness excuses a crime the section provides that the drink must have been administered to him without his knowledge or against his will. This the is an accordance with the English law, under which it is settled that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime,[1] but it is, on the other hand, an aggravation of the crime. "As to artificial voluntarily contracted madness or drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence rather than as an excuse for any criminal misbehaviour."[2] A drunkard, says Sir Edward Coke, who is *voluntarious dareman*, has no privilege thereby, but what hurt or ill so ever he doth, his drunkenness does aggravate it: *nam one crimien ebrietas et incendit, et detegit.* It has been observed that the real use of strong liquors and the abuse of them by drinking to excess, depend much opon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway would make an Italian mad. A German, therefore, says the President Montesquieu[3] drinks through custom founded upon constitutional necessity;

Drunkenness under English law.

1. Plowd. 19: 75 E. R. 31: Co. Litt. 247: 1 Hale P. C. 32; Hawk., P. C., c. 1, Sec. 6.
2. Co. Litt. 247; Plowd. 19: 4 Black, 26.
3. Sp. L. b. 14, c. 10.

a Spaniard drinks through choice or out of the mere wantonness of luxury; and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy than where it only renders them stupid and heavy, as in Germany and in more northern countries. And accordingly, in the warmer climate of Greece, a law of Pittacus enacted, that "he who committed a crime, when drunk, should receive a double punishment," one for the crime itself and the other for the ebriety which prompted him to commit it.[1] The Roman law, indeed, made great allowances for the vice. *Pervinum delapsis capatilis paena remittitur.*[2] "But the law of England considering how easy it is to counterfeit this excuse, and how weak an excuse it is though real, will not suffer any man thus to privilege one crime by another."[3]

2. Scope of Secs. 85 and 86.—Sections 85 and 86 crystallize in tabloid form the law relating to intoxication or drunkenness as a defence or plea in mitigation of a criminal offence. Section 85 gives the same protection as See. 84 does to a person of unsound mind, who is by reason of intoxication "incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law," provided that the thing which intoxicated him was administered without his knowledge or against his will. A person, who gets into a state of intoxication voluntarily is, under Sec. 86, presumed to have the same knowledge as he would have had if he had not been intoxicated. When the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only be punished on the basis of knowledge and not of a particular intention.[4] Where there was no material on the record to show that the appellant was under influence of liquor at the time he committed the offence and no suggestion to this effect was made to any of the witnesses during their cross-examination, nor appellant himself had said anything in this connection in his statement under Sec. 342 of the Code of Criminal Procedure, it was held that there could be no basis for protection under Sec. 85, I. P. C.[5]

3. Principle.—Since criminal intention is the foundation of all criminal responsibility it follows that a person who is drunk is in the same predicament as a person temporarily insane. Indeed, such a state has been termed *dementia offectata*—a form of lunacy in which the functions of the mind are temporarily suspended. But since no man can be permitted to wear the cloak of immunity by getting drunk, the rule justly excepts cases of voluntary drunkenness. But while such drunkenness is never an answer to a crime it is relevant in determining the question of intention and for that purpose it is permissible to prove in defence that the prisoner was suffering from a habitual and fixed frenzy brought on by drunkenness.[6]

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1. Puffendorf's *Laws of Nature*, b. 8, c. 3.
2. Ff. 49, 16, 6.
3. Plowd. 19, cited *per* 4 Black, p. 25; *see* 75 E. R. 31.
4. *In re* Macherla Balaswamy, A. I. R. 1953 Mad. 827 at p. 828: (1952) 2 M. L. J. 722: 1952 M.W.N. 384.
5. Sohan Manjhi *v.* State, A.I.R. 1970 Pat. 303 at p. 304.
6. 1 Hale P. C. 32.

4. Meaning of words.—"*Who at the time of doing it*" : The state of the prisoner's mind to be inquired about is at the time of the act, for it is only the mind as influencing his act that is relevent. "*Incapable of knowing the nature the act, etc.*" these words are the same as, occur in Sec. 84. "*The thing which intoxicated him*," i. e. the intoxicant, such as, alcohol, opium, or laughing-gas. "*Without his knowledge*" not necessarily without his *consent*. For a person may have been imposed upon, in which case he may have consented to taking the intoxicant. "*Or against his will*" : This means *by force*.

5. Operation of drunkenness.—In all ages in all countries, voluntary drunkenness is regarded as offering no answer to a charge of criminality. Indeed in some countries drunkenness is regarded as by itself a crime, so that the wrongful intent to get drunk coalesces in law with the intent of that act done when drunk.[1] But the true position of the law seems to be to ignore the fact of drunkenness altogether. It says to the offender : "We do not care whether you were drunk or not ; if you were so, it was your own act ; you cannot plead your own fault ; we pay no regard to the fact."[2]

Drunkenness neither an aggravation nor palliation of crime.

Drunkenness is, therefore, neither an aggravation[3] nor a palliation of the crime.[4] It is immaterial that the drunkenness had deprived a person of his self-restraint. It was a state which he could have foreseen, and it was at any rate the consequence of his voluntary act.[5] Drunkenness is then never an excuse, but when drunkenness becomes a disease, it is then a defence, not because it is drunkenness but because it is a disease.[6] But in order to relieve a person of criminal responsibility, it must produce a disease of the mind such as *delirium tremens*.[7] So Lord Hale said : "Although simple frenzy occasioned immediately by drunkenness is no excuse, yet if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fired frenzy thereby caused, puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first."[8] So Savage says : "A person, say, is given powerful stimulants masked or concealed in some way, or being weak, or suffering from an old injury to the head, an amount which formerly would not have affected him, now produces a great effect; in a state of acute alcoholism he commits a crime, and doubtless would be considered not guilty ; but if he has experienced several times the danger which he incurs by taking stimulants even in small quantities, and yet continues to indulge, and then perpetrates a crime, he may justly be considered responsible even though it may be proved that by inheritance, or in consequence of the injury to the head, he is specially liable to be affected by stimulants. Next, if in consequence of intemperance he becomes slowly affected by mental disorder, and in a state of *delirium tremens* he commits a crime, he will probably not be considered fully responsible. If instead of *delirium tremens* alcohol produces chronic insanity or general paralysis of the insane, and in this condition of

Savage's view.

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1. Bishop's *Criminal Law*, 482.
2. Collett's *Comments*, p. 16.
3. Zoolfkar Khan, 16 W. R. 36.
4. Ram Sahay Bhar, (1864) W. R. 24.
5. Bodhee Khan, 5 W. R. 79 ; Bhelaka Aham, I.L.R. 29 Cal. 493.
6. Bhelaka Aham, *supra*.
7. Davis, 14 Cox C. C. 563 ; Samman Singh Thakar Singh *v.* Emperor, A.I.R. 1941 Lah. 454 at p. 456 : I. L. R. (1943) Lah. 39 : 198 I. C. 252 : 43 Cr. L. J. 332 : 43 P. L. R. 698.
8. 1 Hale P. C. 32 ; *see* Plowd. 19 : 75 E. R. 31.

genuine insanity he does harm, he will not be considered responsible for his acts."[1]

It has been stated in the above paragraph that insanity producing delusion leads to crime, in which the plea of insanity is sufficient. Such insanity may arise from drunkenness or any other cause. But a delusion arising from drunkenness short of insanity is never a defence to a crime in this country, though it appears to be otherwise in England.

Stephen's remarks.

For as Stephens, J., remarked : "Any disease, which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, may fairly be said to prevent a man from knowing that what he did was wrong."[2]

6. Drunkenness when a defence.—But while voluntary drunkenness, is, as such, never a defence, still when habitual drunkenness produces frenzy that fact becomes material for the purpose of showing how it was produced, and when its existence is established, it will excuse a crime, even though it was caused by voluntary drunkenness.[3] Drunkenness is also relevant in considering intention. As Jervis, C. J., said : "If the prisoner was so drunk as not to know what she was about, how can you say that she *intendeed* to destroy herself."[4] So Coleridge, J., in one case told the jury that "drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."[5] So in the case of attempted murder, Patterson, J., told the jury that 'although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."[6] So Baron Alderson said : "If a man chooses to get drunk, it is his own voluntary act : it is very different from a madness which is not caused by any act of the person. That voluntary species of madness, which it is in a party's power to abstain from, he must answer for. However, with regard to intention, drunkenness may perhaps be adverted to according to the nature of the instruments used. If a man uses a stick you would not infer a malicious intent so strong against him, if drunk, when he made an intemperate use of it, as you would, if he had used a different kind of weapon ; but where a dangerous instrument is used, which if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intention of the party."[7]

Drunkenness ordinarily no defence for crime.

Drunkenness and ascertainment of intention.

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1. *Insanity*, p. 465.
2. Davis, 14 Cox C. C. 563 ; *see* also No. 32 of Sec. 84.
3. 1 Hale P. C. 32.
4. Moore, C. & K. 319 ; to the same effect, Stephen, J., in Doherty, 16 Cox C. C. 306 at p. 308, quoted in 1 Penal Law (4th Ed.).
5. Monkhouse, 4 Cox C. C. 55.
6. Cruse, 8 C. & P. 541.
7. Meakin, 7 C. & P. 297, followed in Waryam Singh *v.* Crown, A.I.R. 1926 Lah. 428 at p. 429 : I.L.R. 7 Lah. 141 at p. 147 ; Patric Carrol, (1835) 7 C. & P. 145, but *contra* in John Thomas, 7 C. & P. 817 ; Pearson, 2 Lewin. 144.

Drunkenness makes no difference to the knowlege with which a man is credited and if a man knew what the natural consequences of his act were, he must be presumed to have intended to cause them. This section deals with the question of the knowledge possessed by an accused person at the time he commits the offence and leaves quite open the question of intention.[1]

7. Drunkenness excuses intention but not knowledge.—Now as regards the section it will be noticed that while it recognises the distinction between "intent" and "knowledge" which are the constituents of most offences under the Code, it lays down no more than that voluntary drunkenness is no excuse for not possessing the *knowledge* of an act, but it says nothing of the *intention*. Consequently, where an offence requires that an act shall be done with a particular intention, voluntary drunkenness is an excuse, though it is no excuse where the degree of mentality necessary for the completion of an offence is limited by "knowledge" as distinguished from an "intention."[2] Moreover since voluntary drunkenness merely creates the presumption of knowledge, such knowledge would not lead to further presumption of intention, since where intention is presumed from knowledge it is presumed from actual knowledge and not when knowledge is merely a legal fiction.[3]

The net result of drunkenness as affecting mental responsibility as regards crime may then be thus stated—

Net result of drunkenness as affecting mental responsibility.

(1) Drunkenness caused without one's knowledge or against one's will excuses the crime (Sec. 85).

(2) Voluntary drunkenness is an excuse only as regards "intention", so that it is a complete excuse in crimes requiring the presence of an "intention" to complete a crime.[4]

(3) But voluntary drunkenness is no excuse for a crime which requires the presence merely of "knowledge" as distinct from an "intention".

(4) In any case though voluntary drunkenness is no excuse for knowledge it does not imply actual knowledge giving rise to the inference of presumed intention.

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1. Prabhunath *v.* State, A.I R. 1957 All. 667 at p. 670 (D.B.): 1957 All. L. J. 572: 1957 All.W.R. (H.C.) 91 : 1957 Cr.L.J. 1056.
2. J.M., (1910) 1 U.B.R. 17 : 8 I. C. 469 ; Nga Bayyan, (1911) 1 U.B.R. 105 ; Nga Tun Bau, 5 Bur. L. T. 175 : 17 I. C. 300 (P. C.) ; Tu, 4 L. B. R. 306 ; Nga Hla Agun, 12 I. C. (Bur.) 85; Rex *v.* Meade, (1909) 1 K. B. 895 ; Director *v.* Beard, (1920) A. C. 479 at p. 499, followed in Jugadi Mollah, I. L. R. 8 Pat. 911 ; Mandaru Gadaba, I. L. R. 38 Mad. 479 ; Public Prosecutor *v.* Budipiti Devasikamani, A. I. R. 1928 Mad. 196; Bishan Singh *v.* Emperor, A. I. R. 1929 Lah. 637. This distinction in the language of the section appears to have been overlooked in Waris Aii, 7 N.L.R. 180 : 13 I.C. 919; Karim Khan, (1909) P.W.R. 4: 1 I.C. 100: 19 Cr. L. J. 156.
3. Abdul Karim, (1892) S. J. L. B. 650; Nga Ba Gyan, (11911) 1 U.B.R 105; Mandaru Gadaba, I.L.R. 38 Mad 479.
4. Director of Public Prosecutions *v.* Beard, (1920) A.C. 479 at pp. 499-502, followed in Sheru *v.* Emperor, A.I.R. 1926 Lah. 232; Muthu Goundan, 1931 M. W. N. 113.

8. Drunkenness—How far excuses intention.—Now since an intention is always a material element in the composition of a crime, the effect of this view would seem to be that though voluntary drunkenness is not a self-sufficient defence, it is yet an element which the Court cannot ignore in judging of the culpability of an act. This was the view taken by Sir Henry James to whom the conflicting views of the Judges had been referred for opinion. After expressing his inability quote any general or definite rules on the subject of the extent to which drunkenness can excuse crime, or ought to increase or mitigate punishment, he suummarises his own views to the effect that in determining the legal character of the offence committed, drunkenness may be taken into account—

Consideration of drunkenness in determining legal character of offence.

(*i*) Where it has established a condition of positive and well-defined insanity.

(*ii*) If it produces a sudden outbreak of passion, occasoning the commission of crime under circumstances which, in the case of a sober person, would reduce the offence of murder to manslaughter.

(*iii*) In the case of minor assaults and acts of violence it never can form any legal answer to the charges preferred, but it may either aggravate or mitigate the character of the act committed—probably aggravate it.

(*iv*) As to the effect that should be given to drunkenness when determining the amount of punishment to be inflicted, no general rule can be laid down. Its existence may be considered, and may tent either in the direction of increasing or diminishing the punishment.[1] That some such discriminating view should prevail in the enlightened criminal jurisprudence of all countries appears to be incontestable. Suppose, for instance, a man has in his pocket some base coins which he keeps for amusement. He gets drunk and instead of paying out in current coin he puts his hand in the wrong pocket and pays in a coin which is counterfeit. Can it be said that such a man stands on the same footing as another who passes as counterfeit coin knowingly and intentionally and yet if the section be closely construed, that would appear to be the consequence.[2]

9. Involuntary drunkenness.—So far then as regards voluntary drunkenness. Turning now to involuntary drunkenness, two questions arise: (*i*) when may drunkenness be said to be involuntary? and (*ii*) what is its effect upon crime? The first question seems simple, and has been disposed of by the section with the words "that the thing which intoxicated him was administered to him without his knowledge or against his will". This description would cover the case of a man made drunk through stratagem or the fraud of another or through ignorance or coercion practised by his friend or foe, when a person is drugged by his enemies or given to eat or drink

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1. *Times*, 4th January, 1892.

2. *See*, however, Sec. 86 and Comm.

such a thing as causes frenzy, or his unskilful physician gives him an intoxicant to drink, in all of which cases the person intoxicated may be said not to have been free agent, and, therefore, not responsible for the consequence of his act.[1] Whether drunkenness in a given case was voluntary or involuntary is a question of fact to be decided upon the proved facts of each case. In some cases drunkenness may have been partly voluntary and partly involuntary, as where a person once drunk is given more to drink when he has either lost the power of resistance or under circumstances which precelude his knowledge of it. What is his criminal responsibility in that case? It is submitted that in so far as his helpnessness was brought on by his involuntary act he could not be held responsible for his act.

Drunkenness may also be partly involuntary and partly voluntary.

10. Sentence.—The mere fact that a man was drunk when he committed the murder is no justification whatever for not imposing the capital sentence. But all the circumstances of the case have to be taken into consideration.[2] But the fact that the accused was in an excited state as the result of having partaken of liquor in his house. This in itself is no excuse, but it may be taken into consideration when the question of sentence is being considered, especially when the quarrel was started by the deceased himself.[3]

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

SYNOPSIS

1. Analogous law.
2. Scope.
3. Principle.
4. Meaning of words.
5. State of intoxication.
6. Presumption of knowledge and intention.
7. Cases.

1. Analogous law.—This section would at first blush appear to have been enacted in antagonism to the prevailing doctrine of the English law. But that does not appear to be really the case. It gives the drunken man the knowledge of the sober man when judging of his action but does not give him the same intention. Consequently, it does not render him liable to be dealt with as if he had the same intent. The omission to make any express provision in this section as to the intention of a drunken man is not accidental but appears to have been dictated by the sense that it would have carried the legal fiction too far. Where, therefore, intention is a consituent of an offence, the question

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1. Hale P. C. 32 (*see* 75 E. R. 31).
2. Samman Singh Thakar Singh *v.* Emperor, A.I.R. 1941 Lah 454 at p. 458: I.L.R. (1943) Lah. 39 : 43 P.L.R. 698 : 43 Cr. L. J. 332 : 191 I. C. 252.
3. Nga Chit So *v.* King, A.I.R. 1937 Rang. 467 at p. 468 : 172 I. C. 197 : 39 Cr. L. J. 117 ; *see* also Muthu Goundan, 1931 M.W.N. 117; Nga Sein Gale *v.* Emperor, A.I.R. 1934 Rang. 361, following Sheru *v.* Emperor, A.I.R. 1926 Lah. 232 and Director of Public Prosecution *v.* Beard, 1920 A. C. 479 ; Nga Sein Gale *v.* Emperor, 36 Cr. L. J. 228: 152 I.C. 1054; Nga Sein Ge *v.* Emperor, A.I.R. 1934 Rang. 10 : 35 Cr. L. J. 1065 : 149 I. C. 1176.

must be dealt with on the general principles of law, which are the same both here and in England. The drunkenness may be and should be taken into consideration on the question of intention[1] (*see* post, para No. 3).

2. Scope.—The law places insanity and involuntary drunkenness on the same footing by using the same criteria, that is, incapability of "knowing the nature of the act or that he is doing what is either wrong or contrary to law."[2] A person who gets into a state of intoxication voluntarily is presumed to have the same knowledge as he would have if he had had not been intoxicated. When the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only be punished on the basis of knowledge and not of any particular intention.[3] It is only in cases where it is proved that the prisoner was in such a condition of drunkenness that his reason was "dethroned" and was incapable of forming any intention, that the defence of drunkeness would be available.[4]

3. Principle.—Voluntary drunkenness does not afford the defence that the knowledge required to complete an offence was wanting, though it may be used to show that any "intent" if required was absent. The section, it will be seen, draws a distinction between the presumption as to knowledge and presumption as to intention, and though, ordinarily, intention is to be inferred from knowledge, still it is not to be inferred when the knowledge is merely a legal fiction.[5]

It is no doubt true that while the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation possibly may be felt by reason of this omission. If in voluntary drunkenness, knowledge is to be presumed in the same manner as if there was no drunkenness the question arises if intent should be placed on the same footing. The result of the many decisions on his point was summarised by the Supreme Court in *Basdeo* v. *State of Pepsu*[6] (for this summary, see *post*, para No. 6).

4. Meaning of words.—"*With a particular knowledge or intent*". The two words "knowledge" and "intent" are not necessarily synonymous here. "*Shall be liable to be dealt with*" which probably means the same thing as "*shall be dealt with*". "*As if he had the same knowledge,*" but not necessarily the same *intent.*[7] The last word has been advisedly omitted.

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1. Director of Public Prosecution *v.* Beard, (1920) A. C. 479 at pp. 501-02; Nga Tun Bau, 5 Bur. L. T. 175 : 17 I. C. 800 ; Tincouri, 27 C. W. N. 290 : A. I. R. 1923 Cal. 460 ; Mandaru, I.L.R. 38 Mad. 479 ; *see* also Sudhu Kumhar *v.* King, A.I.R. 1951 Orissa 351 : 52 Cr. L.J. 1136 ; *In re* Macherla Balaswamy, (1952) 1 M. L. J. 772 : 1952 M. W. N. 784.
2. *In re* Macherla Balaswamy, A. I. R. 1953 Mad. 827 : (1952) 1 M. L. J. 772 : 1952 M. W. N. 384.
3. *Ibid.*
4. *Per* Ghandra Reddy, J., *In re* Suruttayyan, A.I.R. 1954 Mad. 523 ; *see* also Director of Public Prosecution *v.* Beard, (1920) A. C. 479 ; Sheru *v.* Emperor, A. I. R. 1926 Lah. 232 : I.L.R. 7 Lah. 50 : 27 Cr. L. J. 630 ; Waryam Singh *v.* Emperor, A I.R. 1926 Lah. 428 : I.L.R. 7 Lah. 141 : 27 Cr. L. J. 764 ; Nga Sein Gale *v.* Emperor, A.I.R 1934 Rang. 361 : I. L. R. 12 Rang. 445 ; *In re* Macherla Balaswamy, *supra.*
5. Director of Public Prosecution *v.* Beard, (1920) A. C. 479 at pp. 500-02 ; Abdul Karim, (1892) S J. L. B. 650 ; Waryam Singh, I. L. R. 7 Lah. 141.
6. 1956 S C.R. 363 : 1956 S. C. J. 554 : 1956 All. L. J. 666 : 1956 Andh. L. T. 593 ; 58 Punj. L. R. 569 : 1956 Cr. L. J. 919 (2) : A.I.R. 1956 S. C. 488.
7. Nga Sein Gale v: Emperor, I. L. R. 12 Rang. 445 : A. I. R. 1934 Rang. 361.

If the man was beside his mind altogether for the time being it would not be possible to fix him with requisite intention.[1]

Degree of intoxication.

There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.[2]

5. State of intoxication.—There are, of course, many varying degrees of drunkenness, which culminate in a state in which the person becomes incapable of hnowing the nature of any act. The words "state of intoxication" in Sec. 86 can only mean intoxication which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law when he commits it. It would be extremely dangerous to extend the protection afforded by Sec. 86, Penal Code, to persons who commit serious offences under the influence of liquor in varying stages and differentiate culpability in their favour as opposed to similar offences by perfectly sober persons.[3]

The state of intoxication envisaged in Sec. 86 in not in any way different from that contemplated in the preceding section. Both Secs 85 and 86, I. P. C., lay down the law relating to drunkenness as bearing on the wrongful acts committed by persons, the difference between the two sections being with regard to consequences depending upon whether the drunkenness is voluntary or involuntary. The absence of qualifying words in Sec. 86 cannot lead to the inference that even if the insobriety is not such as to impair the reason of the offender the requisite intent cannot be presumed. It is an ordinary rule that every man is presumed to intend the consequences of his acts, but this presumption can be rebutted by showing that the person concerned could not have formed the intent by reason of his drunkenness. To be a sufficient answer to a charge of a crime case involving a specific intent it should be established not merely that the offender had consumed liquor but that as a result of it his mind at the time in question was so obscure that he was incapable of forming the requisite intention.[4]

Difference in the two sections being with regard two consequences.

6. Presumption of knowledge and intention.—Even a drunken man is presumed to intend the natural consequences of his act, unless he proves incapacity in himself to form the intent necessary to constitute the crime.[5] A

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1. Narayana *v.* State, 1959 Ker. L. T. 634 : 1959 Ker. L. R. 614 : 1959 Ker. L. J. 623.
2. Russell on *Crime*, Vol. I, 11th Ed., pp. 86-87.
3. *In re* Macherla Balaswamy, A.I.R. 1953 Mad. 827 at pp. 828-29: (1952) 2 M.L.J. 772 : 1952 M.W.N. 384.
4. *Per* Chandra Reddy, J., in *In re* Suruttayyan, A.I.R. 1954 Mad. 523 at p. 526.
5. Basdev *v.* State, A.I.R. 1955 Pepsu 165 at p. 169 (D. B.) : I.L.R. (1955) Patiala 646 : 1955 Cr. L. J. 1621.

distinction must be made between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things.[1]

Distinctions between motive, intention and knowledge.

Even in some English decisions, the three ideas are used interchangeably and this has led to a certain amount of confusion.

English decisions.

In the old English case[2] Baron Alderson referred to the nature of the instrument as an element to be taken in presuming the intention in these words :

> "However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick you would not infer a malicious intent so strongly against him, if drunk when he made an intemperate use of it, as he would if he had used a different kind of weapon ; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party."

In a charge of murdering a child levelled against a husband and wife who were both drunk at the time, Patteson J., observed in *Regina* v. *Cruse*[3] :

> "It appears that both these persons were drunk, and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in case where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."

Slightly different words but somewhat more illuminating were used by Coleridge, J., in *Reg.* v. *Monkhouse*[4] :

> "The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says and if he says nothing, then his act alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him ; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent

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1. Basdev *v.* State of Pepsu, A.I.R. 1956 S. C. 488 at p. 490 : 1956 S. C. R. 363 : 1956 S. C. J. 554 : 1956 All. L. J. 666 : 1956 Andh. L. T. 593 : 58 Punj. L. R. 569 : (1956) 57 Cr. L. J. 919 (2) ; on appeal from Basdev *v.* State, A.I.R. 1955 Pepsu 165 : 56 Cr. L. J. 162.
2. Rex *v.* Meakin, (1836) 173 E. R. 131 : 7 Car. & P. 297.
3. (1838) 173 E. R. 610 : 8 Car. & P. 541.
4. (1849) 4 Cox. C. C. 55.

to kill could not be inferred from the act. So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged ?

"Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist."

A great authority on criminal law Stephen, J., postulated the proposition in his manner in *Reg.* v. *Doherty*[1] :

> " . . . although you cannot take drunkenness as any excuse for crime, yet when the crime is that the intention of the party committing it is one of its constituent elements, you look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."

In *Rex* v. *Meade*,[2] where the question was whether there was any misdirection in summing up by Lord Coleridge, J. The summing up was in these words :

> "In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this that if the mind at that time is so obscured by drink, if the reason is dethroned and the man is incapable therefore, of forming that intent, it justifies the reduction of the charge from murder to man-slaughter."

Darling, J., delivering the judgment of the Court of Criminal Appeal affirmed the correctness of the summing up but stated the rule in his own words as follows :

> "A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (1) in the case of a sober man, in many ways: (2) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i. e. likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted."

Three rules laid down by the House of Lords.

The House of Lords' decision in *Director of Public Prosecutions* v. *Beard*,[3] a prisoner ravished a girl of 13 years of age, and in aid of the act of rape he placed his hand upon her mouth to stop her from screaming, at the same time pressing his thumb upon her throat with the result that she died of suffocation. Drunkenness was pleaded as a defence. Bailhache, J., directed the jury that the defence of drunkenness could only prevail if the accused by reason of it did not know what he was doing or did not know that he was doing wrong. The jury brought in a verdict of murder and the man was

1. (1887) 16 Cox, C. C. 306.
2. (1909) 1 K. B. 895.
3. (1920) A. C. 479.

sentenced to death. The Court of Criminal Appeal (Earl of Reading, C. J., Lord Coleridge, J., and Sankey, J.,) quashed this conviction on the ground of misdirection following *Rex* v. *Meade*,[1] which established that the presumption that a man intended the natural consequences of his acts might be rebutted in the case of drunkenness by showing that his mind was so affected by the drink that he had taken that he was incapable of knowing that what he was doing was dangerous.

The conviction was, therefore, reduced to manslaughter. The Crown preferred the appeal to the House of Lords and it was heard by a strong Bench consisting of Lord Chancellor, Lord Birkenhead, Earl of Reading, C. J., Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Buckmaster, and Lord Phillimore. The Lord Chancellor delivered the judgment of the Court. He examined the earlier authorities in a lengthy judgment and reached the conclusion that *Rex* v. *Meade*[2] stated the law rather too broadly, though on the facts there proved the decision was right.

The position "that a person charged with a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing what he was doing was dangerous . . . " which is what is said in *Meade's* case,[3] was not correct as a general proposition of law and their Lordships laid down three rules :

(1) that insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged ;

(2) that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent ;

(3) that evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.[4]

The result of the authorities is summarised neatly and compendiously at page 63 of Russel on *Crime*, Tenth Edition, in the following words quoted with approval by the Supreme Court in *Basdev* v. *State of Pepsu*[5]:

> "There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short

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1. (1909) 1 K. B. 895.
2. *Ibid.*
3. *Ibid.*
4. Basdev *v.* State of Pepsu, A. I. R. 1956 S.C. 488 at pp. 490-91 : 1956 S.C.R. 363; *see* Russell on *Crime*, 11th Ed., Vol. I, pp. 86-87 ; *see* also Ajmer Singh *v.* State, A.I.R. 1955 Punj. 13 : 56 Punj. L. R. 339 : 1955 Cr. L. J. 305.
5. A. I. R. 1956 S. C. 488 at p. 491 : 1956 S. C. R. 363.

of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act."

In *Basdev's* case,[1] the Supreme Court dealt with an offence of murder committed by the accused who while very drunk and intoxicated, whipped out a pistol and shot a boy in the abdomen causing a fatal injury as he was enraged by the boy's refusal to step aside to enable the accused to occupy a convenient seat at a wedding. It was found that although the accused was under the influence of drink, he was not so much under its influence that his mind was so obscured by the drink that there was incapacity in him to form the required intention. The offence was therefore not reduced from murder to culpable homicide under the second part of Sec. 304 by reason of the provisions of this section.

First part of the section deals with knowledge or intent while latter part with knowledge only.

It is no doubt true that while the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge, and a certain element of doubt in interpretation may possibly be felt by reason of this omission. The question whether intent should be placed on the same footing as knowledge has been discussed in several cases and the result was summarised by the Supreme Court in *Basdev's* case.[2] So far as knowledge is concerned, the law attributes to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, it must be gathered from the attending general circumstances of the case paying due regard to the degree of intoxication. Where a man was beside his mind altogether for the time being, it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking and from the facts it could be found that he knew what he was about, the rule that a man is presumed to intend the natural consequences of his act or acts can be applied.[3]

Large number of offences in the Code expressly require particular knowledge or intention.

A large number of offences in the Code expressly require that in order to complete a particular crime, an act should have been done with a particular "knowledge" or "intention". Thus, for instance, culpable homicide is murder when the act is done with the intention or knowledge enumerated in Sec. 300. Where such intention or knowledge is absent the offence would be culpable homicide not amounting to murder. According to the rule here enunicated, it is permissible to rebut a charge of murder by reference to drunkenness but it would not be permissible to rebut a charge of culpable homicide not amounting to murder on the same ground, for the section declares that in spite of drunkenness the same knowledge shall be presumed. But the rule has not been construed so strictly for it has been held that though voluntary drunkenness cannot excuse the commission of an offence, yet when the question is whether the act was premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated could not be overlooked.[4] The section deals with cases where an act done is not an offence unless done with a particular knowledge or intent, and it was noticed that there may be cases in which a particular knowledge is an ingredient, and there may be other cases in which a particular intent is an ingredient, the two are not necessarily always identical.

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1. A.I.R. 1956 S. C. 488 at pp. 489, 491, 492 : 1956 S.C.R. 363.
2. *Ibid.* at p. 489.
3. *Ibid*, at p. 490.
4. Boodh Das, (1966) P.R. 41 ; Ram Sahay Bhur, (1894) W.R. 24 ; *In re* Mandru Gadaba, I.L.R. 38 Mad. 479; Nyo Hla Aung, 4 Bur. L.J. 221: 12 I.C. 85; Sheru v. Emperor, A.I.R. 1926 Lah. 232.

It is noticeable that the section does not say that the accused shall be liable to be dealt with as if he had the same intention as might have been presumed if he had not been intoxicated.[1] Intoxication should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged and that the intention which would be ascribed to a sober man in connection with that act must not necessarily be ascribed to an intoxicated man who does the same act.[2]

Intention in many cases is an inference from knowledge.

In *In re Mandru Gadaba*,[3] Alying, J., held that ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. Intention, of course, in many cases, is an inference from knowledge. As an intoxicated man is presumed to have the knowledge, he must, in the generality of cases, be assumed to have had the intention. But there may be cases in which a person by reason of intoxication may, under certain circumstances, be incapable of knowing the nature of a particular act he commits or that it is either wrong or contrary to law, although his state of intoxication may not be such as to render him incapable of knowing the nature of all his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind, which must be found as a fact and not assumed. It is only in such cases, which are rare, that Sec. 86 can be invoked.[4]

Guilty intention if capable of direct proof.

The guilty intention which is the ingredient of several offences in the Penal Code is obviously not capable of direct proof and is generally inferred from the proved facts and circumstances of each case. There is the general presumption that every man intended the natural consequences of his act and if the accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them.[5] Where a drunken person commits an offence, there will be no presumption of guilty intention under Sec. 86, I. P. C., and such intention must be proved like any other fact in issue. But the Court may, after presuming the guilty knowledge from that section on the assumption that he committed the act while in a sober condition, infer the guilty intention also, if the other proved facts and circumstances of the case justify the same, having regard to the degree of intoxication in which the accused is.[6] The evidence is of drunkenness falling short of proved incapacity in the accused to form the intention necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passions, does not rebut the presumption that a man intends the natural consequences of his acts.[7] The correct test is whether by reason of drunkenness the accused person was incapable of forming an intention of committing the offence.[8] This is also the accepted view in England,[9] and it is commendable to reason.

1. Dil Mohammad *v.* Emperor, A.I.R. 1942 Pat. 420 at p. 421 : I.L.R. 21 Pat 250 : 43 Cr. L. J. 883 : 202 I. C. 637; Nga Hpeik *v.* King, A.I.R. 1938 Rang. 219: 39 Cr. L. J. 689 : 176 I.C. 103.
2. Nga Hpeik *v.* King, A.I.R. 1938 Rang. 219 at p. 220.
3. A.I.R. 1916 Mad. 489.
4. *In re* Macherla Balaswamy, A.I.R. 1953 Mad. 827 at p. 829 : (1952) 2 M. L. J. 772 : 1952 M.W.N. 384; *see* also Sudhu Kumbhar *v.* King, 1951 Orissa 354 : 52 Cr. L. J. 1136; Nga Sein Gale *v.* Emperor, A.I.R. 1934 Rang. 361: I.L.R. 12 Rang. 445 : 36 Cr. L. J. 228: 152 I.C. 1054; *In re* Suruttayyan, A.I.R. 1954 Mad. 523.
5. Sudhu Kumbhar *v.* King, A.I.R. 1951 Orissa 354 at p. 355 : 52 Cr. L. J. 1136.
6. *Ibid.* at p. 356; Nga Sein Gale *v.* Emperor, A.I.R. 1934 Rang. 361 : 12 Rang. 445 : 36 Cr. L. J. 228.
7. *Ibid.* at p. 356.
8. Muthu Goundan, 1958 M.W.N. 113.
9. Doherty, 16 Cox. C. C. 306; Cruse, 8 C. & P. 451 at p. 546; Monkhouse, 5 Cox. C. C. 557; Moore. 3 C. & K. 319; Gambu, 1 F. & F. 90; Nga Tun, 5 Bur. L. T. 175 : 17 I. C. 800.

7. Cases.—*A* went into *B*'s house having a *dah* in one hand and called out to him to give him money, threatening to cut up *B* and his wife. He kicked at the doors and slashed them, but when the doors gave way he fell down. Meanwhile *B* and his wife had fled out of their house. *A* was charged with attempted robbery armed with a deadly weapon. It was found that *A* had been drinking toddy before the commission of the offence. It was held that his drunkenness did not prevent the accused from forming in his mind the dishonest intention necessary for extortion, though it was doubtful whether his ebriety would have enabled him to rob *B*.[1]

In another case,[2] where the accused suddenly came out of a garden and tried to catch a bundle and he caught the boy up by the legs and dashed him several times on the ground. In the opinion of the medical officer, death was due to the shock resulting from fracture of the skull and the boy could have come by the injuries found on him and from which he died, if a man held him by the legs and dashed him on the ground. On the evidence there cannot be any manner of doubt that the boy was killed by the accused and that the act of killing such as has been described above amounted to murder. Having regard to the way in which the murder was committed and having regard to the fact that there is practically no evidence of motive it ought to be inferred that the accused at the time when he committed the murder was suffering from some severe mental derangement. The accused must have been at the time, having regard to the fact that he was a habitual *ganja* smoker, in such a state of mind that he was not responsible for his action. The accused has not taken any plea under the provisions of Sec. 64 of the Indian Penal Code, and having regard to the evidence on the record this is not a case which comes under the provisions of Sec. 84, I. P. C. or of Sec. 85 but falls within the provision of Sec. 86, I. P. C. It was held that "we think that the ends of justice will be met if a sentence of transportation for life is passed on the accused. This is obviously not a case where the capital sentence should be passed and as has just been indicated, we do not propose to pass the capital sentence on the accused."

87. Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Act not intended and not known to be likely to cause death, grievous hurt, done by consent.

Illustration

A and *Z* agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if *A* while playing fairly, hurts *Z*, *A* commits no offence.

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1. Nga Tun Bau, 5 Bur. L. T. 175 : 17 I.C. 800.
2. King-Emperor v. Tincouri Dhopi, A.I.R. 1928 Cal. 460 at pp. 460, 461 and 462; *see* also Jaimal Singh v. Crown, A.I.R. 1928 Lah. 294.

SYNOPSIS

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1. Operation of consent on criminality.—Under the law of the Romans, who had borrowed their ethics from the Greeks, consent was a complete answer to any charge including even murder. This remained the law till the advent of Christianity which taught the sanctity of human life, the doctrine of which was echoed by the Prophet of Islam. Christianity in its turn had borrowed the tradition from the Jews who regarded suicide as a crime and committed the suicide's body to an unhallowed grave. In England, the denial of the right of Christian burial to suicide has been abrogated by statute,[1] though such a person is buried with an abbreviated service not touched by the statute. This section adopts the view of the Law Commissioners who instanced the case of a surgeon who had to perform an operation involving the risk of life, but with an even chance of the patient's recovery, or of one who fired at a wild beast attacking a man whom he intended to save, though there was a danger of his killing him by the shot. There were also cases of sport, e. g. boxing and duelling in which both parties consent to suffer harm; but since duelling involves the risk to life it is excepted, otherwise this section and the next two formulate a rule in accordance with modern notions of life.

Roman, Christian and Islamic concepts.

Certain acts involving risk of life.

Apart from this and the two ensuing sections, several Acts, e. g., the Factory Act and the Workmen's Compensation Act, have further limited the operation of consent as an exoneration of the employer from his civil liability for compensating the workmen, even though they might have agreed to take the risk. Where such risk does not involve obvious peril to life or suffering of grievous hurt, it would be a good defence to the employer's criminal liability under the Code, though it would not exempt him from civil liability.

2. Principle.—As already stated in the above paragraph, the common and the canonical law both recognise consent as a good defence to the causing of injury. They both assume that everyone is the best judge of his own interest and, therefore, they presume that no one can consent to that which is hurtful to that interest. The doctrine so far is simple and perfectly intelligible, and it is, indeed, the outcome of that natural liberty to which every man is entitled and the curtailment of which, to be justifiable, must proceed from manifest public policy or obvious necessity. The restrictions made in this and the following sections are dictated by these considerations for, beyond a certain stage, they regard personal injuries from a different ethical standpoint, and it is, therefore, that while on the one hand, the law will not suffer a person to consent to their infliction, on the other hand, when inflicted, the party aggrieved will not be permitted to compound them with the felon.

3. Meaning of words.—"*Not intent to cause death or known to be likely to cause death*" : These words have been used to define murder[2] and culpable homicide,[3] hurt[4] and grievous hurt.[5] *By reason of any harm which it may cause.*"[6]

1. (1882) 45 & 46 Vict., c. 19, Sec. 2.
2. Section 300.
3. Section 299.
4. Section 321.
5. Section 322.
6. Section 321.

Such harm may result even in death, but it should not have been *intended* or known to be likely. Any hurt short of grievous hurt may have been intentionally caused. "*Above eighteen years of age*" : That being the age of majority it is also necessarily fixed here as the age of consent in this country.[1]

"Consent" not defined in the Code.

"*Who has given consent*" : "Consent" is nowhere defined in the Code, through it has been defined in the Indian Contract Act[2] as follows : "Two or more persons are said to consent when they agree upon the same thing in the same sense" ; it is negatively described in Sec. 90. Consent is the manifestation of the will in concurrence of an act. It implies the use of judgment, free-will and physical action. "*Express or implied*" acquiescence is implied consent. It may be inferred from conduct. If *A* challenges *B* to a boxing match, and *B* accepts the challenge, both *A* and *B* impliedly consent to the infliction and sufferance of mutual injuries though the infliction of such injuries may not have been made the subject of an express covenant. Such is the case contemplated in the illustration.

4. **Consent as a defence to criminality.**—Consent, as already seen, has the effect of exonerating or extenuating a criminal-act in the following cases :

(*a*) Harm short of grievous hurt may be caused by consent in any case ;

(*b*) even harm resulting in death may be caused, if it was not not so intended, but was intended for his benefit ; and in such case, even consent (Sec. 92) is unnecessary where it is not possible.

But these sections evidently refer only to the operation of consent on personal injuries. They have no reference to offences relating to property, and sexual relations

Consent as an essential ingredient in certain offences.

But consent plays an equally important part in these cases, and the present discussion will not be complete without reference to them. It may then be generally stated that, in addition to the two cases above set out, there are other cases in which consent is either a material element in the composition of the crime, or has the effect of neutralizing it. Theft and rape may be given as examples of the former, and adultery of the latter. There are other offences, such as wrongful confinement, in which consent is an essential ingredient. Consent, moreover, plays a conspicuous part not only in determining the nature of the offence, but also in justification of an act otherwise criminal. It is a ground of mitigation even in the case of homicide. And as consent may be either express or implied, the subject assumes a degree of complexity into which it is useful to inquire.

5. **Consent defined** —In the first place, therefore, what is consent ? It is undoubtedly the concurrence of wills. But besides concurrence of wills, its chief essential constituent is consciousness or knowledge of the act consented to. So on a charge of indecent assault on a boy of eight years the Court told the jury that "knowledge of what is to be done, or of the nature of the act that is being done, is essential to consent to the act".[3] So where a person consented to the performance of a surgical operation upon himself with great reluctance, the only information communicated to him being that if he submitted to it, he would be cured, the Court held that a person could hardly be said to accept a risk of which he was not aware, and that, therefore, there was no case for exceptional treatment unless it were shown that the patient was aware of the risk and accepted it.[4] So in another

1. Section 3, Indian Majority Act (Act IX of 1875).
2. Section 13, Act IX of 1872.
3. Lock, 12 Cox. C. C. 244.
4. Sukaroo Kabiraj *v.* Empress, I. L. R. 14 Cal, 566.

case the fact that the force applied was a form of initiation to a voluntary society, which the party assaulted had agreed to join, was held to be no defence if he did not know before hand that that was part of the ceremony.[1] Knowledge of the act and its probable consequences is, therefore, the first requisite of consent.[2] And since there can be no knowledge without consciousness, it follows that consent without consciousness is impossible. So sexual intercourse with a female put under chloroform or rendered otherwise unconscious is rape, the question of consent being immaterial.[3] So where in such a case the consent was obtained by fraud, misrepresentation or coercion, the result was held to be the same as if there never had been any consent.[4] The consent required is therefore free consent, or the free exercise of the will of conscious agent.[5] Where, therefore, a child just above ten years of age yielded to her father there was held to be no consent, for as Lush, J,, told the jury : "Consent means consent of will, and if the child (just above ten years of age) submitted under the influence of terror or because she felt herself in the power of the man, her father, there was no real consent."[6]

6. Consent in criminal law.—Sir James Stephen defines consent in criminal law to mean "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents".[7] And he goes on to add that "consent is said to be given freely when it is not procured by force, fraud or threats of whatever nature".[8] This view has become established in America where Orton, J., enunciated the principle as follows : "When the mind is subjugated as well as the body, so that the power of volition and the mental capacity either to consent or dissent is gone, then the act may be said to be against the will", and so also it may be said to be without consent. But when the mind is left free to exercise the will and to consent or dissent, then by consent responsibility for the act is incurred; where there is no such mental capacity, the quality of the act is indifferent, there can be no consent or dissent, and consequently no responsibility. The physical power may be overcome and the utmost resistance be unavailing yet the mind may remain free to approve or disapprove, consent or dissent."[9] Of course, consent may be free, but it may have been brought about by fraud, misrepresentation or coercion. A person may have consented to a game with a sword in ignorance of the fact that it was tipped with poison; the wife may consent to intercourse with her husband in ignorance of the fact that he was suffering from a foul disease.[10] In both of which cases the effect is the same as if there had never been any consent at all.[11]

Stephen's definition approved by American jurists.

7. Implied consent.—But so long as there is consent, and the consent is free, it is not necessary that it should be express or articulate. For it may be *implied* or given by implication, or inferred by conduct. So there may be and are cases in which silence implies consent. A modest girl may even

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1. Bell *v.* Hensley, Jones 131 ; State *v.* Williams, 75 M. C. 134.
2. Section 90, *post* and Comm.
3. Camplin, 1 Cox. C. C. 229; Ryan, 2 Cox. C. C. 115 ; Dee, 15 Cox. C. C. 579.
4. Case, 4 Cox. C. C. 220 ; Flattery, 13 Cox. C. C. 388 ; Dee, 15 Cox. C. C. 579.
5. Woodhurst, 12 Cox. C. C. 443 ; Dee, *supra*.
6. Woodhurst, 12 Cox. C. C. 443.
7. Dig. of Cr. Law, Art. 224.
8. *Ibid.*
9. Whittaker *v.* State, 50 Wis. 518.
10. Clarence, 23 Q. B. D. 58.
11. Section 90 ; *Re* N. Jaladu, I. L. R. 36 Mad. 453 at pp. 456, 457 : 22 I.C. 168 : 15 Cr. L. J. 24.]R. *v.* Hopkins, (1842) Car. & M. 254 followed] ; Soma, (1916) P. R 17 (Cr.).

signify her consent to her lover's proposal by "No" uttered so as to denote a modest but real "Yes" : *Non quod dictum, sed quod factum in jure inspicitur.*[1] So where a customer enters a tradesman's shop and picks up goods exhibited for sale, there is implied consent (*a*) to enter, (*b*) to handle goods, and (*c*) to appropriate them at the stated or reasonable price. So again, where a person has been a welcome visitor in the past, he may well assume consent to his continued visits, unless he has had reason to believe otherwise. The term "implied consent" is then, so far as regards the criminal law, used to signify either (*a*) consent by acts and conduct, or (*b*) consent presumed though never given or in any way signified. The examples above given illustrate the first sense: Illus. (*m*) appended to Sec. 378 of the Code may fitly illustrate the other sense. "*A* being on friendly terms with *Z*, goes into *Z*'s library in *Z*'s absence and takes away a book without *Z*'s express consent for the purpose merely of reading it, and with the intention of returning it. Here it is probable that *A* may have conceived that he had his implied consent to use *Z*'s book. If this was *A*'s impression, *A* has not committed theft." Why not ? Because *A* had *Z*'s implied consent to enter his library, and take on loan any book he required therefrom. In this case "implied consent" was only a fiotion. If was really no oonsent at all, but only the probability of obtaining one in other words, in imputing consent to *Z* in the oase supposed, the law presumes consent because, having regard to human conduct and probabilities, it was highly probable, indeed, so probable that its existenoe may be assumed. It is, however, an assumption all the same, and as such, a fiction, and being a fiction, its acope must be narrowly watched. For while it is true that there are facts which have to be assumed in human conduct, it is also true that human conduct is not invariable, and does not present uniformity. It must, therefore, be clearly established, by evidence from which the Court may be entitled to say that either the consent was not given owing to accidental causes or that it was given by act or conduct or the only way in which it could have been given.

What implied consent signifies in criminal law.

The question whether there was such a consent in a given oase is therefore a question of fact dependent upon the circumstances of each case. A large number of oases are to be found in the reports in which the only phase of the question illustrated is that which relates to consent to sexual intercourse. In such a case express consent is seldom to be looked for, and the only consent possible is implied consent which may be inferred from non-resistance and previous intimacy. It is sometimes said that the resistance required to overcome the imputation of consent must be to the utmost of her power,[2] but there is neither reason nor authority in support of this view. For a woman may find resistance unavailing and even more harmful, and she may therefore not resist more than is essential to express her entire disapproval. And, indeed, more may not always be possible,[3] for the woman may be paralysed from fear and terrorised into submission, or she may have been overpowered by actual force, or by the number of accomplices, or from her own want of strength.

Existence of consent a question of fact dependent on circumstances of each case.

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1. Croft *v.* Lumley, 6 H. L. C. 722.
2. People *v.* Morrison, 1 Parker Cr. R. 625 ; People *v.* Dohring, 59 N. Y. 374.
3. Hallett, 9 C. & P. 751.

Consent cannot be inferred from mere passivity.

Of course, consent cannot be inferred from mere passivity without something more. For a person may be aware of a plot to commit a crime, and he may take no action to defeat it. He may be quiescent and passive but he can be held to have acquiesced in the nefarious act? It is said that the mere fact that facilities for the commission of an offence are afforded is no indication of consent.[1] But one fails to see why it is not. Of course, if the facilities were afforded for detection of the offence, there is an explanation which is inconsistent with the presumption of consent. But without anything to suggest a definite intention, the usual indicia will undoubtedly lead to the usual inference. Suppose, for instance, that expecting a burglary a person puts out the lights, the question whether the person was or was not privy to the burglary depends upon the intention with which the lights were extinguished. If the person blowing out the light was a maid servant, her conduct would, to say the least, be suspicious. If she had, moreover, left the entrance door unbolted, she could not be justly suspected of complicity. But if suppose the person putting out the lights and leaving the entrance door unbolted were the owner, his conduct would be attributed to very different motives.[2] He may, for instance, be presumed to have laid a trap for the burglar; but that would be natural, though not the only presumption, for if the furniture had been heavily insured against burglary, it may be that the owner was plotting to defraud the insurance company.

8. Doctrine of obvious risks.—Another class of cases in which implied consent is inferred is that in which the risk of harm is obvious and visible. Such trades, for instance, as involve the handling of machinery for acids or explosives or the like, naturally offer risk which persons engaged therein are presumably aware of and which they have impliedly consented to.[3] Apart from the special provisions of protective enactments, the presumption arising out of service is that the servant consents to the hazards involved in his service. And he cannot complain on the ground that the chances of his risks might have been minimized if his employer had taken greater precaution. "Having consented to service in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."[4]

9. Trap to detect crime.—The laying of traps is a perfectly justifiable method of detecting crimes. One may have marked property in such a position that if stolen it may be identified; another may offer illegal gratification in coins or notes marked for the same purpose ; a third person may play an accomplice and assist in the commission of a crime, but the criminal cannot in any case contend that those facts in any way mitigated his crime.[5] So it was said in an American case that "the fact that *B* was willing to assist in and facilitate the detection and arrest of the criminal does not amount to a consent to the commission of the crime, nor will the mere fact that there was a detective with (apparently assisting) the appellant in the commission of the crime constitute a defence."[6]

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1. 1 Wharton's *Criminal Law*, 164.
2. Egginton, Leach C. C. 913 : 1 Stephen's *Criminal Law*, p. 257.
3. Employer's Liabilities Act, 1880 ; Membery *v.* Great Western Rly. Co , 14 App. Cas. 198 ; Yarmouth *v.* France, 19 Q. B. D. 647 at p. 661 ; Thrussel *v.* Handyside, 20 Q. B. D. 859.
4. Sullivan *v.* India Manufacturing Co., 113 Mass. 396.
5. Egginton, Leach C. C. 913.
6. State *v.* Strickney, 55 Kan. 308.

The principle underlying this and similar cases has not been stated, but it is obvious. No person can justify an illegal act on the ground of consent. If it were otherwise, the assistance received from abettors and accomplices would be a material element in mitigating the crime. But it is not. So no consent can at one for a public wrong. There are, however, some offences in which consent operates as a condonation of the crime. Such an offence is adultery[1] which, however, is not even a crime in England. Other offences affecting human life, limb or liberty, are also affected by the presence or absence of consent. In fact, such offences may be generally sub-divided into two classes, viz. (*a*) those which are complete independently of consent, and (*b*) those in which consent is a sufficient justification. Instances of the former are given in the next paragraph; instances of the latter are hurt caused during employment or in game, or in rape[2] and theft.[3]

Illegal act cannot be justified on ground of consent.

10. Operation of consent on crime.—Instances have been already given of offences in which consent has the effect of negativing criminality. It has been said that where the offences are of a public character, consent does not vary their nature or effect their penalty. Such are offencs against the State,[4] those relating to the Army, Navy and Air Force[5] or those effecting the public tranquillity,[6] offences by or relating to public servants, which cannot be minimised by consent; indeed, in cases of the receipt of illegal gratification, in which money is received by consent, the consent in no way affects the crime. Offences against public justice,[7] and those relating to stamps, coins,[8] weights and measures[9] are for the same reason independent of consent. On the other hand, consent may mitigate or even excuse some of the offences described in Chapter X.[10] Offences relating to religion are necessarily dependent upon consent, while those effecting the human body depend upon consent only in cases covered by this and the next two sections. It will thus be seen that the value of consent varies in the inverse ratio with the gravity of the crime. And in the case of public crimes it has no place at all. And even in other cases its operation is controlled by public policy.

Offences of a public character.

11. Sports and pastimes.—The question whether harm caused in a game is or is not justifiable does not depend merely upon consent, but upon the lawfulness of the game. If the game was unlawful which means if it was one against public morality or public policy, then the hurt caused therein even by consent is punishable; or in other words consent is no defence to an illegal act, when it is both illegal and injurious to the public. So where persons, engaged in prize-fights which are illegal, commit assault upon each other they are punishable in spite of their consent.[11] But hurt legitimately caused

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1. Section 497 *post*; Marris *v.* Marris, 2 Sw. Tr. 530; Ellyatt *v* Ellyatt, 3 Sw. & T. 504; Adams *v.* Adams, 1 P. & D. 888.
2. Section 375, *post*.
3. Section 378, *post*.
4. Sections 121—130.
5. Sections 131—140.
6. Sections 141—160.
7. Sections 191—229.
8. Sections 230—263-A.
9. Sections 264—294-A.
10. Sections 172—190.
11. Murphy, 6 C. & P. 103; Boulter *v.* Clarke, 1 Buller's N. P. 16; Mathew *v.* Ollerton, Comb. 218; Perkins, 4 C. & P. 537; Lewis, 1 C. & K. 419; Coney, 8 Q. B. D. 534 at p. 549.

in mainly sports and pastimes entered into for health or recreation, such as fencing, boxing, football, single-sticks, wrestling by consent, playing at cudgels, fencing, archery and the like is justifiable in accordance with the rule here enunciated. But the reason that hurt is justifiable even in these games is because the causing of hurt is inevitable but is not the primary object of the game. If, therefore, the game is made a pretext for causing hurt, it becomes the primary object, and it is not then justifiable, since it is necessary that even in a legitimate game, proper caution and perfect fairplay should guide both parties.

Justification for hurt caused in games and pastimes.

Manly sports and pastimes are encouraged because they afford healthy exercise and develop a martial spirit, and they are not illegal merely because they expose the participants to some risk of harm. But the law can tolerate no contest in which the risk of harm is out of all proportion to the advantage derived from the game. And this is specially the case where persons employ deadly weapons or where the game is played in a manner involving the breach of peace. It is for this reason that prize-fights are condemned.[1] Indeed, it may be laid down as the one test of legality in such cases that, if bodily harm is not the motive on either side, the game is legal. But its legality will be seriously shaken if the weapons employed are deadly or dangerous, or the game is played from mercenary motives and draws a large crowd, or being in itself a perfectly fair game, persons engaged therein do not observe its rules, but whether through heat or anger inflict upon each other more injury than would be fair in a friendly contest.[2] While there is nothing unlawful is spearing, it becomes illegal if the combatants fight on until they are so weak that a dangerous fall is the result.[3] Again while wrestling is perfectly legal it would be an assault, if after a combatant cries truce or is vanquished, the other continues to pummel him and thereby cause injury.

Sports and pastimes when become illegal.

12. Unlawful games.—As regards unlawful games, the question depends not so much on the antiquity or popularity of the games as upon their nature and the risk they involve to life and limb. The mere use of force does not render a game illegal unless the force employed involves danger to life and limb. A gladiatorial contest which made the Roman's holiday would undoubtedly be regarded as wholly illegal nowadays. The modern Spanish bull-fight, though a national institution in Spain, would be condemned as illegal in this country. A tilt or tournament was, once upon a time, the favourite pastime of Englishmen, but it was nevertheless held to be illegal even though it may have been commanded by the King, for even the King's commandment would not justify or excuse a person who killed another in a tournament, because the commandment itself was illegal.[4] So fencing with naked swords is illegal though playing with foils is legal so long as there are buttons at the end of the foils. Duels are, of course, illegal and all taking part in them are equally guilty as aiders and

Factor determining lawfulness of game.

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1. Perkins, 4 C. & P. 537.
2. Canniff, (1840) 9 C. &. P. 359; Bradshaw, (1878) 14 Cox. C. C. 83.
3. Young, 10 Cox. C. C. 37.
4. *Per* Stephen, J., in Coney, 8 Q. B. D. 534 at p. 549, citing Lambard Eiren, P 129 ; 1 Hale P. C. 472 ; Foster, C. C. 259, 260: 1 East P. C. 270.

abettors,[1] though it can no longer be maintained that mere presence constitutes the spectators as aiders and abettors.[2]

13. Extent of justifiable harm.—Assuming then that there is consent and it was given for a lawful purpose, the amount of justifiable injury that may be inflicted must not exceed the limit prescribed by the section, the measure of which is not the actual harm but the harm intended or foreseen.

Legality of the extent of harm judged by the intention or the knowledge.

In this connection two points call for notice. *First*, the legality of the extent of harm is judged not by the consent given, but by the intention and knowledge of the person causing it. If he intended or knew that death or grievous hurt would be the result of the harm, he is liable for whatever harm may have been caused independently of any consent of the other party. One person may request another to kill him, but he has no right to kill him by request. The question then, being dependent upon the intention or knowledge of the doer, is one the answer to which must necessarily depend upon the circumstances of each case. But the foregoing considerations are for this purpose material as they illustrate the guiding principles to which the rule is subject. *Secondly*, if the harm was not initially intended or known to cause grievous hurt then the fact that the harm actually caused was grievous or more is immaterial. The two points may be illustrated by reference to the harm caused in a duel and a wrestling match. If the former is fought with loaded pistols, parties intended death, and though the injury caused may be slight, the party causing it is liable irrespective of consent. On the other hand, in a wrestling match there is no intention to cause grievous hurt. It is a fair trial of strength, but if perchance an awkward throw breaks the bone of a wrestler, the other party is not liable, because the injury would be attributed to misadventure.

Harm due to misadventure.

Examples.

In one case the deceased, a middle-aged Burman, believed himself to have been rendered *dao*-proof by charms and asked the accused to try a *dao* on his right arm. The accused believed in the assurance of the deceased and inflicted a moderate blow with his *dao* as requested, with the result that his arteries were cut and the deceased bled to death. He was convicted under Sec. 304 but on appeal his conviction was set aside on the strength of this section and Sec. 90, the Court holding that the accused neither intended to cause nor knew that he was likely to cause any hurt, much less the death, of the deceased.[3]

14. Who must consent?—Lastly, the section enacts that in order to be operative, consent must be given *by the person suffering the harm* and he must be then above eighteen years of age. Of course, where harm is caused with the consent of other persons, the party inflicting it may still be protected under the provisions of Sec. 89, if a proper case under that section is made out or, lastly, it may be a case falling under Sec. 92, in which case there need be no consent at all. Deserving these two later cases for future consideration, the section requires that acts sought to be justified under it must be shown

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1. Young, 8 C. & P. 644; Murphy, 6 C. & P. 103.
2. Perkins, 4 C. & P. 537; Hargave, 3 C. & P. 170. Murphy, *supra*; Bellingham, 2 C. & P. 324, explained, *per* Cave, J., in Coney, 8 Q. B. D. 534 at p. 542.
3. Nga Shive Kin, 8 L. B. R. 166 : 30 I. C. 133.

to have been consented to by the sufferer himself. If, therefore, a person is forced to play a perfectly legitimate game and suffers injury, it is not justifiable. The fact that in such a case the consent of some other person, whether parent or master, had been obtained, is immaterial. And as the person consenting must be above eighteen years of age, what becomes of persons below that age of discretion? Their case is apparently not met by the subsequent sections, which refer to other contingencies. Such a person is then incapable of joining a lawful game under the conditions which prevail in the case of male combatants.

15. Punishment by Panchayat.—In a case, the complainant having molested a Chamar girl, some 200 Chamars armed with *lathi* collected together and determined to punish the complainant, caught hold of him. Three persons of the locality intervened and tried to bring about a settlement. They along with other accused who were relations of the girl, collected a *Panchayat*, and with a view to avoid other harm to the complainant and with his consent, the *panchayat* decided to take him round the village with a blackened face and give him a shoe beating. The decision having been carried out theer persons who intervened and the other accused were prosecuted for offences punishable under Secs. 323 and 506, I. P. C. Holding that the accused were entitled to the benefit of the exceptions contained in Secs. 81 and 87, Penal Code, it was observed : "In ordinary circumstances such a conduct would not be tolerated ; and those responsible for it would be dealt with according to law. But, in a case like this, when the accused persons acted *bona fide*, without any criminal intent, in order to save the complainant from serious consequences, resulting from his own indecent behaviour, with his consent obtained in writing and for his benefit, the position is entirely different . . . . It is true that if an act is unlawful in the sense of being in itself a criminal act, it cannot be rendered lawful because the person to whose detriment it is done consents to it; but there are many acts, the commission of which in the crcumstances mentioned in the section (Sec. 87) may not amount to an offence."[1]

Act not intended to cause death, done by consent in good faith for person's benefit.

88. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration

A, a surgeon knowing that a particular operation is likely to cause the death of *Z*, who suffers under a painful complaint, but not intending to cause *Z*'s death, and intending, in good faith *Z*'s benefit, performs that operation on *Z*, with *Z*'s consent. *A* has committed no offence.

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1. Bishambher *v.* Roomal, A. I. R. 1951 All. 500 at pp. 501, 502 : 52 Cr. L. J. 179.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words,
4. Harm intended to benefit.
5. Act must be beneficial.
6. Act must be done in good faith,
7. Only care and attention required.
8. True test of proper care.
9. What circumstances are material.
10. Evidence of qualified medical men.
11. Corporal punishment by schoolmaster.

1. Analogous Law.—Under the last section the intentional causing of death or of grievous hurt cannot be justified by consent. Under this section unintentional causing of grievous hurt or death is justifiable. The reason is that under the last section there was no question of benefit to the complainant, whereas in this the act is done in good faith and for the benefit to the injured. The illustration makes it clear that the section has direct reference to an operation performed by a surgeon, though the section may have a wider application. This section enacts a rule in harmony with English law which was proposed to be thus stated in the English Criminal Code Bill of 1879: "Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case."

Rule in harmony with English law.

The fact that a person performs an act in good faith and for the benefit of another does not entitle him to perform that act forcibly upon him, even though the person on whom benefit is sought to be conferred be foolish in denying to himself the benefit which the other intends to confer on him. Consent is, therefore, necessary, though it need not be express, and may even be implied. The resultant harm may be great, causing even death, but it must not be so intended. It will, thus, be seen that a person working for the benefit of another is given a greater latitude than one who inflicts harm in sport or play.

2. Principle.—A person working for the benefit of another is given a greater latitude than is allowed to one acting merely with consent. The only thing postulated in his case is that he should not intend to cause death though he may know that death will be caused. Here, since death of a person was probably certain without the benevolent interference of the other party, the law permits him to barter one chance for another. The illustration appended furnishes an apt example. *Z* is there suffering from a painful malady. If it were curable without an operation there would be no necessity for *A*'s assistance. It may not immediately cause death, but it will probably do so and in the meantime cause the sufferer pain. The sufferer is then permitted to choose between the chance of a cure and death, and he is so permitted, because, without taking the risk, no surgeon will operate on him, and without operation he cannot hope for a cure. Take another example: A person in the grip af a wild beast orders his companion to fire and the shot misses its aim and kills him. Here he had bartered one chance for another and the fact that it killed him would not affect the question.

Scope of the illustration.

3. Meaning of words.—"*Which is not intended to cause death*": In the illustrations given under the above para. No. 2, if the surgeon, pretending to cure, intentionally stabs the patient, or the sportsman deliberately aims at the other, in both the cases they will be responsible for their act. The

clause means that the doer must intend not only not to cause death, but his act must be done in good faith and for his benefit which means that the intention must be to confer benefit and not to cause death. "*Or intended by the doer to cause*", that is, if the doer intends to cause any harm short of death, it is no offence if (*i*) he did not intend to cause his death, (*ii*) the act done was for his benefit, (*iii*) it was done in good faith, and (*iv*) the sufferer was apprised of the coming harm to which he had expressly or impliedly consented. "*For whose benefit it is done*" : The explanation added to Sec. 92 says mere pecuniary benefit is no benefit within the meaning of Secs. 88, 89 and 92.

4. Harm intended to benefit.—The scope of the rule here enunciated has been already discussed elsewhere. The section enacts that consent justifies any harm short of intended death even though the harm may result in death, if only it was caused for his benefit and in good faith. These words control the whole section, as do the commencing words : "Nothing which is not intended to cause death." These three restrictions form the exceptions to the rule, for they lay down that (*i*) no one shall under any circumstances be excused for causing another's death if he so intended it, or (*ii*) if it was not caused while doing an act for his benefit, and (*iii*) which was not done in good faith. If so far the act of the accused is not blameworthy, then he is not guilty of any harm including death, even though he may have known that death was likely, and even though he may have *intentionally* caused any harm from which he may have *known* that death would be caused. In the choice of evils a person may well be left to be his own judge.

The three restrictions form exception to the rule.

5. Act must be beneficial.—The first condition postulated is that the act done must be beneficial and as has been explained elsewhere,[1] the "benefit" here contemplated is not a "mere pecuniary benefit," which implies that it *may be* a pecuniary benefit if it is also a benefit of some other kind, as, for instance, it may be for the benefit of his life, health or body. He may expect a legacy if he lives up to a certain age. It may then be also for his pecuniary benefit. But if the harm cause only a pecuniary benefit, it is not a benefit within the comprehension of the rule. For instance, a person may desire, as did the beggar mentioned by Lord Coke, to amputate his arm so as to be able to beg successfully. The harm contemplated would have conferred a mere pecuniary benefit of the sufferer, but that benefit would be the result of imposture. So there is a class of persons in this country who get themselves emasculated with a view to obtaining service in a harem or to follow the occupation of "nautch girls". If, therefore, a person engages another to emasculate him, the question may be whether the performance of such operation would be legal. It was so held in a case[2] in which a man over 18 years of age engaged a party of eunuchs to emasculate him, whereupon they, being persons unskilled and unqualified to perfom the operation, simply cut off his private parts without proper ligatures, in consequence of which the man died. It was held that the accused could not claim exemption under this section.[3] The same view was taken in another case in which the prisoner, a

Benefit if merely a pecuniary benefit.

Unskilled manner of operations.

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1. Section 92, Expl.
2. Babulan Hijrah, 5 W. R. 7.
3. *Ibid.*

Kabiraj, performed an admittedly dangerous operation of cutting out the internal piles by an ordinary knife, in consequence of which the patient died the next day.[1] Mutilation or disfigurement of one's body is then not a "benefit" within the meaning of the section though it may be justifiable on the ground that it was suffered to avert a greater evil. In the case last cited the Court placed some emphasis on the unskillful manner in which the operation was performed. But if the operation was itself illegal, no skill used in performing it would alter its nature or affect the punishment. But where the operation is itself legal, the exercise of care and attention is a necessary prerequisite for they are implied in the doing of an act in good faith[2] which the rule enjoins.

6. Act must be done in good faith.—Now as the exercise of care and attention does not postulate any technical skill but only such skill as a man of ordinary prudence and intelligence may command, it follows that it is by no means a necessary ingredient of the section that the assistance rendered should be by one specially qualified to render it. So it has been held in England that a physician or surgeon need not be a regular or licensed one to be entitled to exemption.[3] Blackstone says that "if a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for negligence or ignorance; but it hath been holden, that if it be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least. Yet Sir Mathew Hale very justly questions the law of this determination; since physic and salves were in use before licensed physicians and surgeons, wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in physic, though it may be of use to make people cautious and wary, how they meddle too much in so dangerous an employment."[4]

Physician or surgeon if need be licensed to entitle exemption.

Certainly, a patient who puts himself under the treatment of a medical practitioner qualified or otherwise gives an implied consent to suffer the harm and to take the risk. There is no doubt about it; but where the medical practitioner so called, is not qualified or begins to apply a medicine which no man in his senses would dare to apply, the consent is not a consent obtained in good faith. Good faith always implies due diligence and caution. In the case of a person who offers to treat others, this diligence and caution do not merely refer to the moment the act is done, but also to the learning and the experience the doer has to have acquired earlier. If a person sets out to be a doctor without knowing anything of the job, and tries to do the best he could under the circumstances, still he would be acting in bad faith, because he has set himself up as a doctor without the appropriate education, training and experience. Similarly, when a person administers quantities of a poison or a drug known to everybody and to him particularly after his experience as

Consent on the part of patient and good faith on the part of medical practitioner are interdependent.

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1. Sukarao Kabiraj *v.* Emperor, I. L. R. 14 Cal. 566.
2. Section 52, *ante*.
3. 1 Hale P. C. 429.
4. 4 Black, 197. It may be added that this view has since been unanimously adopted by the Courts; Crick, 1 F. & F. 519; Webb, 1 M. & Rob. 405; Crook, 1 F. & F. 521; and cases cited *post*.

a deadly poison, pretending to treat his patient, there is no good faith at all. The two elements of consent on the part of the patient and of good faith on the part of the medical practitioner are interdependent and nobody can claim the benefit of this exception without good faith.[1]

7. Only care and attention required.—It has thus been long since settled that what is required is care and attention, not necessarily special skill and knowledge. This was clearly laid down by Hullock, B., in a case in which the prisoner had been arrainged before him for compassing the death of a person by thrusting a round piece of ivory against his rectum. "It is my opinion that it makes no difference whether the party be a regular or irregular surgeon; indeed, in remote parts of the country, many persons would be left to die, if irregular surgeons were not allowed to practice. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. . . . In the present case to evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner and it might have failed. . . . it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or unlicensed surgeon, should fail that surgeon would be liable to be prosecuted for manslaughter."[2] So in another case, the prisoner has been known to act as an accoucheur among the lower classes of people, and as such safely confined the deceased, but two days later the deceased suffered from a *prolapsus utery* which the prisoner, mistaking to be a part of the placenta, attempted to pull out, and in so doing he lacerated the uterus and severed the measentric artery causing the death of the patient. The prisoner was thereupon indicted for murder but Lord Ellenborough, C. J., charging the jury said, that, "though the accused was not a qualified accoucheur the fact that he had confined many women at different times showed that he had some degree of skill and the only question that remained was whether there was any want on attention of his part amounting to criminal negligence."[3]

Only care and attention and not special skill and knowledge.

8. True test of proper care.—But want of care must depend upon the circumstances of each case. Where, for instance, a quack induced a person two of whose relations had died of consumption, to place herself under his treatment stating that she should die unless she became his patient, and thereupon he applied a noxious liniment which produced a wound which the prisoner went on describing as an improvement, and which he did nothing to stop and to which she eventually succumbed in a fortnight, it was held that the prisoner had been guilty of gross imposture and that he could not be acquitted.[4] In this case the prisoner was able to produce 29 witnesses who had been patients of the prisoner, and were satisfied with his skill and diligence; but nevertheless the jury found him guilty, because he had applied a dangerous ointment in a reckless manner and had, moreover, hoaxed the deceased with false assurances of her improvement, in spite of her ulcer which was mortifying and suppurating and growing worse from day to day.

Test of proper care would depend upon circumstances of each case.

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1. Juggankhan Jamshankhan *v.* State, A.I.R. 1963 M. P. 102 at p. 103 : 1963 M. P. L. J. 839.
2. Van Butchel, 3 C. & P. 629.
3. Williamson, 3 C. & P. 635.
4. St. John Long, 4 C. & P. 398.

Proper and adequate care and attention to be judged by the effects produced.

Whether the care and attention employed in a case has been adequate and proper may be judged by the effect produced.[1] And so Bolland, B., observed in the same case: To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed he has acted with due degree of caution, or on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy or of gross rashness in the applcation of it and death ensues in consequence, he will be liable to a conviction for manslaughter."[2] The two cases instituted against one St. John Long aptly illustrate the operation of this rule. In the one case the prisoner had been visited by his patient, of whose condition he was made aware from day to day, in spite of which he went on asserting that the symptoms seen were just the symptoms to be expected in a case of cure, whereas in the second case the prisoner had applied probably the same liniment, but after the application he did not know the whereabouts of his patient and when he did, she was already under the treatment of another person. Consequently the jury convicted him in the first case and acquitted him in the other.

Persons acting with mercenary motives and those inspired by charity, etc.

9. **What circumstanccs are material**.—The amount of care and attention required in a given case depends no less upon the nature of the disorder, the character of the medicine used, than upon the education and experience of the prisoner. The same latitude cannot be allowed to a person working from mercenary motives, as to one whose act was inspired by charity and benevolence. A person who handles a dangerous poison, such as morphia, cannot be excused on the ground of mistake if he had administered it without weighing it.[3] So where a person, not a regular practitioner, administered lobelia, a dangerous medicine, it would be for the jury to say whether he had not acted so rashly and carelessly as to cause death.[4] So where the disease from which a person is suffering is such as requires skilled medical aid it would be sheer recklessness on the part of a quack to perform the operation whatever may have been the wish of the patient; for the question here is not one of consent, but the exercise of good faith, which demands care and attention independently of consent.[5] An unkilled practitioner should be as cautious in not performing difficult operations as in prescribing dangerous drugs, of the use of which he is ignorant.[6] So Cockburn, J., in one case observed: "If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he is guilty of manslaughter."[7] St. John Long was convicted because he had applied a dangerous ointment in a reckless manner. (*see* para. No. 8 above). So where

1. *Per* Barley, B., in St. John Long, (2nd case), 4 C. & P. 423.
2. St. John Long, *supra*.
3. McLeod, 12 Cox, C. C. 534.
4. Crick, 1 F. & F. 519.
5. Spiller, 5 C. &. P. 333; Lamphier *v.* Phipson, 8 C. & P. 475; Spilling, 2 M. & Rob. 107; Moakes, 4 F. & F. 920.
6. Markuss, 4 F. & F. 356; Chamberlain, 10 Cox. C. C. 486; Bull, 2 F. & F. 201; Ruddock *v.* Lowe, (1865)4 F. & F. 519.
7. Bull, 2 F. & F. 201; Nanny Simon's case, (1829) 1 Lewin 172; Joseph Webb, (1834) 2 Lewin 191; Johnes *v.* Fay, (1865) 4 F. &. F. 525.

a blacksmith applied mercury to a tumour due to cancer, in consequence of which the patient died of poisoning and the medical evidence showed that though the deceased would have died of cancer, still his death was accelerated by the medicine, it was held that having regard to the prisoner's education and employment, it was almost want of skill in the prisoner to use the dangerous substance in the manner it had been, but the question was left to the jury who found the prisoner guilty.[1]

10. Evidence of qualified medical men.—In such cases where want of care and caution in the prisoner is alleged, the evidence of qualified medical men is admissible for the purpose of showing that the disease sought to be cured was serious, or that the medicine employed was unsuitable and dangerous. But the prisoner cannot call evidence to show that he had successfully treated others for similar complaints for the question to be inquired into is not the general competency of the prisoner but his competency in the particular case.[2]

Lastly, the greater the education of the prisoner, the greater will be the amount of care and attention required. As Tindal, C. J., said : "Every person who enters into a legal profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause, nor does a surgeon undertake that he will perform a cure nor does he undertake to use the highest possible degree of skill ; there may be persons who have higher education and greater advantages than he has, but he undertakes a fair, reasonable and competent degree of skill.[3]

Greater the education greater the amount of care and attention required.

These principles equally apply to other persons requisitioned for assistance. A fellow sportsman cannot refrain from firing to rescue his comrade from the grip of certain death, merely because his shot might miscarry and kill the very person he intended to save. The test in both cases is the same. Did he act for the benefit of the other, and had used proper care and attention ?

11. Corporal punishment by schoolmaster.—When a child of over 12 years of age goes to a school, it may be assumed that the child gives an implied consent to subject itself to the discipline and control of the school authorities and to receiving such reasonable and moderate corporal punishment as may be necessary for its correction and for maintaining school discipline. Under Sec. 90, Penal Code, a valid consent to suffer harm may be given by a person over 12 years of age.[4]

It cannot be denied that having regard to the peculiar position of school teacher he must in the nature of things have authority to enforce discipline and correct a pupil put in his charge. To deny that authority would amount to a denial of all that is desirable and necessary for the welfare, discipline and education of the pupil concerned. It can therefore be

Reasonable and moderate harm to pupil by school teacher.

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1. Crook, 1 F. & F. 521.
2. *Per* Maule, J., in Whitehead, 3 C. K. 202 ; explaining Williamson, 3 C. & P. 635 as follows : "In Williamson the witnesses were asked generally *causa scientiae*. Neither on the one hand nor on the other can other cases be gone into. The attention of the jury must be confined to the present case."
3. Lamphier *v.* Phipson, 8 C. & P. 475.
4. G. B. Ghatge *v.* Emperor, A. I. R. 1949 Bom. 226 at p. 228 : 50 Cr. L. J. 789 : 4 D. L. R. Bom. 43 : 51 : Bom. L. R. 103.

assumed that when a parent entrusts a child to a teacher, he on his behalf impliedly consents for the teacher to exercise over the pupil such authority. Of course, the person of the pupil is certainly protected by the penal provisions of the Indian Penal Code. But the same Code has recognised exceptions in the form of Secs. 88 and 89. Where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of the exceptions. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted. The principle of Sec. 89 would be available even to a case of a child above the age of 12 years.[1]

Merely because a teacher administering corporal punishment to a student aged 13 years exceeded limits prescribed by the administrative circular of the Board of Secondary Education, it cannot be said that he has deprived himself of the protection given to him under Sec. 88 of the Indian Penal Code, because the circular of the Board of Secondary Education cannot and does not override the provisions of the Penal Code. The mere fact that he exceeded the limits prescribed by the circular of the Board of Secondary Education does not prove that the teacher did not act in good faith.

The English law also recognises that while the child is at school, the schoolmaster is in the position of a parent, that the parental authority is delegated to the schoolmaster and the schoolmaster represents the parent for the purposes of correction.[2] The Rangoon High Court has held in *Emperor* v. *Maung Ba Thaung*,[3] that the schoolmaster can inflict reasonable corporal puinshment. In that case a schoolmaster was prosecuted under Sec. 323 of the Indian Penal Code for beating a boy of the school with a cane. It was held that the schoolmaster had committed no offence in view of Sec. 89 of the Indian Penal Code because the schoolmaster acted *bona fide* in the interest of school discipline.

The Madras High Court has held in *Sankunni* v. *Venkataramani*,[4] that a school teacher as delegate of the parent may for the purpose of correcting the child inflict moderate and reasonable corporal punishment. The Bombay High Court has also held in *G. B. Ghate* v. *Emperor*,[5] that a school teacher commits no offence, if he inflicts moderate corporal punishment on a pupil. In that case the boy was 15 years of age and the school teacher gave 5 or 6 strokes with a cane as the boy was guilty of misconduct in his class. It was held that the school teacher committed no offence in view of the provisions of Sec. 88 of the Indian Penal Code as the punishment was for correcting the boy and for maintaining school discipline.[6]

89. Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied of the guardian or other person having lawful charge of that person, is an offence by

Act done in good faith for benefit of child or insane person, by or by consent of guardian.

1. M. Natesan *v.* State of Madras, A. I. R. 1962 Mad. 216 at p. 218 : 1962 All. W.R. (Sup.) 27.
2. *Vide* Regina *v.* Hopley, (1860) 2 F. & F. 202 ; Cleary *v.* Booth, (1893) 1 Q. B. 465.
3. A. I. R. 1926 Rang. 107.
4. A. I. R. 1922 Mad. 200.
5. A. I. R. 1949 Bom. 226.
6. Ganesh Chandra Saha *v.* Jiw'Raj, A.I.R. 1965 Cal. 32 at pp. 33, 34 ; 68 C. W. N. 1081.

reason of any harm which it may cause or be intended by the doer to cause or be known by the doer to be likely to cause to that person :

Provided—

Firstly.—That this exception shall not extend to the intentional causing of death or to the attempting to cause death ;

Secondly.—That the exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death for any purpose other than the preventing of death or grievous hurt, or the curing of any griveous disease or infirmity ;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievvous hurt, or the curing of any griveous disease or infirmity ;

Lourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death but not intending to cause the child's death. *A* is within the exception inasmuch as his object was the cure of the child.[1]

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Consent by guardian.
5. Corporal punishment by schoolmaster.
6. Right of schoolmaster outside school.
7. "Person of unsound mind."
8. "Benefit."
9. "For the benefit of a person under 12 years of age."
10. "The age of consent."

1. Analogous law.—This section was Cl. 71 which the authors justified on the ground that, as the harm here inflicted was on a lunatic or on a child under 12 years of age, something more than mere good faith and benefit was necessary. This is provided in the four provisos. The authors had appended six illustrations to their note of which only Ill. (*d*) was enacted while the other five were committed. These related to the parent chastising his child or confining it for its benefit or to prevent it from falling into the hands of kidnappers; but if he emasculated his child or abetted a rape upon his daughter, though for pecuniary benefit, his consent would not exempt him. The illustrations are covered by the provisos.[2]

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1. *See* "Good Faith", Sec. 52

2. Note P. Reprint 109.

2. Principle.—The section empowers the guardian or other person similarly situated to inflict harm either himself, or consent to its infliction by another, but it requires that the inflictionof harm shall, as in other cases, be (*i*) "done in good faith," (*ii*) "for the benefit of the person" and further that though done in good faith and for the benefit of person, it is not an act which is immoral or illegal (*see* para. no. 1 above).

3. Meaning of words.—*Nothing done . . . in good faith for the benefit of a person*" : "Good faith" has been defined in Sec. 52, and its sense generally set out under Sec. 87. "Benefit" here does not mean a mere pecuniary benefit; *see* Ill. (*e*) of the original Draft Code.[1] "*Of unsound mind,*" for the meaning of which *see* under Sec. 84. The term is, however, used here in the wider sense as denoting a person who has lost control of his cognition, emotion or will. *Guardian or other person having lawful charge*" : The word "lawful" does not quality the word "guardian" but "other person" having charge of that person. A guardian *de jure* or *de facto* may validly consent; only if the consent required is of "other person," he must be one in lawful charge of the person. The section is really intended to exclude an officious intermeddler in no way interested in the welfare of the child or insane person, as the case may be.

If consent is given under a misconception of facts, it would not be a valid consent. A consent given on a misrepresentation of facts is one given under a misconception of facts within the meaning of Sec. 90, I. P. C., and as such is not useful as a consent under the Penal Code. A misrepresentation as to the intention of a person stating the purpose for which the consent is asked is a misrepresentation of a "fact" within the meaning of Sec. 3 of the Evidence Act.[2]

In a free fight where both parties intended to attack each other there would be no right of private defence.[3]

4. Consent by guardian.—This section extends the exception to harm caused either by the guardian himself or by another with his consent. It recognises the power of parental discipline over children below 12 years of age, for it permits a guardian to chastise his ward for his benefit. The schoolmaster or other persons in *loco parentis* would be excepted for the same reason.

Power of guardian to chastise his ward for his benefit.

The limit within which a person in authority may legitimately chastise another has been already discussed. All such cases are as much excepted under this section, as on the ground of general polioy (*see* para. no. 1 above). The question if and how far the husband is protected by the rule here enacted is perhaps not difficult to answer, as the section does not save any class of persons below 12 years of age. It may then be predicated as regards the husband's right of correction that he, being the guardian of his minor wife, is not precluded from administering correction.

5. Corporal punishment by schoolmaster.—There is no doubt that in English law it is recognised that a schoolmaster may inflict corporal punishment on a pupil for purposes of correction and enforcing school

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1. *See* 1 *Penal Law*, (4th Ed.), Sec. 851.
2. Parshottam Mahadev Patharphod *v.* State, A. I. R. 1963 Bom. 74 at p 78 : 64 Bom. L. R. 788 : 1963 M. L. J. 157 : 1962 Nag. L. J. 529.
3. State *v.* Kolis Hira Bhaga, A. I. R. 1961 Guj. 8 at pp. 10, 11 : (1961) 1 Cr. L. J. 54 (?).

discipline in *Regina* v. *Hopley*,[1] Cockburn, C. J., observed : "By the law of England, a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always however, with this condition, that it is moderate and reasonable." In *Mansell* v. *Griffin*,[2] it has been held that a teacher in a public elementary school has authority to inflict corporal punishment on a pupil, if the punishment inflicted is moderate, is not dictated by any bad motive, is such as is usual in the school and such as the parent might expect that the child would receive if it did wrong.[3] This principle has been accepted by the Rangoon High Court in *King-Emperor* v. *Maung Ba Thaung*.[4] In that case a schoolmaster was prosecuted under Sec. 323, Penal Code, for caning a school boy under his charge. It was not suggested that the schoolmaster was actuated by improper motives or that he was not acting *bona fide* in the interest of school discipline or that the punishment was unduly excessive, it was held that the schoolmaster had committed no offence, in view of the provisions of Sec. 89, Penal Code. The section applies to children under 12 years, but the principle has been held to be applicable to children over 12 years also.[5]

English law.

Indian decision.

6. Right of schoolmaster outside school.—As to the extent of the schoolmaster's right to punish a pupil, if the offence of which the boy had been found guilty had been committed in school there would be no difficulty. Nor would there be any difficulty if it were committed whilst the boy was on his way to or from school. In *Cleary* v. *Booth*,[6] Colins, J., remarked : "In my opinion the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing up and discipline of the child must to some extent include an authority over the child when he is outside the school walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporeal punishment in each case is right."

Lawrence, J., said : "It is difficult to express in words the extent of the schoolmaster's authority in respect of the punishment of his pupil ; but in my opinion the authority extends not only to acts done in school, but also to cases where a complaint of acts done out of school, at any rate while going to and from school, is made to the schoolmaster."

At any rate authority of schoolmaster extends complaints to them for acts done on way of the school.

But suppose the act was done outside the school on a day when the school was closed. Would the schoolmaster be justified in punishing him. Here again it is clear that if the school were closed for any length of time for a period of regular holidays, the boy would have to be held to have returned to the charge of his parents or guardian and the authority of the schoolmaster

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1. (1860) 2 F. & F. 202 at p. 206.
2. (1908) 1 K. B. 160.
3. *See* also Rex *v.* Newport, (Salop), JJ., *Ex parte* Wright, (1929) 2 K. B. 416 : Fitzgerald *v.* Northcote, (1865) 4 F. & F. 656 and Cleary *v.* Booth, (1898) 1 Q. B. 465.
4. A. I. R. 1926 Rang. 107 : I. L. R. 3 Rang. 659 : 27 Cr. L. J. 636 ; (1898) 1 Q. B. 465 followed.
5. G. B. Ghatge *v.* Emperor, A. I. R. 1949 Bom. 226 : 50 Cr. L. J. 789 : 51 Bom. L. R. 103 ; Ganesh Chandra Saha *v.* Jivraj Somani, A. I. R. 1965 Cal. 32 at p. 34 : 68 C. W. N. 1081.
6. (1893) 1 Q. B. 465.

would cease. But it is not so easy to answer the question if the school were closed for a day or two only. Such a difficulty arose in the Rangoon case.[1]

Example.

In that case the school was closed for two days. The boys were in the habit of going to night classes, but on the particular day in question there was no night class as the teacher had gone out. One boy was called out of his house by another boy on the ground that the schoolmaster wanted him and was then assaulted on the way by a number of boys. The mother of the assaulted boy complained to the schoolmaster and he punished the boy who took part in the assault. Brown, J., held: "It was presumably as pupils of the school that the boys had collected together on the road, and a direct complaint was made to the schoolmaster by the mother of the boy who was assaulted. If the schoolmaster were bound in such cases to refuse to take action it is difficult to show he could be expected to maintain proper control over the boys under his charge, and . . . he would probably incur opprobrium if his boys misbehaved themselves in such places. In all these circumstances I think it is a reasonable inference that the implied consent of the parents of the boy to his being under the discipline and control of the schoolmaster extended to the alleged offence which the schoolmaster found it necessary to punish him, and that the boy must be held at the time to have been under the authority of the schoolmaster."

7. **"Person of unsound mind."**—A person of unsound mind is for all purposes in the same predicament as a child under twelve years of age. The section does not speak of his lucid intervals but it is probable that a person, though of unsound mind, would be allowed to judge for himself in his lucid intervals. But it would be no illegality if the guardian even then exercised the same power as at any other time, for the section confers upon him a power which is in no way limited or qualified by the fits of the maniac.

8. **"Benefit."**—The power conferred by this section must be exercised for the benefit of the person and in good faith. The "benefit" here spoken of is the personal temporal benefit, not being merely a pecuniary benefit. A person may firmly believe that it would be to the benefit of his child, if it were sacrificed to his deity. He is not, therefore, justified in offering him as a sacrifice. Some persons have a belief that it is an act of deity to offer their virgin daughters to the deity. The section will not justify their action, whatever may have been their motive. Indeed, the section does not except cases on the ground of so-called spiritual benefit. If it were so, it would not be difficult to justify the most atrocious crime on that ground. Moreover, it will place the life and liberty of infants too much in the hands of their guardian.

9. **"For the benefit of a person under 12 years of age."**—To obtain the benefit of the exception under Sec. 89, it is necessary to show that the act was done for the benefit of the minor. Where the husband desires to have possession of his wife who has not attained the age of puberty, presumably with the intention of sexual intercourse with her, the act is not for her benefit and one which it is the policy of law to prevent. It cannot, therefore, be said that he is entitled to take his minor wife away whether she desires it or not.[2]

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1. Emperor *v.* Maung Ba Thaung, A. I. R. 1926 Rang. 107 at pp. 108, 109: 27 Cr. L. J. 636: I. L. R. 3 Rang. 659.
2. Nanku *v.* Emperor, A. I. R. 1935 All. 916 at p. 917: 37 Cr. L. J. 35: 159 I. C. 183: 1935 A. W. R. 1081: 1935 A. L. J. 1096.

10. "The age of consent."—Unlike the last section this section does not prescribe the age of consent, and it may be a question whether the section applies to all persons irrespective of age. But since the next section refers to the consent of the guardian in the case of persons under twelve years of age, and Sec. 90 enacts that unless the contrary appears from the context, a consent is not such a consent as is intended by this section, if it is given by a person who is under twelve years of age, it follows that this section permits a minor above that age to consent to an act done under this section. But the validity of consent on the ground of non-age or other incompetency is thrown into the background by the provisions of Sec. 92 which provides for such cases. Of course, one person seeing another in distress will not wait for the pharisaical formality of a formal consent, which will in most cases be presumed from acceptance of service or the exigency of the case.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knowing or has reason to believe, that the consent was given in consequence of such fear or misconception ; or

Consent known to be given under fear or misconception.

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent ; or

Consent of insane person.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Consent of child.

SYNOSIS

1. Analogous law.
2. (*a*) Consent under misconception.
   (*b*) Consciousness.
   (*c*) Mere submission is not consent.
   (*d*) Merely taking the risk.
3. Unintelligent consent.
4. Evidence of consent.
5. Consent of a child.

1. Analogous law.—This section does not define consent, but merely provides that wherever the term consent is used in the Code it must be deliberate and free.[1]

2. (a) Consent under misconception.—In order then that there should be such a consent, the mind must have materials to work upon. In the first place it must have knowledge or consciousness of the act consented to.[2] A person consenting under a "misconception of fact" cannot be said to consent within the meaning of the section. Such misconception may arise from fraud or a misrepresentation of fact.[3] Suppose, for instance, that

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1. Story's *Equity Jurisprudence*, Sec. 222.
2. Lock, 12 Cox 244 ; Nagwa Shwe Kin, 8 L. B. R. 166 : 30 I. C. 133.
3. Jaladu, I. L. R. 36 Mad. 453 at pp. 456 and 457; Soma, (1916) P. R. (Cr.) 17; Mg Ba Chit, I. L. R. 7 Rang. 821 at pp. 836 and 837.

a person is told by a medical man that a certain drug, if taken internally would cure him of his ailment. He believes him and consents to take the drug which was poison and dies. Here his consent cannot be availed of because it was given under a misconception of facts. Similarly, where the accused who professed to be snake-charmer persuaded the deceased to allow them to be bitten by a poisonous snake, inducing them to believe that they had power to protect them from harm, there was consent, but it was given under a misconception of facts, that is, in the belief that the accused had power by charms to cure snake-bites and the accused know that the consent was given under such misconception. It was, therefore, not such a consent as is here understood.[1] So there have been several cases in which women consented to the connection on the assurance of their medical men that it was part of the treatment, and as such, necessary for the cure, in all of which cases consent could not be used to exculpate the criminal.[2] In such a case it may be said in the words of Wilde, C. J., that "she consented to one thing ; he did another materially different on which she had been prevented by his fraud from exercising her judgment and will."[3]

Misconception may arise from fraud or misrepresentation of fact.

Where a person consents to a thing on the assumption of facts which in fact did not exist, the result is the same as if on the true facts there never had been any consent. Field, J , in one case said : "The actual circumstances were that the prisoner, knowing he had a foul and infectious disease upon him and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited intercourse. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances, I think, that her consent to the intercourse in fact was given upon the implied condition that, to the knowledge of the prisoner, the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, i. e. a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature, one which, in all probability, would communicate to her a foul disease, to which, the jury have found, that she would not have consented, had she known the state of his health. It seems to me, therefore, to follow, that the mere consent of the prisoner's wife to an act, innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did, and, moreover that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease. . . . The result, therefore, at which I have arrived, is that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse because although he knew yet his wife did not know, and he wilfully left her in ignorance as to the real nature and character of that act."[4] "Where consent is obtained by duress, fraud, or misrepresentation, there is not even the freedom of will necessary for consent."[5]

Instances.

Of course, it is not necessary that the misconception of facts should have been brought about by the accused. All that is necessary is that he must know or have reason to believe, that the consent was given under the misconception of facts. If, therefore, there be a misconception of facts

Misconception of fact and its knowledge to accused.

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1. Ponnai Fattemah, 12 W. R. 7.
2. Flattery, 2 Q. B. D. 410 ; Young, 14 Cox. C. C. 14.
3. Case, 1 Dent. C. C. 580 at p. 582, citted with approval, *per* Mellor, J., in Flattery 2 Q. B. D. 410 at p. 413.
4. Clarance, 22 Q. B. D. 58,
5. Sunders, 8 C. & P. 265.

unknown to the accused, the result so far as he is concerned is the same, as if there had been no misconception at all. The deceased believed that he had been made invulnerable by charms. He invited the accused to try his *cla* (a stick with a blade about a foot and a half long) on him, and he struck him with it with a moderate force with the result that the arteries were cut and the deceased bled to death. The accused, an ignorant youth of 19, had probably believed in the alleged immunity of the deceased. He was consequently acquitted, the Court holding him protected both by Sec. 87 and this section.[1]

Where the deceased, a literate young woman of nineteen years, and her husband, the accused, entered into a pact that the husband should kill the wife first and then take his life out of disgust caused by his repeated failures at the annual examination for Class X, the deceased did not give consent under fear of injury or a misconception of fact and, therefore, he was guilty not under Sec. 302 but under the first part of Sec. 304.[2]

(b) **Consciousness.**—Secondly, there can be no knowledge unless there is consciousness. Where, therefore, the prisoner made the prosecutrix quite drunk, and ravished her while she was in state of insensibility, there could be no question of consent, for consent implies a conscious mind.[3] So, where the mind is blank to idiocy or imbecility, there can be no consent, and any consent given is immaterial.[4]

(c) **Mere submission is not consent.**—Thirdly, there may be both consciousness and knowledge, and yet not that freedom of mind which is the very essence of consent. So in a case where a master had taken indecent liberties with a female scholar which she did not resist, the Court told the jury that though there was submission, there was no consent as the act was done against her will.[5] So in a similar case Coleridge, J., distinguished a mere submission from consent : "Every consent involves a submission ; but it by no means follows that mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting ; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law."[6] So the submission by a boy of eight years of age to an indecent assault was held not to amount to consent; as he was ignorant of the moral nature of the act done to him. In the cases above cited there was a fear, though not perhaps the fear of injury. But where that fear is present the case is, of course, worse.

Distinction between mere submission and consent.

(d) **Merely taking the risk.**—It is sometimes said that persons who "take the risk" must be deemed to consent. Instances have been given before of cases in which the Courts have refused

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1. Nagwa Shwe Kin, 8 L. B. R. 166: 30 I. C. 133.
2. Dasrath Paswan *v.* State of Bihar, A.I. R. 1958 Pat. 190 at pp. 191, 193 : 1958 B. L. J. R. 60 : 1958 Cr. L. J. 548 : 1958 A. L. J. (Rev.) 56.
3. Complin, 1 Dent. C. C. 89.
4. Fletcher, 28 L. J. M. 85 ; Charles Fletcher, L. R. 1 C. C. R. 39 ; Barret, L. R. 2 C. C. R. 83.
5. Nicholes, Russ. & Ry. 130.
6. Day, 9 C. & P. 722 ; Lock, L. R. 2 C. C. R. 10.

to infer consent from the mere desire to take a risk. A workman may find the machinery he is employed on dangerous. He apprises his employer of that fact and protests against his having to work on it. The employer neglects to repair it. The workman is unwilling to work, but he is afraid to strike, lest he should be dismissed. He takes the risk but does not consent to it. The question, however, becomes more complicated when the question of taking risk is presented to that expression as used in Exception 5 to Sec. 300, which says: "Culpable homicide is not murder when the person whose death is caused being above the age of eighteen years, suffers death, or take the risk of death with his own consent." In this connection it was said in a case: A man who, by consent with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life; and, as he voluntarily puts himself in that position, he must be taken to incur the risk. If this reasoning is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riots, or assemblies who agree to fight together, and of whom some on each side, are to the knowledge of all the members, armed with deadly weapon."[1]

Desire to take the risk if amounts to consent.

The question of consent is said to play a part where an armed body of men encounter another body similarly armed, resulting in a free fight between them,[2] in which case it cannot be said that one party had consented to fight the other. The intention, indeed, was not to fight at all, but to overawe the other party to submission by the show of force. In such a case, the question of consent does not arise, though, if death is caused it may be a question what offence the combatants had committed. The subject is discussed under Sec. 299.[3]

Question of consent does not arise in case of free fight.

3. Unintelligent consent.—The second paragraph deals with the semblance of consent which is, however, not real consent as understood in law. If a person consents to an act, "the nature and consequence" of which he does not understand, his consent is inoperative and ineffectual. The meaning of the phrase "nature and consequence" of an act has been explained before Sec. 83. It is used here in the same sense.

4. Evidence of consent.—The question whether there was consent in a given transaction is necessarily one of fact depending upon the facts of each case. As consent justifies an act otherwise criminal, it has to be pleaded and proved by the defence. But the evidence required and given will vary in each case. Where the consent pleaded is express, it must be so established. But the accused is not bound by any technical rules of pleading and if he establishes consent of any kind, it would be sufficient. The quantum of evidence required in a criminal case is not greater than or different from that required in a civil suit.[4] As consent is a mental act it is idle to speak of "physical consent"—a phrase sometimes used to denote physical expression of consent, for "there can be no such thing as material consent and in the case of a rational being it must be mental consent or nothing".[5] The Code

Evidence of express or implied consent varies in each case.

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1. Kukier, Mather, (unrep.) cited in Shamsher Khan, I. L. R. 6 Cal. 154.
2. Shamsher Khan, *supra*.
3. Empress *v.* Rahimuddin, I. L. R. 5 Cal. 31 : 8 C. L. R. 285 ; Queen-Empress *v.* Nayamuddin, I. L. R. 18 Cal. 484 (F. B.) (I. L. R. 6 Cal. 154, dist. from).
4. Anunto Ruruagat, 6 W. R. 57 at p. 58.
5. Dee, 15 Cox. C. C. 494.

speaks of consent as express or implied, or as consent simply in which case too the term would appear to have been used to mean consent, whether express or implied. The evidence of implied consent may consist of acts, circumstances and conduct from which the Court may infer at least a state of mind not opposed to the act. In some cases implied consent may be merely a fiction, that is to say, it may be based upon a mere presumption unconnected with the actual state of one's mind

5. **Consent of child.**—This section prescribes an age-limit for consent in that it enacts that a child under twelve years of age is incapable of giving consent "unless the contrary appears from the context", i.e. unless any provisions of the Code mentioning consent permit of a different interpretation.[1]

91. The exceptions in Secs. 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause to the person giving the consent or on whose behalf the consent is given.

Exclusion of acts which are offences independently of harm caused.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm," and the consent of the woman or of her guardian to causing of such miscarriage does not justify the act.

SYNOPSIS

1. Analogous law.
2. Miscarriage.
3. Compoundable and non-compoundable offences.

1. Analogous law.—The section is intended to explain the exceptions in which the operation of consent in condonation of crime is defined. It lays down that the condonation will not extend beyond the harm caused and the offence that the causing of that harm may constitute. The section is a recognition of the two great sub-divisions of crime, public offences and private offenc. Such are the offences against the State or its various departments or its currency or revenue offences intended to produce public commotion or disturbance, acts intended to interfere with public convenience or to corrupt public morals which are all punishable regardless of the consent of any person who may have been incidentally affected by them. So the consent of an individual to obsene publications, indecent exhibitions and public nuisances has no effect on the criminal responsibility of the persons guilty of them. So again, in cases of affrays and riots consent of the individuals harmed thereby is no answer to the crime which affects the society generally. Duels and prize-fights afford other instances of offences in which the measure of criminality is not the harm consented to or caused to an individual.

Section is recognition of public and private offences.

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1. Khalil-ur-Rahman, I. L. R. 11 Rang. 213 at pp. 222 and 223 (F. B.)

2. Miscarriage.—The case of offence of miscarriage given in the illustration furnishes another, though not a very apt, example of the operation of the rule. With regard to this offence, there are two theories. It is, on the one hand, contended that the offence partakes of its public character on account of the injury caused to the child, and as affecting society, by preventing the increase of its population. It is, on the other hand, said that the injury both to society, and the child, is too remote, to be penal, but the unsoundness of this view is apparent, since an operation which is both dangerous to the life of the mother as well as deterrent to the progress of population cannot be regarded but as unlawful, regardless of the consent of the mother.

3. Compoundable and non-compoundable offences.—The same policy underlies the classification of offences made in the Code of Criminal Procedure between "non-compoundable" and "compoundable" offences, the former being offenoes in which the consent of the individual directly affected is insufficient to exculpate the offender, the latter being those in which the party wronged is permitted to exonerate the wrong-doer.

The illustration quotes the expression "by reason of such harm", used in Secs. 87, 88 and 89 in a way which would seem to suggest that this section is naturally implied in those sections which it is not. If it were, the illustration would have been sufficient without the section.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit :

Act done in good faith for benefit of a person without consent.

Provided—

Firstly.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death ;

Provisos.

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death, or grievous hurt or the curing of any grievous disease or infirmity ;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt ;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations

(*a*) *Z* is thrown from him horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A* not intending *Z*'s death, but in good faith for *Z*'s benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.

(*b*) *Z* is carried off by a tiger. *A* fires at the tiger knowing it to be likely that the shot may kill *Z* but not intending to kill *Z*, and in good faith intending *Z*'s benefit. *A*'s ball gives *Z* a mortal wound. *A* has committed no offence.

(*c*) *A*, a surgeon sees a child suffer an acoident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. *A* performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

(*d*) *A* is in a house which is on fire, with *Z*, a child. People below hold out a blanket. *A* drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending in good faith, the child's benefit. Here, even if the child is killed by the fall, *A* has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of Secs. 88, 89 and 92.

SYNOPSIS

1. Analogous law.
2. Illustrations.
3. Principle.
4. Meaning of words.
5. Beneficial act without consent.
6. Exceptions.

1. Analogous law.—In its natural sequence this section should have found a place next after Sec. 89. It deals with cases of emergency not covered by that section. It was thus justified by the Draft Committee: "There yet remains a kindred class of cases which are by no means of a rare occurrence. For example, a person falls down in an apoplectic fit. Bleeding alone can save him and he is unable to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught by a blanket below but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall though the person who threw it down knew that it would very probably be killed, and although he was not the child's parent or guardian, he ought not to be punished. In these examples there is what may be called a temporary guardianship, justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed or when the public

Justification for the section explained by Draft Committee.

peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by Cl. 72 (now 92), a protection very similar to that which we have given to the acts of regular guardians."[1]

2. Illustrations.—Four illustrations are appended to the section, to which the following may also be added :

Additional illustrations.

(*a*) *A* is rendered insensible by an accident which makes it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(*b*) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(*c*) *B* is drowning and insensible. *A*, in order to save his life, pulls him out of the water with a hook which injures him. This is no offence.[2]

3. Principle.—This section enacts a rule which carries its own defence. The four exceptions were added because it was considered inexpedient to give unlimited power to officious interference with one's self, however benevolent They demand that the interference shall be to save life, not to imperial it, and no one has a right to interfere with another unless he is reasonably certain of doing more good than harm.

4. Meaning of words.—"*By reason of any harm*" : This phrase has been used in Secs. 87, 88 and 89, and in the illustration to Sec. 91. It refers to cases in which the mere causing of harm alone constitutes an offence. "*For whose benefit*" : As the explanation adds, this does not mean a mere pecuniary benefit. It does not also mean a spiritual benefit. "*If the circumstances are such*" : These circumstances may have affected his mind or power of speech or thought. A man gagged and wrongfully confined may be in such a predicament. "*It is possible to obtain consent in time*", of which the person aiding will be the sole judge.

5. Beneficial act without consent.—This section deals with those cases in which the exigency of the case requires prompt assistance, in which the formality of consent might delay the benefit till it is too late. The acts authorised without consent are therefore only such acts as from their urgency call for immediate relief, in which no one will think of pausing for consent before rendering assistance. Indeed, in such cases the dictates of humanity prescribe a rule far higher than the one recognised by the criminal law. For who will think of asking consent to justify an interference in a quarrel between two persons and would it be wrongful confinement if the timely interference of a stranger prevents the combatants from coming to blows? These are trivial cases which may be excused under Sec. 95, but nevertheless they illustrate the first principle in the law of consent which underlies civil as well as criminal law. For civil law as much welcomes the presence of a stranger[3] as the section under discussion. In both the cardinal rule be to observed is that (*i*) his interference was necessary ; (*ii*) that it was beneficial; and (*iii*) that it was made when consent was unavailable.

Cardinal rule in law of consent in civil and criminal law.

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1. Note B, Reprint, p. 109.
2. Stephen's *Criminal Law*, Art. 226.
3. E. g., Sec. 69, Indian Contract Act (Act IX Act of 1872); Sec. 95, Transfer of Property Act (Act IV of 1882).

6. Exceptions.—The four exceptions appended to the section are self-explanatory. The first exception requires that under no circumstances shall a person *intentionally* cause the death of another or attempt to cause it. The exception is self-evident, but by no means supererogatory. A person may find himself surrounded by robbers who make a criminal assault on his daughter, whereupon he decides to kill her to save her from the disgrace. So a person may offer his child in sacrifice, believing that it will be to its spiritual benefit. So, again, while a person may not *intend* another's death, he may risk his life without calculating its cost. This is safeguarded by the second exception. The third exception enunciates the salutary rule that the hurt caused shall in no case exceed the hurt to be averted, which is another way of saying that the interference shall not cause more harm than good. The last exception is directed against assistance rendered for an unlawful purpose. The case of a number of eunuchs having caused the death of a person in trying to emasculate him may be cited by way of an illustration. In that case the deceased desired to emasculate himself and for that purpose employed an old eunuch who, however, performed the operation by cutting off his private parts without ligatures with the result that the patient died from bleeding. It was held that the accused were all guilty.[1]

I Exception.

II Exception.

III Exception.

IV Exception.

93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Communication made in good faith.

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

SYNOPSIS

1. Analogous law.
2. Principle.
3. "Benefit."

1. Analogous law.—A communication made in good faith may amount to defamation,[2] or it may perhaps amount to hurt,[3] or more. The section sets at rest any doubt that may exist on the subject by protecting all communications made in good faith.

2. Principle.—Two things are essential to protect a person under this section: *Firstly*, the communication must be made in good faith, and *secondly*, it must be made for the benefit of that person. It is not clear how the illustration given answers this second requirement. A doctor may be under the painful necessity of giving his patient a timely warning of his approaching dissolution, to enable him to settle up his worldly affairs, to arrange for his succession, and in such a case, speaking broadly,

Two essentials for protection under this section.

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1. Baboolun Hijrah, 5 W. R. 7.
2. Section 499, *post*.
3. Section 319, *post*.

it will be "for the benefit of that person," though the resultant shock may kill him. But without any such paramount necessity a communication which merely hastens his patient's death without doing his state any good could scarcely be regarded as entitled to any exceptional privilege.

3. "Benefit."—The word "benefit" has been here used undoubtedly in its wide sense as including both personal or pecuniary benefit where death is inevitable, it will be to the patient's pecuniary benefit that he should be warned of it betimes, so that he may have time to settle up disputes which may avert the ruin of his fortune. Such a communicatian may even be for the personal benefit of the patient if it induces him to submit to a treatment of the last resort.

94. Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.[1]

Act which a person is compelled by threats.

Explanation 1.— A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits knowing their character is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.--A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Crime under compulsion:
   (1) When compulsion is no defence.
   (2) When a compulsion is a defence.
5. Proviso.
6. Reasonable apprehension of instant death.
7. Explanation 1.
8. Explanation 2.

1. Analogous law.—This section is narrower than the English law under which, except in cases of treason and homicide, a person who has been forced to commit an offence by fear of death or of grievous bodily harm is exempt. The fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels[2] though an actual force upon the person and present fear of death may form such excuse, provided they continue all the time during which the party remains

1. MacGrowther's case, (1746) 18 St. Tr. 391. 2. *Ibid.*

with the rebels.[1] As Blackstone observed: "A sixth species of defect of will is that arising from compulsion and inevitable necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves and which it is to be presumed his will if left to itself would reject. As punishments are therefore only inflicted for abuse of the free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion."[2] Of this nature there is the obligation of civil subjection, whereby the inferior has to obey the behests of his superior. as where the State commands us subjects to do an act contrary to religion and sound morality. "The sheriff, who burnt Latimer and Ridly, in bigoted days of Queen Mary, was not liable to punishment from Elizabeth for executing so horrid an office, being justified by the commands of that magistracy which endeavoured to restore superstition under the holy auspices of its merciless sister prosecution."[3] So in the case of persons in private relations the principal case where constraint of a superior is allowed as an excuse for criminal misconduct proceeds upon the matrimonial subjection of the wife to her husband, which the law, indeed, presumes so great that she is exempt from punishment for theft or even a burglary if committed in her husband's company.[4] But this is only a presumption, and even as such it only applies to minor offences to *mala qua prohibita* and not *mala in se*, such as treason, murder or robbery, for which, apart from her husband's coercion, she is equally responsible.

In this respect this section lays down a widely divergent rule according to which no compulsion justifies murder and offences against the State punishable with death, but, compulsion may justify other offences if the compulsion was not self-invited.[5]

2. Principle.—"Criminal law," wrote Sir James Stephen "is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit a crime. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, 'if you do it, I will hang you'. Is the law to withdraw its threat if some else says, 'if you do not do it, I will shoot you'?

"Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminal could confer impunity upon their agents by threatening them with death or violence if he refused to execute their commands. If impunity could be so secured, a wide door would be opened to collusion, and encouragement would be given to associations of malefactors, secret or otherwise."[6]

3. Meaning of words.—"*Threat which at the time of doing it, etc.,*" that is, the apprehension of instant death must be present at *the time of the act*. The person must be under the belief that he is to do or die, "*providep*

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1. 1 Hale P. C. 44 (516); Hawk, P. C. C. 1, Sec. 14.
2. 3 Black. 27.
3. 4 Black., 28.
4. Black., 28: 1 Hale P. C. 45, 1 Hawk. P. C. C. 1, Sec. 9.
5. Buncumbe, 1 Cox, C. C. 183.
6. 2 His. Cr. Law 107.

the person did not of his own accord, etc.", as in the case contemplated in Explanation 1. Having joined a gang of dacoits, a person could not then plead compulsion for his initial act was illegal, and one which he was by no means bound to do. "*Seized by a gang of dacoits*," i. e. unawares; not if the smith was one of the party but unwilling to force the door.

4. Crime under compulsion.—(1) *When compulsion is no defence.*—This section enunciates a simple rule under which the law recognises the presence of compulsion as a defence to criminality. It enacts that no compulsion can justify murder and offences against the State punishable with death. As regards the first, no man has a right to take another's life to save his own.[1] As regards the second, the State has a right to insure its own preservation by enacting deterrent pains and penalties. In this respect all States do not take the same view of their rights and responsibilities. Indeed in England the law in this respect has long since been settled and is different. So McGrowther who was tried for high treason in 1746, for having joined the Duke of Perth in arms against the King, proved that being a tenant of the Duke he had been compelled by him to join the rebel army, which had threatened to burn his house and to destroy his cattle and corn, and that several of the Duke's men came and threatened him with destruction and bound him with cords till he consented to serve as a lieutenant of the Duke's rebel regiment whereupon Lee, C. J., told the jury that there is, nor ever was, any tenure which obliged tenants to follow their Lords into rebellion. And as to the matter of force, he said, that the fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels. "The only force that doth excuse is a force upon the person,and present fear of death ; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon he could."[2] Such force will not excuse joining in a rebellion in this country. In other words, English law permits a man save his life at the expense of the State, but in India the State demands that it shall be preserved it may be, at the expense of its subjects. But offences against the State to which compulsion is no answer are only those punishable with death. There is only one such offence in the Code, that of waging war against the Government of India,[3] and the only section to which this section is applicable are Secs. 121 and 300.[4] In the case of murder, compulsion is not only not a defence, but is not even an extenuating circumstance.[5]

English law.

Indian law.

(2) *When a compulsion is a defence.*—With these exceptions the rule here enunciated applies. It lays down that an act committed by a person under the fear of instant death is not a crime. But the fear must be present *at the time* of the act. If it preceded the act, it ceased to exercise the influence

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1. Dudley and Stephen, 14 Q. B. D. 273 ; Umar Din, 3 L. L. J. 287 : 67 I. C. 340.
2. McGrowther, (1746) 18 St. Tr. 301 at pp. (393, 394, followed in Aung Hla *v.* Emperor, A. I. R. 1931 Rang. 235 at p. 241; I. L. R. 9 Rang. 404 : 135 I. C. 849; 33 Cr. L. J. 205.
3. Section 121, *post*.
4. Aung Hla, I. L. R. 9 Rang. 404.
5. Emperor *v.* Itwa Munda, A. I. R. 1933 Pat. 258 at p. 261 : 175 I. C. 300 : 39 Cr. L. J. 554 : 19 P. L. T. 476.

which alone entitles a person to exoneration.[1] So where certain persons admitted having perjured themselves to incriminate a person of murder because they had been so tutored by the Police, the defence was rejected, because they were under no compulsion to make the statements which they did, and which would have had the effect of sending an innocent man to the gallows.[2] Indeed, in permitting a man to commit a crime for the sake of his life, law does not by any means set an exalted standard of morality before the people, but the law is a corrector of evil and not a moralist and it never places before itself a standard of altruism which people will generally find it easy to follow. If it did so, the law will soon be more honoured in its breach than by its observance. It has, therefore, been enacted that self-preservation shall be a defence, but a defence only when it was a case of self-preservation. Where, therefore, certain persons offered bribes to classes of the revenue survey, alleging that the bribes were paid under the influence of threats held out by the acoused of raising the assessment, cutting down the hedges, and erecting new boundary marks, it was held that the bribe-givers were all accomplices, as nothing but fear of instant death could excuse their crime.[3] But the person may not be threatened with death and yet the person by paying the money need not necessarily be an accomplice. Such a case would arise where the offence discloses facts constituting the offence of extortion.[4] Of course, this section only lays down the general rule, and it is subject to the special provisions of other parts of the Code.

Sel-preservation when a defence.

This section lays down general rule subject to provision of this Code.

In order, however, to entitle a person to avail himself of the general exemption here provided for, he must bring his case strictly within its compass. He must not only show that he was not a voluntary agent, but he must further show that he was given no alternative but to do or die. On this subject people have curiously very vague notion in this country. They seem to think that compulsion, whether physical or moral, of any degree, is sufficient to justify their crime. A policeman is no more justified in torturing a man to death simply because he had been ordered to do so by his superior,[5] than a robber can justify his act on the plea that he had to obey his fellow confederates. If this has been a sufficient justification, the law would be robbed of its most salutary check for necessity would be made "the legal cloak for unbridled passion and atrocious crime".[6] Necessity, short of the threat of death, does not, therefore, excuse a crime, though as a matter of judicial propriety it will necessarily mitigate the punishment.[7]

Compulsion physical or moral if sufficient to justify crime.

Where the evidence shows that the accused continued to be under the threat of instant death at the hands of the murderers not only when he was

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1. McGrowther, (1746) 18 St. Tr. 391; Emperor v. Autar, A. I. R. 1925 All. 315: I. L. R. 47 All. 306: 86 I. C. 52: 23 A. L. J. 25.
2. Sonno, 10 W. R. 48.
3. Queen-Empress v. Maganlal and Motilal, 14 Bom. 115 at pp. 131, 132; Secs. 383 and 384.
4. Sections 363, 384.
5. Queen-Empress v. Latif Khan, I. L. R. 20 Bom 394.
6. Dudley, 14 Q. B. D. 273.
7. 2 Stephen Cr. Law. 107. But see Itwa Munda, A.I.R. 1938 Pat. 258: 39 Cr. L. J. 654: 175 I. C. 300.

asked to hold the legs of the accused but also when he was asked by the murderers to carry the dead body from the place of the murder to another place despite the accused's omission to mention that he removed the dead body on account of such fear it was reasonable to hold that the accused could reasonably apprehend that if he refused to comply with that direction he would be killed.[1]

Where a person commits the offence of abetment of murder under threats of being put to death in the case of non-compliance, he commits no offence in view of the provisions of this section.[2]

In the above-noted case the accused had reasonable cause to apprehend that instant death to him would result if he would not hold the legs of the deceased. To hold the legs under such circumstances is not an offence when such holding did not amount to the commission of the offence of murder or any offence against the State punishable with death. Only such offences, even if committed under the apprehension of instant death, are not excused on the ground of committing them under such threat. Similar view was taken in *Umadasi* v. *Emperor*.[3]

5. Proviso.—Even where a person is shown to have acted under the fear of instant death, still it must be shown that the predicament in which he found himself was not brought about by himself. If the accused of his own accord had placed himself in a situation by which he became subject to the threats of another person, whatever threats may have been used towards him, the benefit of Sec. 94 cannot be availed of.[4] As the authors of the Code wrote: "If a captain of a merchantman were to run his ship on shore in order to cheat the insurers and then to sacrifice the lives of others in order to save himself from a danger created by his own villainy ; if a person who had joined a gang of dacoits with no other intention than that of robbing, were, at the command of his leader accompanied with threats of instant death, in case of disobedience, to commit murder, though unwillingly, the case would be widely different, and our former reasoning would cease to apply: for it is evident that punishment, which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear, which a man may entertain of being brought to the gallows at some distant time, as sufficient to overcome the fear of instant death ; but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang robbers and rioters to excuse their crimes by declaring that they were in dread of their associates and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and

No man from a fear of consequences to himself has right to be a party to mischief to mankind.

1. Bachchan Lal *v.* State, A. I. R. 1957 All. 184 at p. 187 : 1957 A. L. J. 20 : 1957 A. W. R. (H. C.) 86: 1957 Cr. L. J. 344, citing Subramaniam *v.* Public Prosecutor, (1956) 1 W. L. R. 965 (P. C.) at pp. 969 and 972.
2. Bachchan Lal *v.* State, *supra*.
3. A. I. R. 1924 Cal. 1031: I. L. R. 52 Cal. 112.
4. Sanlaydo *v.* Emperor, A. I. R. 1933 Rang. 204 at p. 203 : 147 I. C. 49 : 36 Cr. L. J. 262 : 1933 Cr. C. 919.

gangs of robbers may have committed crimes which every one among them was unwilling to commit, under the influence of mutual fear, but we think it clear that this circumstance ought not to exempt them from the full severity of the law."[1] No man from a fear of consequences to himself has a right to make himself a party to committing mischief on mankind.[2]

6. Reasonable apprehension of instant death.—The only exception that justifies a person to participate in crime is a *reasonable* fear of *instant* death, not a mere threat which may or may not be carried into execution but a threat which precedes action, and an action which can only be averted by associating in the crime. The question whether the act of a person was prompted by such a fear is a question on fact depending on the circumstances of each case. But whatever the facts, three essential points must be clearly established to justify an act ; (*a*) that the person did not voluntarily expose himself to the constraint; (*b*) that the fear which prompted his action was the fear of instant death, and (*c*) that the act itself was done at a time when he was left no option but to do it or die. The threat couched in a resolution as of an anarchist meeting that a certain member shall murder a certain personage, failing which his head is proscribed, is therefore, threat of certain death, but not of instant death. It is, moreover, not a threat at all but a condition of membership, of which all members had timely notice. No anarchist can, therefore, complain that he was the victim of coercion the question whether a person was a *particeps criminis* or merely an involuntary agent will, therefore, depend upon his previous relations with the other criminals, and upon the circumstances which threw him in their company upon the threats given and resistance made and the chances that there were of his dying at their hands if he did not submit to their will.

Three important considerations for justifying the criminal act.

7. Explanation 1.—The fact that a person was coerced into joining a gang of ruffians may be a sufficient excuse, if he had been presented with the certain alternative of death in case of refusal. The mere fact that a gang of dacoits threatened to beat a recruit is no reason for joining it. But if the gang had personated, say a marriage procession oroffiocers of Government on duty, the case would be otherwise. For he had then joined a lawful assembly as he then considered it. And if the gang afterwards threw up the mask, and compelled him to commit a crime, he must still resist, and must not be a willing tool in their hands, for his duty is even then to mankind. It is only when his will is dominated by the fear of instant death that he is permitted to plead necessity in justification of his crime. The mere fear of beating or other personal violence is not a reason for swelling the rank of criminals. If such a reason were sufficient it existed in *McGrowther's* case,[3] but it was considered wholly insufficint (*see* para. No. 4, *ante*).

8. Explanation. 2—But where a person does not join a gang but is physically overpowered to join it, and is then compelled by a threat of instant death to work for it, he cannot be held responsible, for his will was never given a free play, as he was himself overpowered by physical force. Such is the case of the smith mentioned elsewhere.

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1. Note B, Reprint, p 112.
2. Tyler, 8 C. P. 616 at p. 620 ; Queen-Empress *v.* Manganlal and Motilal, I.L.R. 14 Bom. 115 at pp. 131, 132; Queen-Empress *v.* Devji Govindji, I. L. R. 20 Bom. 215 at pp. 222 and 223; Kil!ikyarara, 19 I. C. (Mad.) 207,
3. 18 St. Tr. 391.

It will be observed that the section makes no special reference to *femme covert*. Their case will, therefore, be judged by the general rule.[1]

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.[2]

Act causing slight harm.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Object and scope.
4. Meaning of words.
5. Applicability.
6. Negligible wrongs.
7. Triviality depends upon relative position of parties.
8. Petty thefts.
9. Vulgar abuse.
10. Trivial injuries.

1. Analogous law.—This section is the legal recognition of the maxim *de minimis non curat lex*.[3] So the authors observe: "Clause 73[4] is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public and for the most part dealt with by the tribunals as incorrect. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommodate him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evidence, and we think it far better to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice; for if the Code is silent on the subject the Judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning."[5]

Statement by framers of the Code.

The Madras Regulations[6] as to trivial offences remain unaffected by the section, which has no application where the act charged is an offence irrespective of whether the accused intended to cause or knew himself likely to cause harm.[7] It has, consequently, no application to offences under special or local laws,[8] which are dictated by a different policy.

2. Principle.—Law does not busy itself about unconsidered trifles. It should be stultifying itself if it concerned itself with matters too trivial to demand its notice about which men in their ordinary frame of mind do not complain. Indeed, men living in society must suffer some inconveniences and transgressions whithout which indeed no society is possible. It will be an idle travesty of law to deal with such delinquencies as if they were crimes. The Code has, therefore, rightly exempted them from that category.

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1. This omission must have been intentional, for it was noticed and animadverted upon by the Law Commissioner (First Report, Secs. 153, 154).
2. Intend to cause—Sec. 35.
3. ("Law does not care about trifles"), Sadananda Jash *v.* Shibakali Hazra, A. I. R. 1954 Cal. 288 at p. 288.
4. Now Sec. 95.
5. Note B, Reprint, pp. 109 and 110.
6. Regulation XI of 1916, Sec. 10; Reg. IV of 1821, Sec. 6.
7. John Scott, 1 N. L. R. 139.
8. *See* Sec. 40, *ante*.

3. Object and scope.—It is true that the object of framing Sec. 95 was to exclude from the operation of the Penal Code those cases which from the imperfection of language may fall within the letter of the law, but are not within its spirit and are considered, and for the most part dealt with by the courts, as innocent. It cannot, however, be said that harm caused by doing an act with intent to cause harm or with the knowledge that harm may be caused thereby, will not fall within the terms of Sec. 95. The argument is belied by the plain terms of Sec. 95. The section applies if the act causes harm or is intended to cause harm or is known to be likely to cause harm, provided the harm is so slight that no person of ordinary sense and temper would complain of such harm.

The expression "harm" has not been defined in the Indian Penal Code: in its dictionary meaning it connotes hurt; injury; damage; impairment, moral wrong or evil. There is no warrant for the contention that the expression "harm" in Sec. 95 does not include physical injury. The expression "harm" is used in many sections of the Indian Penal Code. In Secs. 81, 87, 88, 89, 91, 92, 100, 104 and 106, the expression can only mean physical injury. In Sec. 93 it means an injurious mental reaction. In Sec. 415 it means injury to a person in body, mind, reputation or property. In Secs. 469 and 499 "harm", it is plain from the context, is to be reputation of the aggrieved party. There is nothing in Sec. 95, which warrants a restricted meaning should be attributed to that word. Section 95 is a general exception, and if that expression has in many other sections dealing with general exceptions a wide connotation as inclusive of physical injury, there is no reason to suppose that the Legislature intended to use the expression "harm" in Sec. 95 in a restricted sense.

Section 95 is intended to prevent penalisation of negligible wrongs or of offences of trivial character. Whether an act which amounts to an offence is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes. A soldier assaulting his colonel, a policeman assaulting his Superintendent or a pupil beating his teacher commit offences, the heinousness of which cannot be determined merely by the actual injury suffered by the officer or the teacher for the assault would be wholly subversive of discipline. An assault by one child on another, or even by a grown up person on another, which causes injury may still by regarded as so slight, having regard to the way and station of life of the parties, relation between them, situation in which the parties are placed, and other circumstances in which harm is caused, that the victim ordinarily may not complain of the harm.[1]

4. Meaning of words.—"*Intended to cause any . . . harm*": Even the *intentional* causing of harm is here excused because of its triviality. The word "harm" here means injury of any kind, including injury to mind, body or property. "*No person of ordinary sense and temper*," and belonging to the same class as the complainant and under the circumstances, would complain. Two friends may take liberties with each other, which, as strangers, they would have resented. So, while a friend may walk into another's library and carry away a newspaper, a stranger doing the same would be guilty of theft.

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1. Mrs. Veeda Menezes *v.* Yusuf Khan Haji Ibrahim Khan, A. I. R. 1966 S.C. 1773 at pp. 1774-75.

5. Applicability.—The application of the principle underlying the section would particularly be attracted in case of a domestic quarrel such as one between a father and his daughter,[1] or between two brothers.[2]

The law does not in this section concern itself with matters too trivial to demand its notice about which men in their ordinary frame of mind do not complain. As a matter of fact, it is common experience that men living in society must suffer some inconveniences and transgressions without which no society is possible. That being so, it would be travesty of law to deal with such trivial matters as if they were crimes. It is because of this the law rightly exempted such trivial actions from the category of crimes. A close examination of the provisions of this section shows that even the intentional causing of harm specified in this section is excused because of its triviality. The word "harm" no doubt means injury of any kind, including injury to mind, body or property. It provides that in the normal circumstance even if the injury to mind, body or property is caused and if the harm is so trivial, no person of ordinary sense and temper would complain of it.[3]

6. Negligible wrongs.—This section is intended to exempt from criminality offences which, from their triviality, do not deserve the name of crimes. In one sense they are crimes because they fall within the general definition of crimes and, as such, but for this section, they would be punishable. Indeed, this section has no application unless the act in question amounts to an offence under the Indian Penal Code.[4] If there was no offence under the Code there is no need to apply the section. For instance, the accused, a servant, was ordered by his employer to take certain bags of waste paper and forms belonging to him to his yard in a certain place and there to burn and destroy them but the accused carried the bags to his own house, where he kept them presumably for sale, and he was prosecuted for criminal breach of trust, and the question was, whether the act of the accused was justifiable under this section. It was conceded that the paper was worthless to the employer and its destruction was ordered to prevent designing men from misusing it for the purpose of committing forgery, and it was held that, as the act of the accused did not amount to an offence, there was no need to resort to the provisions of this section.[5] This case undoubtedly proceeded upon the assumption that the relinquishment by the owner of his dominion over the bags had the effect of making the bags no man's property, the appropriation of which could not therefore be a crime. So where the Health Department of Government condemned as rotten a consignment of rice, and ordered its officers to destroy it, whereupon the latter appropriated it without destroying it, it was held that as the rice had ceased to be the property of the Government, the accused could not be convicted of criminal breach of trust, though they may have been guilty of disobedience of departmental rules.[6]

Section not applicable if an act is no offence under the Code.

An enclosure in which ring game is played is not a gaming-house and even if technically it could be so, the principle of Sec. 95, viz. *de minimis non curat lex* applies.[7] Similarly, it has been held that the possession of empty cartridges

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1. Mohammed Ibrahim *v.* Ismail, A., I. R. 1949 Mad. 706 at p. 761: (1949)1 M.L.J. 445: 62 M. L. W. 287: 1949 M. W. N. 323: 51 Cr. L. J. 173.
2. Kundamal *v.* Emperor, A. I. R. 1943 Sind 196 at p. 197: 209 I. C. 234: 45 Cr. L. J. 105.
3. Devendrappa *v.* State of Mysore, (1970) 2 Cr. L. J. 1188 at p. 1190.
4. Preo Nath, I.L.R. 29 Cal. 489; State Government *v.* Amrit Lal Aman Lal, A.I.R. 1953 Nag. 141 at p. 142.
5. Preo Nath, *supra*.
6. Wilkinson, 2 C. W. N. 216, followed in Preo Nath, *supra*.
7. Abdul Kadar Jan *v.* Emperor, A.I. R. 1935 Lah. 225 at p. 226: 36 Cr. L.J. 125: 158 I. C. 65.

would be ignored under Sec. 95, if it is not suspected that the cartridges would be reloaded and used as ammunition.[1]

7. Triviality depends upon relative position of parties.—Where, however, the facts point to an offence the section is applicable only if the facts disclosed make it an offence of a trivial character. The triviality of an offence, however, must not be judged solely by the measures of harm for it depends equally upon other considerations. A soldier striking his officer in anger commits an offence, the heinousness of which cannot be determined by the injury directly caused to the officer. Such assaults, if suffered, will be wholly subversive of military discipline, and they are, therefore, considered fit for exemplary punishment. This was the *ratio decidendi* of a case in which a dismissed policeman approached his Superintendent in office and asked him what had been done in the matter of his petition of reinstatement. The Superintendent replied that it had been rejected; thereupon the accused lost control of his temper and struck the Superintendent a blow across his chest with an umbrella which he had in his hand; whereupon he was convicted under Sec. 323 of the Code and sentenced to a year's imprisonment. The conviction and sentence were affirmed on the ground that though the pain caused by the blow might have been trivial, still as it was a blow struck in anger and was accompanied by language of a most violent kind, it could not be treated as a case under this section.[2] A person may pull another by the ear and the case would be one under this section, if the two persons were friends and the pulling was done in sport or by way of gentle admonition. But where an official superior pulls the ear of his subordinate in a quarrel, the case is then one which cannot be so lightly passed over.[3] In this case the complainant having attended the office late, the accused called him into his room and assaulted and insulted him by pulling him by the ear, whereupon the complainant moved for a summons for assault, which the Court held could not be refused. So, while it will be an assault of an aggravated kind if a stranger caught hold of the hand of a modest maiden, while passing along a public thoroughfare, the case would be different where the woman was of a questionable character, and the hand was caught in jest, though it had the effect of arresting her movement and causing her annoyance.[4] The object with which an act was done, no less than the relationship in which a party stood to another, will then determine the nature and degree of the crime.

Considerations for determination of nature and degree of crimes.

Valueless thing—What may be.

A thing may be valueless to one person, but it may have quite a different value to another. For example, a rough jotting of accounts between two persons in the handwriting of the obligor may have no value to the latter, but it may be a piece of valuable evidence to the obligee. Where, therefore, it was in the custody of the obligee as a token of the obligor's indebtedness, the latter would be guilty of destroying a valuable security, if he tore it up in the course of an altercation with his creditor.[5] And the fact that the account sheet was unstamped, and therefore inadmissible for the enforcement of any legal claim, would be immaterial. For though it was not a valuable security, still, since it purported to be a valuable security, the wanton act of the accused became an offence under Sec. 477 from which this section offered no escape.[6] So a person who made away with cancelled cheques which were to be filed as exhibits in a case, could not

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1. Emperor *v.* Bhopal Singh, A. I. R. 1936 All. 392 at p. 393: 37 Cr. L. J. 727: 162 I. C. 912: 1936 A. L. J. 657.
2. Sheo Gholun, 24 W. R. 67.
3. Walmsley, 1 C. W. N. cxxxiv.
4. Bhairon Missra, (1887) A. W. N. 73.
5. Ramasami, I. L. R. 12 Mad. 148.
6. *Ibid.*, followed on this last loint, Kashi Nath Naek, I. L. R. 25 Cal. 207, to the effect Kaplavaya, 2 M.H.C. R. 247: 7 M.H. C. R. App xxvi; Maula Baksb, I. L. R. 27 All. 28.

plead exemption under this section, on the ground of their intrinsic worthlessness, because, though in themselves valueless, they furnished valuable evidence of payments, which fact could not be ignored in judging of the gravity of the accused's crime.[1]

8. Petty thefts.—Again law does not regard the same offence in the same light in every case. Reference has been made before to offences relating to property exposed to view or laying in the open, theft of which is treated with special severity This must be the underlying reason in the case in which the Court refused to apply this section to the theft of dung-cakes worth one pie and mangoes worth three pies from the field of the complainant.[2] Such a case is easily distinguishable from one in which the accused was charged with theft of some pods of trees from Government ground, which were of no value to Government.[3] Such also will be the case where persons pluck fruit or leaves from road-side trees. Where a person dug some earth from an open piece of private ground the earth so appropriated having hardly any appreciable value, the Court regarded the case as a fit one to be disposed of under this section;[4] the same view was taken in another case in which a person had lopped off the branch of a tree overhanging his house, because it inconvenienced him.[5] Section 95 was made applicable to case of theft of a cheque of no value and the accused was acquitted of theft.[6]

9. Vulgar abuse.—The ordinary terms of abuse do not constitute an insult and would be covered by this rule, since no one takes them seriously.[7] Moreover, the harm caused by defamatory or insulting words may be so slight as to call in the aid of this section. Where two pleaders in the midst of a case quarrelled over a remark made by one conveying an imputation on the other whereupon the latter retaliated by calling him a "liar," the Court considered the case sufficiently met by the section.[8] So where the guard of a train asked a passenger for his ticket, stating that he suspected him of travelling without a ticket, the Court threw out the passenger's suit for damages on the ground that the matter was too trivial to call for damages.[9] It was found as a fact in the case that the guard had used the words *bona fide*, and his suspicion was not altogether unfounded, which was really the saving grace in his case, otherwise the verdict would have been probably different. So where a man was falsely charged with the theft of a goat, he was held justified in prosecuting his accuser of defamation, and the fact that he was a man of low caste could not bring his case within this exception. "The false accusation was one against the moral character of the prosecutor, defamatory in its nature, and presumably made with knowledge and intent to harm or injure the prosecutor, and unless shown to have been made in good faith, renders the party making it liable to be charged with the offence of defamation."[9] So to write of

Dafamatory cases.

1. Maula Baksh, I.L.R. 27 All. 28.
2. Ranchore, 1888 B. M. L. 400.
3. Kasya, 5 B.H.C.R. 35; Mahomed Khan, 8 C. P. L. R. 15.
4. Guljarilal, (1882) A. W. N. 229.
5. Jiwa Ram, (1881) A. W. N. 100; Mahomed Khan, *supra*.
6. Ethirajan, *In re*, A. I. R. 1955 Mad. 264 at pp. 264, 265: 1954 M.W.N. 754: 1955 Cr. L. J. 816.
7. Sharif Ahmed *v.* Qabul Singh, I. L. R. 43 All. 497; Lala Bhagirath *v.* Saiyid Ali Hamid Sahib, A. I. R. 1931 Oudh 392: 32 Cr. L. J. 991; Jas Raj Jagga *v.* Emperor, A. I. R. 1929 Lah. 234.
8. Vansitart, (1883) A. W. N. 46; Sharif Ahmed *v.* Qabul Singh I. L. R. 43 All. 497; Philip Rangel *v.* Emperor, I.L. R. 56 Cal. 199 : A. I. R. 1932 Bom. 193; Atwa Singh, A. I. R. 1926 Lah. 412; Mg Sein, A. I. R. 1927 Rang. 23; Sadananda Jash *v.* Shibakali Hazra, A. I. R. 1954 Cal. 288; Hukumchand *v.* Chandmal, 4 D.L.R. (M.B.) 36: 3 A.I. Cr. D. 651, following Philip Rangel *v.* Emperor, A.I.R. 1932 Bom. 193; Mohammad Ibrahim *v.* Ismail Maracayar, A. I. R. 1949 Mad. 760: (1949) 1 M. L. J. 445: 62 L. W. 287: 1949 M. W. N. 323: 51 Cr. L. J. 173.
8. South Indian Railway Co. *v.* Ramkrishna, I.L.R. 13 Mad. 34; Abdul Rashid *v.* Harish Chandra, A.I.R. 1929 All. 940.
9. *Per* Trevor and Loch, JJ ., in Nobin Dome, 2 W. R. 35 at p. 36.

a man as a *kulbhrashta*[1] or among Hindus if would cause the gravest harm to allege that a man was out of caste[2] in a published work would be clearly defamatory.[3] An offence under Sec. 504 (intentional insult with intent to provoke breach of the peace) is not so trivial as to attract the application of this section.[4]

10. Trivial injuries.—There are some injuries which are from their very nature trivial, as where a person distorts his mouth and smiles at another[5] or where one indulges in practical jokes, in which case the criminality of the act will be judged by the intention and the harm actually caused. So where two disputants challenged each other to a fight in the open, brandishing their sticks, the Court dismissed the case as one covered by this section taking the demonstration as in the nature of sparring with no intention to fight.[6] A stranger entered a pleaders' room attached to a court in order to see a pleader. One of the pleaders objected to the entry of a stranger reserved for pleaders only, but as the stranger persisted in refusing to leave it he was ejected. He re-entered the room when the objecting pleader abused him, apologizing very shortly afterwards. The stranger prosecuted him for insult but the Court held that in view of the previous provocation to and the subsequent apology by the pleader the case fell under this section.[7] The accused killed a goat by twisting its neck and not by cutting off its throat. He exposed its carcass for sale, which was objected to by Mohammedans but the Court dismissed that complaint holding that though the mode of killing might be obnoxious to their religious feelings the accused was doing it for a living and he could not therefore be convicted under Sec. 298.[8]

Illustrative instances.

While the rule is then applicable to all trifling injuries whether they relate to one's person, reputation, or property, still there are cases in which the law holds the rule inapplicable. Such is the case of intangible immoveable property rights in which could not be protected by permitting petty encroachments. Consequently a commoner may maintain an action for an injury to the common against a person who merely walked over it.[9] "That if a commoner could not maintain an action of this sort, a mere wrong-doer might by repeated torts in course of time establish evidence of a right of common."[10] In such cases the law allows an action on the ground of the apprehended damage which the denial of the right might entail.[11] These were civil cases but it is conceivable that the same reasoning may also support a criminal action. They are, however, exceptional cases and fall within the principle that a small mischief is actionable when its prevention would have the effect of preventing a greater mischief.

Rule under this section if applicable to all trifling injuries.

LAW OF SELF-DEFENCE AND PRIVATE DEFENCE

Origin, evolution, and historical background of the law of private defence in India.—According to the ancient law-givers of India, homicide was permitted if committed when danger to life was feared (**प्राण संशये**)

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1. Lit. Kul, family, and Bhrashta defiles—one who defiles the family, one who is a disgrace to the family by doing an act condemned by the tenets of religion or morality.
2. Mohan Lal *v.* Ramcharan, A. I. R. 1928 All. 213 at p. 214.
3. Ramanuja *v.* Prathirvatti, 12 I. C. (Mad.) 217.
4. Mohammad Sabed Ali *v.* Thulesvar Borah, A. I. R. 1955 Assam 211 at p. 213 (D. B.): I. L. R. (1954) 6 Assam 274: 1955 Cr. L. J. 1318.
5. Brain's case, 1 Hale, P. C. 455; Cro. Eliz., 578, in which, however, the prisoner had killed the man, and it was held to be murder.
6. Parma Singh, 9 I. C. (Cal.) 536.
7. Moro Balwant, 22 I. C. (Bom.) 158; Abdul Rahiman, 35 I. C. (Mad.) 142.
8. Kirpa Singh, (1912) P. W. R. 26: 16 I. C. 169.
9. Pindar *v.* Wordsworth, 2 East 154.
10. *Ibid.* at p. 162.
11. Genger *v.* Lysaght, 49 L. T. 51; Robertson *v.* Hortopp, 42 Ch. D. 484 at p. 500.

Manu enjoined resort to arms in self-defence (**आत्मनः परित्राणे**).[1] But in case the assailant had desisted before striking, he was to be captured, and not killed (**गृहता न वध्यः स्मृतः**) (Katyayana in *Smritichandrika*, p. 729). For other instances, reference may be made to the *Hindu Law in its Sources* by Ganganatha Jha, page 541.

Homicide cannot be employed as a shield to justify aggression.

Law permits taking of the life of another for prevention and not for punishment. It is a right essentially of defence and not of retribution. The right of self-defence is exercisable in the face of actual or imminent danger. It is available only to those who act honestly and in good faith. In no case, can it be employed as a shield to justify aggression. The accused cannot invoke self-defence as a device or pretence for provoking an attack in order to slay his assailant and then claim exemption on the ground of self-defence.

Imminence of danger and not spirit of revenge.

The necessity justifying exercise of the right must be urgent and the danger of loss of life or great bodily harm, imminent. The right exists if the attack is either actual or threatened. The Courts will naturally view the circumstances from the standpoint of the accused and not from that of a cool bystander. In order to justify the taking of life on the ground of appearance of peril, the appearance must be real, though not the peril. The act of killing must be committed because of an honest and well-founded belief in the imminence of danger and not in a spirit of revenge.

Right of self-defence begins when necessity commences and ends when necessity ceases.

Law allows resort to force to repeal force *vim vi repellere licet* but this should be done not for taking revenge but for warding off the injury *non ad sumendam vindictum, sed ad propulsandam injuriam.* Right of self-defence is not available to a person who resorts to retaliation for past injury but to him who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. The necessity must be present, real or apparent, before the antagonist can justifiably be deprived of his life. The right of self-defence commences when necessity begins, and ends when necessity ceases.

Quantum of force permissible.

As to the quantum of force that might be employed, that would depend upon the nature and the fierceness of the assault and the ordinary rule is that the force used should be proportioned to the force of the attack or the threatened danger. It must be such as the circumstances reasonably indicate to be necessary for self-defence. Differences of age of physical strength apart, an assault by an unarmed person is not permitted to be repelled by causing fatal injuries with a deadly weapon.

Courts do make reasonable allowances in judging nature of assault.

Of course, the Courts do not expect a person assaulted to modulate his defence step by step according to the waxing or the waning tempo of the attack. Once the assault has assumed a dangerous form, Courts make all reasonable allowances in favour of a person, who in fear of his life or limb, gives harder blows than appear necessary to a calm spectator watching from safe distance. An accused person when placed in such a predicament, is not expected to maintain sangfroid and remain composed and unperturbed. To use the words of Holmes, J., "detached reflection cannot be demanded in the presence of an uplifted knife".[2]

1. Mann 8 : 348-349.
2. Brown *v.* United States, (1921) 256 U. S. 335 at p. 343.

Necessary corollary flowing from the right of self-defence based on necessity.

While the law does not expect from the man whose life is placed in danger to weigh with nice precision the extent and the degree of the force he employs in his defence, the law does insist that person claiming such a right does not resort to force which is out of all proportion to the injuries received or threatened and far in excess of the requirements of the case. In certain eventualities, it is the duty of the accused even to retreat in order to avoid danger to himself before inflicting fatal injury. This is a necessary corollary that follows from the right of self-defence being based on necessity.

Common law doctrine "of retreat to the wall" or "retreat to the ditch."

Life of an antagonist may not be taken if it can be avoided by retreating, and if retreat is practicable consistently with one's safety. Where there are two courses equally feasible, open to a person one leading to and the other from the difficulty, he must take the latter in order to rely on the right of self-defence, if he can do so without adding to his peril. But where such a course is not possible because of suddenness or fierceness of the attack, he is not obliged to retire and in such a case he might stand his ground and inflict counter-blow. The strict common law doctrine of retreat to the "wall" or "retreat to the ditch" was thus expressed in the words of Blackstone[1]:

> "The party assaulted must, therefore, flee as far as he conveniently can either by reason of some wall, ditch, or some other impediment; or as far as the fierceness of the assault will permit him; for it may be so fierce as not to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantaneously. And this is the doctrine of universal justice, as well as of the municipal law."

Modifications to the common law doctrine.

This doctine has undergone modification. A person attacked in his own permises or where he has a legal right to be, is not bound to retreat. The exemption from retreating is available to the faultless, but those in fault must retreat if able to do so, there being a safe avenue of escape unless prevented by fierceness of the attack.

Cardinal conditions to justify man killing in self-defence.

From the above discussion, four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of self-defence.

First, the accused must be free from fault in bringing about the encounter;

Secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity;

Thirdly, there must be no safe or reasonable mode of escape by retreat; and

Fourthly, there must have been a necessity for taking life.

The law of right of private defence as contained in Sec. 100 of the Indian Penal Code is no different. Thus where the previous conduct of the accused, his amorous relations with Baldev Kaur, his unconcealed jealousy and pronounced repugnance of Malkiat Singh, whom he considered to be his rival and whom he strongly suspected to be pursuing his intrigue with her, his surprise visit at night after having armed himself with a *chhura*, his suspicion of Baldev Kaur's being with another, his persistent refusal to enter the house unless she had lighted a lamp to enable him to see if there was anybody with her in the house, and on seeing Malkiat Singh his having plunged the *chhura* sixteen times into his body without having received a single scratch or any other injury on his person, were facts which leave no doubt that the accused had come with a premeditated intention to commit aggression if necessary.[2]

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1. Commentaries, Book 4, p. 185.
2. Balbir Singh Balwant Singh *v.* State, A. I.R. 1959 Punj. 332 at pp. 336, 337.

Doctrine of necessity as distinguished from "self-defence".— The leading English decision on the doctrine of necessity was rendered in the case of "The Mignonette", known professionally as the *Queen* v. *Dudley and Stephens*.[1]

Leading English decision on the doctrine of necessity.

On 5th July, 1884, the crew of a yacht, consisting of three adult seamen and a boy of seventeen or eighteen, was compelled to abandon ship and take to an open boat. For twelve days they subsisted on pitiably small rations. On the eighteenth day in the boat, one thousand miles from land, without food and water for several days, the sacrifice of the boy was suggested by the defendants to Brooks, the third seaman, but he rejected it. Two days later, having been entirely without food for eight days, one of the defendants, with the assent of the other killed the boy who was then in a quite helpless condition. The men, including Brooks, who had opposed the killing to the last, fed on the boy's body for four days when they were rescued by a passing ship. In the trial for murder of the boy, the jury found that the men would probably have perished from famine within the four days had they continued without food, that the boy would probably have died first, and that, at the time of the killing, there was no reasonable prospect of rescue, "there was no appreciable chance of saving life except by killing some one for the others to eat."[2]

Chief Justice Coleridge, speaking for a distinguished Bench, entirely repudiated the defence of necessity. In a detailed review of the literature he found that most of the language concerning necessity, at least in English treatises, was written in the context of self-defence; it merely justified the killing of an assailant to avoid death. To apply the doctrine to such a case as this, where no wrongful act had been committed by the deceased, indeed, where he was only "the weakest, the youngest, the most unresisting," was preposterous. The doctrine of necessity was a notion which seemed to the Judges "at once dangerous, immoral, and opposed to all legal principle and analogy".[3] Hale had correctly stated that hunger is no defence of larceny; how could it possibly justify murder.[4] The decision in Holmes which approved the doctrine of necessity and, also, the selection by lot was dismissed as resting on a "somewhat strange ground" an estimate which followed Stephen, who thought that method of selection "odd,"[5] indeed, "almost grotesque."[6] The Court was eloquent in its repudiation of the alleged "duty" of self-preservation: "the plainest and the highest duty" may sometimes be to sacrifice one's life, as had been done frequently in war and in shipwreck by crew of many vessels. They stressed the hazards of approving the doctrine of necessity. In this very case, the men might have been picked up the next day, or they might never have been rescued, in either event the sacrifice would have

Doctrine of necessity seems to Judges, at once dangerous, immoral and opposed to all legal principles.

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1. (1884) 14 Q. B. 273.
2. Queen *v.* Dudley and Stephens, (1884) 14 Q. B. at 275.
3. *Ibid.* at p. 281.
4. But Hale also stated that the Judges could reprieve in such cases; 1 P. C. 54. Natural law writers invariably held that taking another's food in case of famine was justified. The Carolion (Art. 166) provided for justification in such cases, stipulating (1) the necessity must be so extreme as to threaten life, e.g. famine; (2) taking the property of another must be the only means available to obtain relief; (3) the doer himself or his family must be the persons endangered; (4) the situation must not have arisen through prodicality or other fault; (5) the person whose property is taken must not be in equal distress; (6) the taking must be with intent to restore or compensate and (7) actual restitution must be made as soon as possible. For a modern case exculpating taking bread by a famished woman, *see* Dalloz, *Jurisprudence*, 1899 II, 329. the Note by Josser, *ibid.* at pp 329-331, and Garrud, Precis de Droit Criminal 313 (1934).
5. Digest of the Criminal Law, 25 N. (1887)
6. 2 H. Cr. L. 108n (1883). But none of these critics proposed any alternative method except, presumably, that everyone must die unless self-sacrificing volunteers come forward.

been futile. Who is to judge of the necessity? How measure the comparative value of each life? How avoid tempting the strong to profit from such a rule? Matters of mitigating on must not interfere with legal principle, specifically without "the legal definition of the crime". If the law is too severe, the sovereign may be merciful. The defendants were accordingly found guilty of murder and sentenced to death. But the Crown commuted the sentence to six months' imprisonment.

The facts in Dudley and Stephens were undoubtedly a great stimulus to repudiation of the doctrine of necessity. The harm was not perpetrated in such emotional stress as prevailed in Holmes or in fear of imminent drowning. It was, instead, committed in calm determination, evidenced by the fact that the homicide was discussed several times, although, to be sure, in the firm conviction that death by starvation was not far off. In addition, there was the cannibalism which must have suggested that this was one of those cases where men ought to die rather than live by utterly repugnant means.[1] But however revolting facts may be, they do not invalidate the rationale of the doctrine of necessity that it is better that some live than that all perish. They merely suggest certain esthetic limits as conditions of the application for the doctrine.

It is significant that in both cases the final sentence was six months' imprisonment, although Holmes actually served fourteen months. On a functional view of the penal law of both countries, one may therefore conclude that both in fact approved the doctrine of necessity. But the important difference is that whereas that doctrine is recognized in the substantive criminal law of the United States, English law is left in an unsatisfactory condition that is almost universally opposed.[2]

Yet the chief ground of the English decision was approved by no less a jurist than Cardozo. Emphasising the crucial fact, he asked, "Who shall know when masts and sails of rescue may emerge out of the fog?"[3] This view point, it will be recalled, was expressed in the unwillingness of the English Bench to admit the necessity of the homicide, indicated by its remark that the men might have been picked up the next day or might never have been rescued. It is therefore clear that neither the English Court nor Cardozo considered the ethics of the doctrine of necessity. They rejected the doctrine because, in effect, they denied that a state of necessity could ever exist. Such repudiation of the doctrine of necessity amounts not to the invalidation of the principle to conserve the maximum value possible but to such a challenge of it on empirical grounds as to guarantee that it could never be applied. For factual knowledge neither is, nor can it ever attain, certainty. It has at best only a degree of probability. We can, therefore, never be certain that any emergency will not pass, that "masts and sails of rescue may (not) emerge out of the fog". In the lack of such certainty, it is wrong to sacrifice any life—so runs the Coleridge-Cardozo thesis.[4] Plainly on this estimate, the doctrine of necessity becomes a mere speculation. Modern legal systems, however, do not require omniscience of human beings. The doctrine, on the contrary, is that a very high probability of complete destruction by physical

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1. Several other cases of cannibalism are cited by Moriaud, *op. cit. supra*.
2. For the anomalous effects of the decision on English Criminal Law, *see* Stallybrass in 14 J. Comp. Leg. & Int. L. 237 (1932) and *cf.* Davies, "Every student of the elements of the subject knows how unsatisfactory was the discussion of the matter in the leading case of R. *v.* Dudley and Stephen 2." But *cf.* Rex *v.* Bourne, (1939) 1 K. B. 687, 693.
3. Cardozo, *Law and Literature*, 113 (1931). This view was also expressed by the Contemporary Philadelphia Public Ledger. "They must consent to leave their fate together in the hand of events and take what comes.....while there is life there is hope...." Hicks, *op. cit.*
4. *See* also Cahn, *The Moral Decision*, 71 (1955).

forces is a justification for sacrifice of some to save some, provided the method of selection is fair. These judgments are embodied in the criminal law.[1]

It is desirable to distinguish it from "self-defence," with which, as seen above, it is often confused.

Doctrine of necessity distinguished from self-defence.

To assert that a harm is privileged is to assert that it is not a legal harm. This implies that the individual whose interests were injured by another's exercise of his privilege had no right to protect them, and, therefore, that any injury inflicted by such an individual is illegal. Failure to recognize these implications of legal privilege, together with a blurring of self-defence and state of necessity, confused Stephens' analysis of the latter. Thus, after commenting adversely on Holmes, he remarks: "Self-sacrifice may or may not be a moral duty, but it seems hard to make it a legal duty, and it is impossible to state its limits or the principle on which they can be determined. Suppose one of the party in the boat had a revolver and was able to use it... could anyone deny that he was acting in self-defence... and would he violate any legal duty in so doing?[2] But if there is a duty to preserve the greatest possible value in situations where due to the impact of physical forces, some value must be lost, then a guiding principle does exist. And, as regards the situation Stephen described, far from it being impossible to 'deny that he was acting in self-defence,' a correct statement of the legal import of such conduct is that not only was he not acting in self-defence (any more than does one who resists a legal arrest or self-defence, itself) but, also, that he was guilty of inflicting a proscribed harm. A wise exercise of discretion would, of course, suggest considerable mitigation of the penalty, but this does not alter the substantive law."

That the privilege of self-defence is closely related to the doctrine of necessity is apparent.[3] Sometimes, self-defence is indiscriminately treated as a form of action in telcological necessity in the sense that the defender's conduct is justified on the ground that the harm he inflicted was necessary to preserve his legally protected and thus, superior, interests. If "self-defence" is employed loosely to denote conduct stimulated by any danger, human or inanimate, to the instinct of self-preservation, this usage would include harms committed in states of necessity. Technically, the privilege of self-defence implies that there is a human assailant, one who is bound by a legal duty. In the exercise of the privilege of necessity on the other hand, there was no violation of the actor's legal right. In self-defence, the defender injures the creator and embodiment of the evil situation; in necessity, he harms a person who was in no way responsible for the imminent danger, one who, indeed, might himself have been imperiled by it.,[4]

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1. The legal issue is narrowed to complete exculpation or the imposition of some punishment that is slight as compared with that for usual homicide, as was actually done in the above cases.
2. (1883) 2 H. C. R. 108-109.
3. *See* Oliver *v.* State, (1850) 17 Ala. 587; *cf.* "Self-defence naturally falleth under the Head of Homicide founded in Necessity...."Foster, of Homicide, in trials of the Rebels of Scotland, (1762) 273.
4. Some very nice problems arise in application of these distinctions. One of these is posed by an attack by an animal beating it off is no more legally significant than is the control of an inanimate force. Hence such conduct in inaccurately termed self-defence. The animal's behaviour cannot constitute a violation of a legal right. More complex is the case of protection against an attack by an insane person, which is sometimes treated as "self-defence." But since an insane person is not bound by duties of the penal law, it follows that he cannot violate any legal right conferred by that law. Accordingly the better solution is suggested by the fact that, although in attacks by animals or insane persons, the measures of protection are directed against attacker, yet, in a truer sense they are directed against a natural force, *cf.* Note, Necessity as a Defence (1921), 21 Col. L. Rev. 71 *General Principle of Criminal Law*, 2nd Ed., by Jerome Hall at pp. 430-436.

General features of the doctrine of necessity and self-defence.—In the old authorities statements[1] are to be found to the effect that there may be circumstances in which a man may be excused for deeds which he has done not of his own free volition but under compulsion exercised upon him by another. A simple example can be imagined of a powerful man who, seizing the hand of one much weaker than himself and overcoming his resistance by sheer strength, forces the hand to strike someone else. The defence, if it be admitted, must be that the mental element of volition is absent—the accused, in other words, pleads that his conduct was not voluntary. Compulsion can take other forms than physical force; but in whatever form it appears the Courts have been indisposed to admit that it can be a defence for any crime committed through yielding to it and the law of the matter is both meagre and vague. It can best be considered under the heads of obedience to orders, marital coercion, duress per *minas*, and necessity.

Excuse for death not done under own free volition but under compulsion.

Obedience to orders.—This rarely affords any defence in English law, though there are, of course, acts which are legal when done lawfully for the advancement of justice but which would otherwise be illegal,[2] e.g. the execution of the lawful sentence of a court, acts done for the prevention of forcible crimes and breaches of the peace, or to secure the arrest of criminals. Though the King can do no wrong, either civilly or even criminally—and also because the King can do no wrong—his subordinates must be held strictly accountable for any wrongs they may commit on his behalf. Hence, if a soldier or sailor or constable unlawfully does violence to any one, he cannot plead as a defence merely that he was acting under orders from his superior officer, or even from the King himself.[3]

The King can do no wrong—Interpretation.

Of course such orders, when not obviously unlawful may be relevant to his defence under some more general rule of law. They may give him such a claim of right as renders it no larceny for him to appropriate another man's goods, or such grounds for supposing the immediate circumstances to justify his conduct as will render this mistake of fact a valid defence, or negative a particular intent[4] or excuse apparent recklessness.[5]

And, more than this, it is said that a mistake even of law may afford a defence to public servant who has obeyed unlawful orders under a reasonable (though mistaken) belief that they were lawful. Thus, when force is exercised by a gaoler or hangman in carrying out an invalid sentence, then, if the Court which passed the sentence had jurisdiction over the offence, and the sentence had all reasonable appearance of validity, the man's mistake affords him immunity.[6]

Mistake even of law may afford a defence to public servant who has obeyed unlawful orders.

Cases of this kind illustrate the point that fundamentally it is impossible to distinguish a mistake of law from a mistake of fact. They are further complicated by the use of language which suggests that the defence is based upon the obligation of an inferior officer to obey the directions of his superior,[7] this, it is suggested, is a misconception, the real point being that the inferior officer was led to suppose that the man before him was, for example, a condemned criminal

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1. 1 Hale P. C. 43; 4 Bl. Comm. 27.
2. *See* in particular in relation to homicide.
3. *Cf.* Pollock's *Law of Torts*, 14th Ed. Chap. IV, 88; and Kenny's *Select Cases on Torts* 122-6; *see* Haallam's *Constitutional History*, Chap. 3, and Chap. VII, 526 as to has peculiariy Englisb check upon royal authority.
4. R. *v.* James, (1837) 8 C. & P. 131.
5. R. *v.* Trainer, (1864) 4 F. & F. 104.
6. 9 Coke 68; 1 Hale 496; 1 Hawk., c. 28; 1 East P. C. 331; *see* the authorities cited in Marks *v.* Frogley, (1898) 1 Q. B. 396, 404; *cf.* 3 C. & K 199.
6. *See* the observations of Willes, J., in R. *v.* Trainer, (1864) 4 F & F. 104 and R. *v.* Hutchinson, (1864) 9 Cox 555.

whose execution could not have been an *actus reus* or (as in *R.* v. *Trainer*) that the signal given on the railway mean that it was safe to proceed (so that he had no *mens rea*, since he did not foresee any risk of the collision). Persons in the naval, military, and air forces of the Crown may find themselves in a difficult position if superior orders are given to them to carry out something which seems contrary to the ordinary criminal law of the land. There is no conclusive English authority which extends immunity to such a person, if in obedience to discipline, he carries out the order and thus commits what proves to be a crime. He can, of course, rest his defence upon the rules as to mistake when the facts are appropriate. Thus a marine who, to obey orders, shoots a boatman who insists on rowing up to the ship, will probably be held[1] not guilty of murder if he knew that the orders were given lest the boatman should promote a mutiny on board; for such orders he might reasonably suppose to be lawful. Yet he clearly would be guilty if he knew them to be given from a mere desire to keep the ship agreeably isolated. The official British Manual of Military Law admits it to be still "somewhat doubtful" how far a superior officer's specific command, even one not obviously improper, will excuse a soldier for acting illegally. But the courts of the United States have repeatedly refused to recognise any such excuse at all; and insist that a soldier or sailor cannot plead his commander's orders as a defence unless they not merely seemed to be legal but actually were so.[2]

Marital coercion.—Private civil subject has been of more frequent importance than public, as a defence. It never afforded exemption to servants or children who committed crimes at the instigation of a master or a parent. Only in the case of conjugal subjection did it ever amount to a defence. For if a wife,[3] committed an ordinary felony in her husband's actual presence, the common law raised a *prima facie* presumption that she had committed it under such a compulsion as to entitle her to be acquitted, even though there were no proof of any actual intimidation by him. (Yet for any crime committed by her when he was not actually present, his previous orders or threats would afford her no more excuse than those of any other instigator would do.) This presumption of coercion never applied in non-indictable offences. But it extended[4] to all misdemeanours, except those that are connected with the management of the house (for in that matter the wife is assumed to be the person chiefly active). And it extended to most felonies,[5] e.g. to burglary, larceny, forgery, but not to felonies of extreme gravity, such as treason and murder. Still, this presumption of subjection was only a *prima facie* one, rebuttable by proof that the wife took so active a part in the crime as to show that her will acted independently of her husband's.[6]

Singular privilege accorded to the wife yet denied to child has an obscure history.

The singular privilege thus accorded to the wife yet denied to the child, has an obscure history. It was suggested by Sir James Stephen[7] that it was due to the rule that for a long period our common law gave to a man who could read the right known as "benefit to clergy," whereby he could escape capital punishment for felony. This relaxation was not allowed to women[8]

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1. R. *v.* Thomas, (1816) MS. of Bayley, J. (Russ. I, 490; T. A. C.); R. *v.* Smith, (1899) 17 Cape of Good Hope 561 (T.A. C.); and Stephen's *History Crimial Law*, I. 205.
2. For the different view of English, Scottish, American and South African Courts, *see* the cases in T.A.C. under "Duress and Official Subjection" *see* United States *v.* Jones, (1913) 3 Washington 218; and United States *v.* Carr, (1872) 1 Wood 480. This extreme American doctrine has been ridiculed by French Jurists as "*la theorie des baionettes intelligentes.*"
3. Not a concubine, R. *v.* Court, (1912) 7 Cr. App. R. 127.
   So the majority of writers and so Lord Brikenhead's Committee of 1922 reported *cf. R. v.* Torpey, (1871) 12 Cox. 45; R. *v.* Smith, (1916) 12 Cr. App. R. 42, assert.
5. Kel 31 (R. A. C.) In 1891 Cave., J., allowed it in arson.
6. R. *v.* Cruse, (1838) 2 Moody 53.
7. *Hist. Criminal Law*, I, 105.
8. Maitland (Pollock and Maitland, I. 445) found some traces of the privileges being allowed to men and perhaps some other women in very early times. In 1692 benefit of clergy was allowed to all women.

with the result that when a man and his wife were charged with jointly committing a felony, the man, if he could make a semblance of reading, would get off lightly, whilst his wife, even though the less guilty of the two, would be sentenced to death. Stephen thought that this comparative injustice led to the doctrine of marital coercion, because the Judges wished to give to married women "some sort of rough equivalent for the benefit of clergy enjoyed by their husbands". Stephen, however, gave no authority for this explanation and none appears to exist. It seems very likely that it really depended upon the ancient notion that the wife was entirely subservient to her husband and that while he was alive she had legally no will of her own.[1] Bracton[2] mentions the case of Roger de Fanborne and Agnes his wife who were charged with uttering a forged writ of right; Roger was hanged but his wife was liberated irrespective of whether she was a party to the offence or not, because she was under the rod of her husband (*sub virga viri sui*).

Whatever the origin and however unreasonable the rule, it was applied by courts up to 1925.[3] In that year, largely as the result of public comment following upon a case in which the rule was applied.[4] The Criminal Justice Act, 1925 (Sec. 47) abolished the presumption although, strangely enough, it retained the defence. The statutory provision was as follows:

> Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife, for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.

Burden of proof shifted to wife, to establish coercion by husband.

The result of this hesitant legislation is that the burden of proof has now shifted to the wife, who must affirmatively establish "coercion" by her husband. What this marital coercion is, has not yet been judicially decided in a reported case. Presumably it is something less than such duress as would operate as a defence[5] to someone other than the wife who participated in the man's crime, since otherwise there would be no point in the statute's express declaration of the defence for her.

It may perhaps be convenient, though not strictly relevant, to mention here that there are a few cases in which even an act itself, otherwise criminal, that has been done by a wife, will fail to be *reus* because of its connexion with the relations between her and her husband. Thus, if a husband who has committed a crime is received and sheltered by his wife, she is not regarded by the law as becoming by such "bare reception" an accessory after the fact (or a participator in his treason); for she is bound to receive him. Again, in consequence of the conjugal unity by which the married pair are—for some purposes—treated in law though they constituted only a single person,[6] no criminal agreement to which they are the only parties can amount to the crime of conspiracy; for a conspiracy needs two conspirators. And, similarly, a libel published against a husband by his wife, or one against a wife published by her husband, constitutes no offence.[7] Nor can a husband or wife normally be guilty of stealing each other's property.

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1. *See* Pollock and Maitland, II, 409.
2. Fo. 413 b.
3. It was in effect repudiated by a Judge in 1912, but the old rule was fully accepted by the Court of Criminal Appeal who quashed the conviction; R. *v.* Caroubi, (1912) 66 J. P. 262.
4. R. *v.* Peel and Wife, (1922) The Times, 15th March.
5. If indeed duress really can be set up as a defence.
6. *See* the observations of Maule, J., in Wenman *v.* Ash, (1853) 13 Q. B. 936 at p. 844; Glanville Williams, *The Legal Unity of Husband and Wife*, (1947) 10 Mad. L. R. 16.
7. R. *v.* Lord Mayor of London, (1866) 16 R. B. D. 772.

Duress per minas.—Duress *per minas* is a very rare defence; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. It has, however, been thought that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse some crimes that have been committed under the influence of such threats. Yet it has been found impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Perhaps it may excuse the still graver offence of treason though only in its minor forms: as where a prisoner shows that under pain of death, or of some physical injury falling little short of death, he was forced into giving some subordinate assistance in a rebellion. But he must show that the compulsion continued throughout the whole time that he was assisting and that he did no more than he was obliged to do, and that he desisted at the earliest possible opportunity.[2] Moreover, according to Sir James Stephen, this defence is admissible, only where the prisoner has been threatened by a body of rebels or rioters. Yet it would seem, on principle, that two persons may differ so much in strength, or in weapons, that a degree of compulsion sufficient to exempt may have been exercised by one of them over the other, although there was but this single threatener. It has been held in Ireland, upon a charge of receiving stolen property,[2] that acts otherwise criminal may be excused if they were performed under threats by one person of immediate death or personal violence so terrifying as to overcome ordinary human resistance at the very time when the acts were committed. It has always been clear that if after the threats have been made there is time and opportunity for the person threatened to assert his will then no excuse can be allowed.

Sir James Stephen's view.

The law as to duress was discussed by the Court of Criminal Appeal in *R.* v. *Steane*,[3] and its obscurity was recognized: the Court, however, decided that duress could, in appropriate circumstances, operate to negative an allegation that a prisoner acted with a particular intent, on the argument that where one who being subjected to the complete control of another (especially if he be a brutal enemy) obeys his orders under threats of violence, it is impossible to say that an inference that he intended the natural consequences of his acts must be drawn merely from the fact that he did them.[4]

Law of duress and its obscurity.

Fears of some lesser degree of violence, insufficient to excuse a crime, may nevertheless mitigate its punishment. Wherever there are two criminals, one of them is often to some extent in terror of the other. In such a case the timid rogue may deserve a less severe punishment than his masterful associate.

Necessity.—The fact that a man who has inflicted harm upon another's person or property, did so for the purpose of saving himself or others from a much greater harm, has from early times been recognized as a defence in civil actions, brought to recover compensation for the harm thus inflicted. It is admittedly no tort to pull down houses to prevent a fire from spreading[5] or to enter a person's house to put out a fire. It would therefore seem natural that such prospect of greater harm should be still more readily admissible as a defence to criminal proceedings. For in them the main object is not to compensate loss but to punish actual guilt (which here seems almost or altogether absent); and punishment itself must fail to attain its great object, that of deterrence, in those cases of so-called necessity where the evil it threatens is less than the evil which would

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1. R. *v.* McGrowther, (1746) Foster 13 (T. A. C.). McGrowther was convicted but not executed. R. *v.* Crutchly, (1831) 5 C. & P. 133.
2. Attorney-General *v.* Whelam, (1934) 1 Ir. R. 518.
3. (1947) K. B. 997: 1 All E. R. 813: 32 Cr. App. R. 61.
4. *See* Hosegood *v.* Hosegood, (1950) 66 T. L. R. 735.
5. 1 Dyer 36-b; *see* Kenny's *Select Cases on Torts*, 161-70.

have been suffered if the crime had not warded it off. So a person who commits some trivial offence, for the purpose of saving life—who goes at night, shall one say, on a lampless bicycle to fetch the fire-engine—might seem to have a valid legal excuse. Yet, though theoretical writers have been willing to accept this ground of defence, there is no English case in which the defence has been actually raised with success; however, Lord Mansfield gave an *obiter dictum* that even an act of treason, like the deposition of a colonial governor by his council, might, in some circumstances of public danger, be justified by its necessity.[1] The correctness of this dictum was conceded by Lord Coleridge in *R. v. Dudley and Stephens*.[2] The word "necessity" which is often used to indicate these predicaments, is somewhat misleading. Strictly speaking, there is no necessity in the sense that the thing is inevitable or unavoidable. For if it were, then there would be the legal defence that the accused's act was not voluntary. In reality the position is that the person (perhaps with very good reason) much prefers to do the thing which he does rather than something else, which would be more unpleasant.

Captain commits no larceny by breaking into cargo to feed his crew if provisions run short during voyage.

It has often been thought that if provisions run short during a voyage, the captain of the ship commits no larceny by breaking into the cargo to feed his crew. In *Gregson* v. *Gilbert*,[3] which was an action on a policy of marine insurance to recover the value of a hundred and fifty slaves, who had been thrown overboard during a voyage because the casks of water were running short and a hundred slaves had already died of thirst, no doubt was suggested, either by the Court or even at the Bar, as to extreme urgency being capable of excusing even so lawful an act as this. But there the question of criminal liability did not directly arise; and now, since *R.* v. *Dudley and Stephens*,[4] it seems that the criminal law would concede no exemption, on the ground of necessity, for such an act of homicide.

When necessity no defence.

Clearly no such defence can be accepted in any case (1) where the evil averted was a lesser evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined before hand".[5]

Illustrative cases.

In the only English case where this defence has been expressly raised, it failed.[6] Three men and a boy escaped in an open boat from the shipwreck of the yacht "Mignonette". After having passed eight days without food, the men killed the boy in order to eat his body. Four days later, they were rescued by a passing ship. On their arrival in England, two of the men were tried for the murder of the boy. Lord Bacon had suggested (Maxims, v) that if two shipwrecked men were clinging to a plank which was only sufficient to support one, and one of them pushed the other off, he would be exempt from any criminal liability, because his conduct was necessary to save his life.[7] But the Court of Queen's Bench declared emphatically that there is no general principle of law which entitles a man to take the life of an innocent person in order to preserve his own. The Court appears to have been willing, if necessary, even to overrule Lord Bacon's dictum about

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1. R. *v.* Stratton, (1779) 21 St. Tr. 1222.
2. (1884) 14 Q. B. 273.
3. (1783) 3 Douglas 232.
4. (1884) 4 Q. B. D. 273 (T. A. C.).
5. *Hist Criminal Law*, II, 109.
6. R. *v.* Dudley and Stephens, (1884) 14 Q. B. D. 273 (T. A. C.).
7. 1 Hale P.C. 54. Much legal controversy was aroused in France in 1898 by a judgment at Amiens which adopted Bacon's lenient principle; for Hale's view is more generally adopted by French Judges,

the plank but Sir James Stephen considers that their actual decision does not go so far as to overrule it. For, as he points out, the accused man does no direct bodily harm to the other, but leaves him still the chance of getting another plank; whereas in the "Mignonette" case the boy was actually killed, and moreover by men who did it for the sake of avoiding a starvation which the jury only found to have been otherwise "probable", not otherwise inevitable.[1]

The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others an English Judge would probably take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty.[2]

Yet where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to threaten any punishment the threat of which cannot have the effect of deterring.[3] Hence, perhaps it is that in the United States the defence of necessity seems to be viewed with favour.[4]

OF THE RIGHT OF PRIVATE DEFENCE

96. Nothing is an offence which is done in the exercise of the right of private defence.

Things done in private defence.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Scope.
4. Foundation of the right of private defence.
5. Steps to avoid causing harm to assailant.
6. Use of English precedents.
7. Plea of private defence.
8. Alternate pleas.
9. Proof of private defence.
10. Standard of proof.
11. Self-defence.
12. Private defence *v.* Private defence.
13. Right of private defence when a complete defence.
14. Right of private defence.
15. Who are likely to be aggressors.
16. Non-aggressiveness, proof of.

1. Analogous law.—The object of the group of these sections dealing with the right of self-defence agrees with the English general law,[5] though the

1. Stephen maintained that the circumstances of R. *v.* Dudley and Stephens distinguish it from many cases in which there is a choice of evils; for instance, where an accoucheur finds it necessary to destroy a child at the approach of birth in order to save the mother (an act that is never made the subject of a prosecution); *see* R. *v.* Bourne, (1939) 1 K. B. 687. Still more is it distinguishable from those in which the question is not which one shall live, but whether any shall live; as where three mountaineers are roped together, but two of them slip, and the third cuts the rope to save himself from being dragged to death with them. In such a case the defence should be that there was no *actus reus*, for the survivor had not caused the other's death (since nothing could save them) but had merely severed the rope to prevent them from pulling him over also. *See* Plowden 13 for a prisoner's escaping from a burning gaol to save his life.
2. But in continental countries (where a minimum is frequently set to punishments) the necessity of averting grave bodily harm is often raised as a defence.
3. At a court-martial held (*The Times*, 28th July, 1893) in consequence of a collusion, it was shown that naval discipline regards even disobedience to an admiral's orders as being excusable by necessity, **e.g.** the paramount necessity of not endangering the safety of a ship.
4. Commonwealth *v.* Brooks, (1868) 99 Mass. 434; State *v.* Way, (1875) 72 N. C. 253. In Rice *v.* Georgia, (1899) 34 S. E. R. 202, a man prosecuted for breach of a statute, that forbade taking alcoholic liquor to church, pleaded that it was necessary for his wife's life that she should always have alcohol at hand. But the defence was disallowed, as it was not necessary for the wife to go to church; Kenny's *Outline of Criminal Law*, 1952 Ed., by J. W. C. Turner at pp. 54 to 61.
5. First Report, Sec. 146, Reprint, p. 272.

Commissioners had noted in their report that owing to the lack of spirit displayed by men in this country they had further strengthened this law.[1]

2. Principle.—Self-help was the first rule of criminal law.[2] It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity, and social order. "The right of defence," wrote Bentham, "is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men."[3] The eleven sections comprised in this sub-head codify the rules and limitations which are found floating in English law. They are based on the cardinal principle that it is the first duty of man to help himself. It is next based on the principle that the police of the State is not ubiquitous, and a person may then strike out for himself, or for another. But such a rule, if unqualified, might encourage vendetta which would lead to social disorder. It, therefore, lays down the limits within which the rule applies, and the conditions to which it is subject. These conditions were the subject of extended controversy at the time the draft Bill was under consideration, but the clauses as framed, were found to be in substantial agreement with English law, and were as such passed.

Cardinal principle of self-help.

3. Scope.—The rule as to the right of private defence has been stated by Russell on *Crime*[4] thus :

> "....a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known *felony* against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

What is meant by right of private defence and when it is available.

As stated in *Mahandi* v. *Emperor*,[5] the law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. The right of self-defence as defined in Secs. 96 and 97, Penal Code, contemplates that if a man is attacked he would be justified in the eye of law if he holds his ground and delivers a counter-attack provided always that the injury which he inflicts in self-defence is not out of all proportion to the injury with which he was threatened.[6] When the whole conduct of the deceased was aggressive from the beginning the presence of *lambardars* on the occasion who did not take any step to protect the accused from assault by the deceased does not take away the right of private defence which the accused had. In such cases it is difficult to judge the extent of the right of private defence by any hard and fast rule and the accused cannot, as has already been remarked by the Lahore High Court in some decided cases, be expected to regulate the extent of

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1. Note B, Reprint, p. 110. These clauses were subjected to an exhaustive review by the Indian Law Commissioners (First Report), Secs. 130, 162. But there is nothing in this discussion to elucidate the text. It is indeed, wholly confined to answering objection, and justifying the clauses in the words of the author themselves.
2. *See* Introduction.
3. Bentham's *Principle of Penal Laws.*
4. 11th Ed., Vol. 1, p. 491.
5. 51 Cr. L. J. 654 (Lah.); Alinga Kunhinayav *v.* Emperor, I.L.R. 28 Mad. 454; Ranganadham Perayya, *In re*, (1957) 1 Andh. W. R. 181.
6. Rahmat Ali *v.* State, A. I. R. 1953 All. 338 at p. 339: 1952 A. L. J. 609.

force to be used by him by any precise standard. This section is merely declaratory of a right in the abstract. It lays down that an act done in the exercise of the right of "private defence" is not an offence. It does not define that right nor does it describe its extent and limitations. This is left to the subsequent sections. The right of private defence is, however, here declared to be a justification for a crime. But in order to be a justification, the crime must be complete without it. There is no right of private defence under this Code against an act which is not in itself an offence under it.[1] Consequently, as laid down in *Gorie Sankar* v. *Sultan*,[2] an act done in the exercise of the right of private defence is not an offence and does not, therefore, give rise to any right of private defence in return.[3] Again, "you cannot claim the righ of private defence if you yourself committed an attack, nor can such a right be claimed by a person who deliberately joins in a riot and find himself attacked and his life is in danger".[4] So also, "when a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights, or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other."[5] Inflicting blows in retaliation will not amount to an exercise of the right of private defence.[6] There is no right of private defence where there is no apprehension of danger, as where the quarrel had ceased before the accused stabbed the deceased.[7] The Penal Code puts no restriction either upon the weapon, or upon the mode of using it, in those particular cases in which it provided that the voluntary causing of death is justified when acting in exercise of the right of private defence of the body, but of course, all the circumstances of the case must be considered together.[8]

4. Foundation of the right of private defence.—The law of private defence is founded on two cardinal principles:

(1) Everyone has the right to defend one's own body and property, as also another's body and property. The law does not require him to be cowardly.

(2) This right cannot be used as a pretence for justifying aggression, i.e. for causing harm to another person, nor for inflicting more harm than is necessary to inflict for the purpose of defence.

Law allows resort to repel force *vim vi repellere licet*, forwarding off an injury but not for taking revenge; *Sed ad propulsandam injuriam non ad sumendan vindictum*. The right of private defence is not available to one who resorts to retaliation for any past injury, but to one who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. In a word, the right is essentially of defence not of retribution.[9]

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1. Ganouri Lal Das *v.* Queen-Empress, I. L. R. 16 Cal. 206 at p. (218); *see* also Chandra Bhan *v.* State, A.I.R. 1954 All. 39: 1953 A. L. J. 430: 1953 A. W. R. (H. C.) 381; Mustqim Jagga *v.* Emperor, A. I. R. 1939 Lah. 416: 184 416: 184 I. C. 208:40 Cr. L. J. 874.
2. A. I. R. 1917 L. B. 12 (1).
3. State *v.* Narayanan Asaan Ramchandran Asaan, A. I. R. 1956 T. C. 89 at p. 90: 1955 Ker. L. T. 638: 1956 Cr. L. J. 276.
4. *Principles of Law of Crimes in British India* by Syed Shamsul Huda, T. L. L. p. 385; *see* also Z. D. Samuel *v.* Emperor, A. I.R. 1937 Pesh. 23.
5. Sir John Edge, C. J., in an unreported case, Queen-Empress *v.* Rupa, cited with approval in Queen *v.* Prag Dutt, I. L.R. 20 All. 459; *see* also Bhairoo Singh *v.* Emperor, A. I. R. 1935 Nag. 141: 36 Cr. L.J. 861: 156 I.C. 120: 31 N.L.R.380.
6. Subbanna Goundan, 1935 M. W. N. 1128; *see* also Harbans Singh *v.* Emperor, A. I. R. 1947 Lah. 37: 47 Cr. L.J. 358: 223 I. C. 99.
7. Nag Po Nyun *v.* Emperor, A. I. R. 1936 Rang. 325 at p. 326 : 37 Cr. L. J. 902: 164 I. C. 206.
8. Nga Chit Tin *v.* The King, A. I. R. 1939 Rang. 225 at p. 239: 183 I. C. 1451: 40 Cr. L. J. 725.
9. State of M. P. *v.* Saligram, 1971 Jab. L. J. 292 at p. 296.

Under Sec. 105, Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon the accused and the Court shall presume the absence of such circumstances. Where the accused were not in possession of Dhipa Kiari. *Held* that they had no right of private defence of property.[1]

5. Steps to avoid causing harm to assailant.—It is difficult to find anything in Secs. 96 to 106 of the Indian Penal Code which can lend support to the view that a person entitled to exercise the right of private defence cannot exercise it until he has failed after taking other reasonable steps to avoid causing harm to his assailant. Section 99 imposes restrictions upon exercise of the right of private defence and no special restriction has been provided in it against exercise of the right of private defence of person. Section 102 lays down that the right of private defence of body commences as soon as a reasonable apprehension of danger to the body arises and continues as long as such apprehension lasts. There is no indication at all in this section as the right cannot be exercised until the man entitled to exercise it finds himself without any other means to avoid the encounter. Section 105 lays down when the right of private defence of property commences and how long it continues against the apprehension of commission of different offences. There is nothing in the section to show that the right of private defence of property stands on a better footing than the right of private defence of person.[2]

Distinction between enforcing a right and maintaining a right.

At first there may appear to be some confusion between the right of private defence of property as set out in Secs. 96 and 105, I. P. C., and the provisions of Sec. 141 (Fourth) of the same Code which make it an offence to "enforce any right". A party cannot be said "to enforce any right" where he is in undoubted possession of the land upon which an attack has been made and he defends that possession. In that case the right of private defence of property would arise. If on the other hand there was a real doubt whether the land belonged to one party or the other, then if either party used force, that would amount to enforcing a right and there would be no right of private defence of property. What indeed the law prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within the provisions of Sec. 141, I. P. C. The phrase "to enforce a right" can only apply when the party claiming the right has not possession over the subject of the right and therein lies the distinction between "enforcing a right" and "maintaining a right". A party in possession is entitled to resist and repel and aggression and his action in so doing would be in the maintenance of his right.[3]

6. Use of English precedents.—The law of private defence of person and property in this conutry is codified in Secs. 96 to 106 of the Penal Code and Courts do not think that it is permissible to interpret the provisions of these sections on the basis of principles governing the right of self-defence under the

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1. Padia Patra *v.* State, A. I. R. 1966 Orissa 199 at pp. 202, 203.
2. Barisa Mudi *v.* State, A. I. R. 1959 Pat. 22 at p. 28: 1957 B. L. J. R. 756: 1959 Cr. L. J. 71.
3. Ganouri Lal Das *v.* Queen-Empress, I.L.R. 16 Cal. 296; Ramnandan *v.* Emperor, 17 C. W. N. 1132; *see* also Karunkar Samal *v.* State, 25 Cut. L. T. 500 at pp. 505 and 506.

Common Law of England. The provisions are complete in themselves and the words used in the sections must be looked to for finding the extent and limits of the right.[1]

7. Plea of private defence.—Right of private defence of person and property is recognised in all free, civilised, democratic societies within certain reasonable limits. Those limits are dictated by two considerations: (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them or to punish the wrong doer for commission of offences.

The right of private defence serves a social purpose and as observed by this Court more than once there is nothing more degrading to the human spirit than to run away in face of peril (*Munsi Ram* v. *Delhi Administration*). But this right is basically preventive and not punitive. It is in this background that the provisions of Secs. 96 to 106, Indian Penal Code, which deal with the right of private defence have to be construed. According to Sec. 96 nothing is an offence which is done in the exercise of the right of private defence and under Sec. 97 subject to restrictions contained in Sec. 99 every person has a right to defend: (1) his own body and the body of any other person against any offence affecting the human body and (2) the property whether moveable or immoveable of himself or of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit these offences. The right of private defence, according to Sec. 99, does not extend to an act which does not reasonably cause the apprehension of death or of a grievous hurt if done or attempted to be done by a public servant acting in good faith, etc., and there is also no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Nor does it extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. Section 100 lays down the circumstances in which the right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailants. They are: (1) if the assault which occasions the exercise of the right reasonably causes the apprehension that death or grievous hurt would otherwise be the consequence thereof and (2) if such assault is inspired by an intention to commit rape or to gratify unnatural lust or to kidnap or abduct or to wrongfully confine a person under circumstances which may reasonably cause apprehension that the victim would be unable to have recourse to public authorities for his release. In case of less serious offences this right extends to causing any harm other than

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1. Bansa Mudi *v.* State, A. I. R. 1959 Pat. 22 at p. 28; *see* also Gopal Naidu *v.* Emperor, A.I.R. 1923 Mad. 523 (2) (F. B.): I. L. R. 46 Mad. 605: 24 Cr. L. J. 599; 44 M. L. J. 655; Mst. Ramanandi Kuer *v.* Mst. Kalawati Kuer, A. I. R. 1928 P. C. 2: 55 Ind. A. 18: 26 A. L. J. 385: 30 B.L.R. 227; Emperor *v.* Dahu Raut, A. I. R. 1935 P. C. 89: 36 Cr. L.J. 838; Pakala Narayanaswami *v.* Emperor, A. I. R. 1939 P.C. 47: 40 Cr. L. J. 364; Piare Dusadh *v.* Emperor, A. I. R. 1944 F. C. 1: 45 Cr. L. J. 413: 1944 M. W. N. 1, differing from Farnean Khan *v.* Emperor, A. I. R. 1926 Pat. 433: 27 Cr. L. J. 1322.

death. The right of private defence to the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of danger to the body continues. The right of private defence of property under Sec. 103 extends, subject to Sec. 99, to the voluntary causing of death or of any other harm to the wrong-doer if the offence which occasions the exercise of the right is robbery, house-breaking by night, mischief by fire or any building, etc., or if such offence is theft, mischief or house trespass in such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if the right of private defence is not exercised. This right commences when reasonable apprehension of danger to the property commences and its duration, as prescribed in Sec. 105, in case of defence against criminal trespass or mischief, continues as long as the offender continues in the commission of such offence. Section 106 extends the right of private defence against deadly assault even when there is risk of harm to innocent persons.[1]

It is well settled that even if an accused does not plead self-defence, it is open to the Court to consider such a plea if the same arises from the material on record.[2] The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.[3] No question as to the exercise of the right of private defence can arise unless and until the prosecution has proved what would, but for the exercise of this right, be an offence.[4] The right of private defence being an exception to the general law, it must be pleaded and proved by the defence,[5] though such proof does not imply any evidence tendered by the defence, it cannot be secured by the evidence of the prosecution or in the course of the cross-examination of their witnesses,[6] or by the statement of the accused.[7] In the case of *Thommen Thomas* v. *State of Kerala*,[8] the accused did not specifically plead the right of self-defence. This fact influenced the Court's conclusion that the plea of self-defence was not available to the accused to any degree. *Held* that there was too narrow a view opposed to well-established principles.

Plea of private defence.

The plea of self-defence may not have been taken by the accused specifically, it is open to the Court to give him the benefit of such plea, if on a proper appraisal of the evidence it comes to the conclusion that the injury caused by the accused was in the circumstances of the case inflicted at a time when he was having reasonable apprehension of a grievous injury being caused to him by the deceased.[9]

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1. Gottipulla Venkata Siva Subbrayanam *v.* State of Andhra Pradesh, A.I.R. 1970 S. C. 1079 at p. 1087.
2. See *In re* Jogali Bhaigo Naiks, A. I. R. 1927 Mad. 97.
3. Munshi Ram *v.* Delhi Administration, A. I. R. 1968 S. C. 702 at p. 703: (1968) 2 S. C. R. 455.
4. Nga Chit Tin *v.* The King, A. I. R. 1939 Rang. 225 at p. 229.
5. Section 105, Indian Evidence Act (I of 1872); Farman Khan *v.* Emperor, 1926 Pat. 433: I. L. R. 5 Pat. 52.
6. Kali Charan Mukerjee, 11 C. L. R. 232; Timmal, I. L. R. 21 All. 122; Kartar Singh *v.* Raj, A. I. R. 1951 Raj. 129: 52 Cr.L.J. 1034; Dhirendra Nath *v.* State, A. I. R. 1952 Cal. 621: 1952 Cr. L. J. 1427; *cf.* Bhola Nath, I. L. R. 51 All. 313.
7. Bhola Nath, I. L. R. 51 All. 313 at pp. 321, 322.
8. A. I. R. 1957 Ker. 53: 1957 Ker. L. T. 278.
9. State of U. P. *v.* Jagdish Puttoo Lal, A. I. R. 1966 All. 244 at p. 246,

It is now well settled that in taking a plea of exercise of the right of private defence of person or property an accused person need not take it specifically or in so many terms nor need he adduce any evidence on his own behalf for substantiating such a plea. He may elicit such facts and circumstances from the cross-examination of prosecution witnesses as may support this plea and utilise them in meeting the case of the prosecution.[1] But once the defence has established that the accused acted in the exercise of the right of private defence, the burden of proving that they exceeded that right lies on the prosecution.[2] The principle that if a person is injured in a fight the burden of proving the right of private defence always lies on him. This comes perilously near, if it does not actually amount to saying, that it is an offence to be hit or injured.[3] When the complainant is found to be the aggressor the accused should be given the benefit of the right of private defence.[4] Accused are responsible for their own acts. The acts done by them may amount to various offences. Those acts would cease to be offences in the eye of law under Sec. 96, I. P. C., only if the accused are protected by right of private defence. When there is a free fight between two parties, which are armed and determined to fight, the members of each party are liable for the offences committed by them unless any of the ties is protected by the right of private defence.[5] It is competent to the accused to deny the act, and if proved, to justify it,[6] though in some cases the contrary has been maintained. So it is said: "No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases; it must be by proof of the actual facts.[7] The plea of private defence cannot, it is said, be listened to unless it is pleaded,[8] and the proper time to plead it is in the first Court and not in appeal.[9] But even so,

When plea of private defence is to be raised.

1. Superintendent and Legal Remembrancer of Legal Affairs *v.* Bhupati Bhusan Biswas, 1956 A. W. R. (Sup.) 10: 60 C. W. N. 114.
2. Makhdoom Singh *v.* Emperor, A. I. R. 1945 Oudh 296 at p. 297: 221 I. C. 174: 47 Cr. L. J. 102.
3. Ahmad Sher *v.* Emperor, A. I. R. 1931 Lah. 513 at p. 518: 32 Cr. L. J. 868: 132 I.C. 381.
4. Dari, 41 P.L.R. 14.
5. Padia Patra *v.* State, Vol. XXXII (1966) C. L. T. 441 at pp. 450, 451.
6. Yusuf Hussain, I. L. R. 40 All. 284; Fandi Khot, A. I. R. 1921 Pat. 192; Janki Mahto, A. I. R. 1933 Pat. 568 at p. 570. It has been frequently held by the Patna High Court as well as by other High Courts that the right of private defence may be pleaded even alternatively with the plea of *alibi* and that the right should not be denied to an accused person merely because he does not specifically plead it, provided that circumstances found by the Court are such as clearly entitled him to the exercise of that right.
7. *Per* Ainslie, J., in Jamsheet Sirdar, 1 C. L. R. 62; Pasupat *v.* Rambhajan, 1 C. W. N. 545; Veerana, 15 I. C. (Mad.) 310; Adam Ali, A. I. R. 1927 Cal. 324; Dhirendra Nath *v.* State, A. I. R. 1952 Cal. 621: 1952 Cr.L.J. 1427.
8. Jamsheet Sirdar, 1 C. L. R. 62; Kali Charan Mookerjee, 11 C. L. R. 232; Timmal, I. L. R. 21 All. 122; but *contra* in Wajid Hussain, I.L.R. 32 All. 451; Baburam, 19 I. C. (Cal.) 951 ; Ram Khelawan Singh, I. L.R. 36 Cal. 827; Veerana, 15 I.C. (Mad.) 310 and cases cited *post*.
9. Timmal, *supra*; but *contra* in Rahiman Shah, A. I. R. 1926 Nag. 202, where the Court admitted the plea in appeal; Nurdad, A. I. R. 1932 Lah. 606.

there is nothing to prevent its being raised even at a later stage before the close of trial unless it has the effect of springing surprise on the prosecution, in which case the Court will have to allow the prosecution a chance of meeting it. Of course, a court cannot set up a plea of self-defence when the accused himself has not done so,[1] but if the facts are all there the Court is bound to apply the law as it is its duty to do so. In *In re Jogali Bhaigo Naiks*,[2] a Bench of the Madras High Court held that even if the accused does not plead self-defence, it is open to the Court to consider such plea if the prosecution evidence would support it. In *In re Pachai Gounden*,[3] it was held that if the circumstances show that the right of private defence was legitimately exercised, the Court is bound to take it into consideration even though self-defence was not specifically pleaded.[4] And while it is true that the plea must be raised by the accused[5] still the Courts are reluctant to sacrifice justice to a mere technicality[6] unless there are other substantial objections to support it.[7]

Burden of proof when becomes relavant.

The true rule appears to be that where a certain intention or knowledge is part of the definition of an offence it is on the prosecution to prove it and in proving it facts have to be necessarily ascertained upon which the accused is entitled to rely for disproof or mitigation of his offence no less than for proving his non-liability. In such cases the question is not one of the burden of proof at all, but rather a question of what offence the evidence discloses. But where proof of the offence is complete, and independent evidence is required to disprove the offence, then the question of onus becomes material. Even in that case the accused may by cross-examination of the prosecution witnesses or otherwise establish his exceptional immunity from the crime, and if the facts are all there, and there is no question of surprise or unfairness to either side, the Court will permit the accused to establish his non-liability on the facts appearing on the record. But where the evidence is clear and unequivocal he cannot be permitted to take a line inconsistent with his previous defence and argue for his innocence on hypothetical grounds. He cannot persuade the Court to assume facts which he never pleaded, the pleading of which would necessitate the calling in of new evidence.

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1. Gullu, (1904) A.W.N. 113.
2. A.I.R. 1927 Mad. 97.
3. A. I. R. 1915 Mad. 532: 15 Cr. L. J. 710.
4. Nga Ba Sein *v.* Emperor, A.I.R. 1936 Rang. 1 at p. 2: 160 I. C. 463.
5. Upendra Nath, 30 I. C. (Cal.) 113 (F.B.); Afiruddi, 52 I.C. (Cal.) 485 at p. 488; Wajid Hussain, I.L.R. 32 All. 451; Yusuf Hussain, I.L.R. 40 All. 284, explaining Sec. 105, Indian Evidence Act (I of 1872); Prag Dat, I.L.R. 20 All. 459; Timmal, I.L.R. 21 All. 122, to the same effect Ghulam Rasul, 62 I.C. (Lah.) 331; Kishen Lal, A. I. R 1924 All. 645; Jogali, A. I. R. 1927 Mad. 97; Adam Ali, A. I. R. 1927 Cal. 324; Hafiza Singh, A. I. R. 1927 Lah. 796.
6. Bahadur Khan, 9 O. W. N. 1019.
7. Ganowri Lall Dass, I.L.R. 16 Cal. 206.

No general rule regarding plea of private defence.

It is not possible to formulate a general rule which the Court at times are apt to lay down in cases which, from their very complexity and variety, present no common rule for guidance. While then the plea of private defence should in strictness of law be raised by the accused, the Court out of its solicitude for doing justice allows such a plea to be argued at any stage, not upon any hypothetical grounds, but if the facts necessary to establish it are on record.[1] But this is an indulgence and not a right and it cannot be extended in a case involving consideration or proof of independent facts, as for instance, defamation.[2] Moreover, the Court will not entertain a plea on appeal inconsistent with the defence set up at the trial.[3]

It is open for the Court to set up plea of self-defence not taken by the accused.

Where a plea of self-defence has not been taken by the accused is it open to the Court to set up that defence for him and give him the benefit thereof if the circumstances so justified it ? It is well settled that even if the accused does not plead self-defence, it is open to the Court to consider such a plea if the facts and circumstances of the case make out such a case.[4]

An accused person who puts forward the plea of private defence will seek to prove it from the material on record, consisting of defence evidence, oral or documentary, and admissions elicited from the prosecution ; and he can derive advantage from such material in two ways. In the first place, if this material is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved, the accused will be entitled to acquital on the ground that he has discharged the onus laid on him by Sec. 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the Court regarding something that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. In the vast majority of offences *mens rea* is one of the essentials that the prosecution has to establish before the crime can be said to be proved ; and a reasonable doubt as to whether *mens rea* is present or not must inevitably lead to acquittal. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of *mens rea* and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the *mens rea* that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of

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1. Wajid Hussain, I.L.R. 32 All. 451; Yusuf Hussain, I. L. R. 40 All. 284 ; Garugu, 8 I. C. (Mad.) 1088 ; Veerana, 15 I. C. (Mad.) 310; Baburam, 19 I. C. (Cal.) 951 ; Pachai Goundan, 26 I. C. (Mad.) 158 ; Upendra Nath Das, 30 I. C. (Cal.) 113 (F. B.); Afiruddi, 52 I. C. (Cal.) 485 at p. 488 ; Pasupat *v.* Ram Bhajan, 1 C.W N. 545 ; *cf.* Nizamuddin, I. L. R: 40 Cal. 163 ; Ghulam Rasul, 62 I. C. (Lah.) 331 ; Kartar Singh *v.* Raj, A.I.R. 1951 Raj. 129 : 1952 Cr. L. J. 1034 ; Dhirendra Nath *v.* State, A. I. R. 1952 Cal. 621 : 1952 Cr. L. J. 1427.
2. Abdur Razak *v.* Gansi Nath, (1910) P. W. R. 4 : 5 I. C. 714.
3. Philpat, (1912) 7 Cr. A. R. 140 ; Fitzgibbons, (1912) 7 Cr. A. R. 264.
4. State of U. P. *v.* Ramnath, 1969 A.W.R. (H. C.) 356 at p. 361.

the doubt regarding this essential pre-requisite of the prosecution case and will be entitled to acquittal.[1]

Calcutta decisions.

In a Bench decision of the Calcutta High Court reported in *Ajgar Shaikh* v. *Emperor*,[2] it was held that in order to establish the exercise of the right of private defence it is absolutely necessary to detail the exact circumstances which led the accused to strike the below in question. Such a defence can seldom, if ever, successfully be made out when the accused's case is that he did not strike the blow at all. It is true that it was observed in this case that if the accused do not admit striking the opposite party they can hardly be heard to urge that they struck the opposite party in the exercise of the right of private defence.

A later decision of the same Court reported in *Kuti* v. *Emperor*,[3] however, took a different view. In this later case it was held that the charge to the jury by a Judge in the following terms, namely "the accused have not set up the right of private defence in answer to the charge against them, and there are not also circumstances appearing upon the evidence in the case justifying the exercise of that right. The learned Public Prosecutor had argued the matter by way of anticipation, but as it is not necessary for you to consider in this case I do not think it necessary to place the law on the subject before you" was held to amount to misdirection which occasioned failure of justice, because it was ruled that it ought to have been left to the jury to decide on a consideration of the evidence as a whole, whether the existence of the right of private defence had or had not been established and if so what would be the effect of the existence of that right on the question of the liability of the accused in respect of the charges on which he had been tried. It will thus appear that the Calcutta High Court itself has taken a view running counter to the earlier decision of the Court reported in *Ajgar Shaikh* v. *Emperor*.[4] Lot of water has flown down the judicial stream since these decisions were given and it appears that now the consensus of opinion of the different High Courts has been that even though the plea of self-defence may not have been taken by the accused specifically, it is open to the Court to give him the benefit of such plea, if on the proper appraisal of the evidence it comes to the conclusion that the injury caused by the accused was in the circumstances of the case inflicted at a time when he was having reasonable apprehension of grievous injury being caused to him by the deceased.

Full Bench decision of Allahabad High Court.

In a majority decision of a Full Bench of the Allahabad High Court reported in *Parbhoo* v. *Emperor*,[5] it was held that the accused person is entitled to be acuitted if upon a consideration of the evidence as a whole a reasonable doubt is created in the mind of the Court whether the accused person is or not entitled to the benefit of any general exception in the Penal Code.

Kerala decisions.

In *Govindan Neelambaran* v. *State of Kerala*,[6] it was remarked by a Bench of the Kerala High Court that the right of self-defence need not be specifically pleaded. It was further observed that a person taking the plea of the right of

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1. Rishikesh Singh *v.* State, A. I. R. 1970 All. 51 at p. 62.
2. 30 Cr. L. J. 799 : A.I.R. 1928 Cal. 700.
3. A.I.R. 1930 Cal. 442.
4. 30 Cr. L. J. 799: A. I. R. 1928 Cal. 700.
5. A. I. R. 1941 All. 402.
6. 1960 Cr. L. J. 1088 : A. I. R. 1960 Ker. 258.

private defence is also not required to call evidence on his side but he can establish that plea by reference to the circumstances transpiring from the prosecution evidence itself. The question in such case, it was held, would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden. It was observed that in considering whether the accused is entitled to exercise the right of private defence an opinion has to be formed whether under the peculiar circumstances the accused did or did not have the apprehension of such injuries to his body as could entitle him to exercise his right of self-defence. The facts of this case reveal that the accused had denied having stabbed the deceased and inflicted the injury in fact, he had even denied the possession of the knife with which the injury was said to have been caused. In spite of this statement of the accused and the defence ultimately conceding that the prosecution had succeeded in proving that it was the accused who inflicted the fatal injury on the deceased the High Court on a consideration of the entire evidence in the case, circumstances and probabilities came to the conclusion that the attack by the accused was neither intentional nor retaliatory in nature and held that his act did not, therefore, amount to an offence as he was completely protected by the right of private defence. Therefore the right of self-defence need not be specifically pleaded and that an accused person is entitled to the benefit of that plea, even though he may not have pleaded it if the facts and circumstances of the case are such as to lead to a reasonable inference that the attack might have been made by him in the right of self-defence.

Other Allahabad decisions.

In a Bench decision of the Allahabad High Court reported in *Babu Lal* v. *State*,[1] it is held that where there are circumstances proved in the case whether by the prosecution or the defence to make an exception applicable it is immaterial from which side the evidence is placed on the record, and the benefit of these circumstances cannot be denied to an accused on the ground that he did not plead the exception. Although the facts of this case did not relate to the exercise of the right of self-defence the observations are nevertheless pertinent to determine the question of the availability of the benefit of an exception in a case where it is not being specifically claimed by accused person. The decision of the Calcutta High Court reported in *Kuti* v. *Emperor*[2] was referred to with approval in this decision. In another decision of the same Court reported in *Baldeo* v. *State*,[3] which has accepted the view laid down in the earlier decision of their own Court cited above.

In an unreported decision of the same Court[4] laying down that it is necessary for the accused to prove to the guilt that it was in the exercise of the right of self-defence that the knife was used. It is enough that circumstances have been placed before the Court for it to conclude that it was in the right of self-defence that the knife might have been struck by the accused at the deceased. It may be that the plea of the exercise of the right of self-defence was not taken probably because the accused had not enough courage to say that it was he who struck the knife.

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1. 1960 A. L. J. 136 : A.I.R. 1960 All. 223.
2. A. I. R. 1930 Cal. 442.
3. 1964 A. W. R. 629.
4. Ram Bharosey *v.* State, Criminal Appeal No. 843 of 1964 (L. B.) decided on 22nd January, 1965.

Conclusion.

Thus it can be safely concluded that the benefit of the right of self-defence to the accused is available even if he had not pleaded any such right in his defence.

The question of the accrual of the right of private defence to a person does not depend upon an injury being caused to him. If the facts and circumstances of a particular case indicate that the accused could have had a reasonable apprehension in his mind of a grievous injury being caused to him, then the right of self-defence is available to him.[1]

In determining this question of fact one has to consider all the surrounding circumstances. Where the circumstances would definitely cause a reasonable apprehension in the mind of the respondents that at least grievous hurt would be the result of assault on them, a person acting under an apprehension cannot be expected to judge too nicely the force of his own blows. A person with an instinct of self-preservation strong upon him may pursue his defence a little further than what may be absolutely necessary judged from the point of view of cool by-stander, but reasonable apprehension has to be judged from the point of view of the person faced with danger.[2]

In a case where the accused pleads the right of private defence it is the duty of the Court to see whether the accused had been the aggressor.[3]

Once it is established that an accused killed another person the onus is on him to prove that the killing was justified or excusable. It is open to an accused person at any stage to point out to the Court to examine the evidence and ascertain for itself whether it is consistent with a plea of self-defence.[4] A plea of the right of private defence is open to an accused even though he repudiated his complicity in the crime provided such a plea could properly be raised upon the evidence and the surrounding circumstances of the case.[5]

As observed by the Supreme Court in *Narain Singh* v. *State of Punjab*[6] and reported in the latest blue print edition : ". . . . Where a person accused of committing an offence sets up at his trial a plea that he is protected by one of the exceptions, general or special, in the Indian Penal Code, or any other law defining the offence the burden of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. The prosecution case, however, did not by reliable evidence establish affirmatively that Narain Singh had done any act which rendered him liable for the offence of murder. His responsibility, if any, arose only out of the plea raised by him : if the plea amounted to a confession of guilt the Court could convict him relying upon that plea, but if it amounted to admission of facts and raised a plea of justification the Court could not proceed to deal with the case as if the admission of

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1. State of U. P. *v.* Jagdish Puttoo, 1965 A.L.J. 977 at pp. 980-982 : A.I.R. 1966 All. 244.
2. Delhi Administration *v.* Mahadev, (1965) 67 Punj. L. R. 948 at p. 951.
3. State *v.* Narayanan Assan, A.I.R. 1956 T. C. 89 at p. 90: 1955 Ker. L.T.638 : 1956 Cr. L. J. 276.
4. Ambika Singh *v.* State, A.I.R. 1961 All. 38 at pp. 40-41 : 1960 A. L. J. 782.
5. Sagar Chandra Saha *v.* State A.I.R. 1962 Cal. 85 at p. 86 : 65 C. W. N. 808.
6. (1964) 1 Cr. L. J. 730 (S.C.).

facts which were not part of the prosecution case was true, and the evidence did not warrant the plea of justification."[1]

In *Chacko Mathai* v. *State of Kerala*,[2] Anna Chandy, J., observed : "The right of self-defence is a high prized gift granted to the citizens to protect themselves by effective self-resistance against unlawful aggression. No man is expected to fly away when he is attacked. He could fight back and when he apprehends death or grievous hurt could see that his adversary is vanquished without modulating his defence step by step. Faced with a dangerous adversary, no man can possibly act with a detached reflection and under such circumstances if he travels a little beyond the limit, the law protects him and hence courts should not place more restrictions on him than the law demands."[3]

In *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Bhupati*,[4] a Division Bench of the Calcutta High Court, consisting of J. P. Mitter and D. N. Das Gupta, JJ., took the view that a plea of the right of private defence was open to an accused even though he repudiated his complicity in the crime, provided such a plea could properly be raised upon the evidence and the surrounding circumstances of the case. Where the accused are tried upon charges under Sec. 304, Part II and Sec. 324 of the Indian Penal Code, and the evidence in the case discloses circumstances to suggest a plea of self-defence even if the defence was a denial of the accused's complicity in the crimes concerned, the Sessions Judge is bound to explain to the jury Exemption II to Sec. 300 of the Indian Penal Code and the entire law relating to right of private defence. The omission to do so is a non-direction amounting to a gross misdirection. The omission is bound to affect the jury's consideration of the case.[5]

Sections 96, 147, 339 and 425.

In a decision by the Patna High Court,[6] it was held that there is really no distinction between forming an assembly to enforce a right or supposed right and forming an assembly to maintain forcibly an existing right. But the decision of the Calcutta High Court in *Ramnandan Prosad* v. *Emperor*[7] and other cases has drawn a distinction between enforcing a right and maintaining an existing right. Both the Patna High Court and the Calcutta High Court, however, are agreed on the point that unless a right to the exercise of private defence is established the claim of right or title will not avail the accused. That was the view expressed in the abovecited case by the Patna High Court and that was also the view adopted in *Ramnandan Prosad Singh* v. *Emperor*,[8] by the Calcutta High Court. It has been held also that where a party of men or determined to vindicate their right or supposed right by unlawful force and they engage in a fight with another party of men equally determined to vindicate their right or supposed right by unlawful force, no question of right of privase defence can arise. Reference may be made to the case on *Kabiruddin* v. *Emperor*[9]

Right of private defence when does not arise.

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1. Chacko Mathai *v.* State of Kerala A. I. R. 1964 Ker. 222 at p. 225 : 1963 Ker. L. T. 450 at p. 454 : I.L.R. (1963) 1 Ker. 458.
2. *Ibid.*
3. *Ibid.*
4. 60 C. W. N. 114.
5. Sagar Chandra Saha *v.* State, A.I.R. 1962 Cal. 85 at p. 86: 65 C. W. N. 808.
6. Ghayasuddin Ahmad *v.* Emperor, A.I.R. 1932 Pat. 215 : I. L. R. 11 Pat. 523.
7. 17. C. W. N. 1132.
8. *Ibid.*
9. I. L. R. 35 Cal 368.

and *Maniruddin* v. *Emperor*.[1] There can be no right of private defence when the person concerned has ample opportunity of having recourse to the proper authorities.[2]

In the case of *Basan Bhowmick* v. *State*,[3] the right claimed by the accused petitioners was a disputed right. They were claiming a right of way to the tank over the inner courtyard of the house of the complainant's house and the complainant's party was equivocally insistent that the second party did not have such a right, i.e. no right to pass over the inner courtyard. The complainant got his masons and labourers to fill up the gap in the compound which existed and so block the passage over the inner courtyard of the complainant's house. The accused party wanted forcibly to prevent the complainant party from filling up the gap in the boundary wall. The question was whether in such circumstances there was any offence committed by the complainant party in trying to close the gap in the boundary wall. *Held* that the act of the complainant could not come within the ambit of Sec. 425, I. P. C., which defines the offence of mischief. Further, no offence of wrongful restraint within the meaning of Sec. 339 was committed by the complainant against which the accused could rightly exercise the right of private defence. In the circumstances, if the first accused petitioners and others by means of criminal force, tried to enforce their right of keeping the pathway open by preventing erection of the boundary wall by the complainant, their action would amount to an unlawful assembly and if force was used, the offence would amount to rioting.[4]

8. Alternate pleas.—It has been said that the plea of self-defence must not be incompatible with the other plea set up by the defence.[5] This is undoubtedly the rule but it does not mean that the accused is not entitled to set up alternative pleas. His pleas must not be hypothetical, but founded on a statement of facts. But suppose that the prosecution wholly fail to establish a person's presence in a riot, could not the accused say : "I decline to say if I was there ; but I do say that if I was, I was justified ?" Such a case is widely different from one in which the accused wholly denies his presence at the scene of crime, but finding his presence conclusively established, he attempts to justify it on appeal.[6] So where the accused had an intrigue with *A*'s wife, who left her cot to visit him, *A* understood the purpose of her absence and followed her with a hatchet with which he attacked the accused, wounding him, whereupon the accused stabbed *A* with a knife in the heart killing him immediately. He then made away with the body and all traces of his crime. On being prosecuted for murder he denied all knowledge of the transaction and of his intimacy with *A*'s wife. He was convicted, and on appeal he contended that even if the facts be as proved, his act was justifiable homicide in the exercise of the right of private defence but, though the plea was considered, it was rejected.[7]

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1. I. L. R. 35 Cal. 384.
2. Lala Ram v. Hari Ram, A. I. R. 1970 S. C. 1093 at p. 1095.
3. A. I. R. 1963 Cal. 3.
4. Basan Bhowmick v. State, A. I. R. 1964 Cal. 3 at p. 5.
5. Wajid Husain, I. L. R. 32 All. 451 ; Baburam, 19 I. C. (Cal.) 951; Dhirendra Nath, A. I. R. 1952 Cal. 621 : 1952 Cr. L. J. 1427.
6. Hakim, (1884) P. R. No. 41.
7. *Ibid*.

The right of private defence can be pleaded even alternatively with the plea of *alibi*, and that right should not be denied to an accused person merely because he does not specifically plead it, provided that the circumstances found by the Court are such as clearly entitle him to the exercise of that right.[1]

The accused may have, in his statement, taken up a plea of total denial of the offence, it is open to him to raise an alternative plea of the right of private defence ; if he is able to prove the same on the strength of the prosecution evidence itself.[2]

9. Proof of private defence.—An accused person who puts forward the plea of private defence will seek to prove it from the material on record, consisting of defence evidence, oral or documentary, and admissions elicited from the prosecution ; and he can derive advantage from such material in two ways. In the first place, if this material is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on the ground that he has discharged the onus laid on him by Sec. 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the Court regarding something that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. In the vast majority of offences, *mens rea* is one of the essentials that the prosecution has to establish before the crime can be said to be proved; and a reasonable doubt as to whether *mens rea* is present or not must inevitably lead to acquittal. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of *mens rea* ; and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the *mens rea* that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential pre-requisite of the prosecution case and will be entitled to acquittal.[3]

10. Standard of proof.—Whether an accused person, taking a plea of the right of private defence, is to prove it in the same manner as the prosecution is required to prove its case or whether a lower standard of proof would suffice, the accused must at least make a case out of which a plea of the right of private defence might arise. It is true that an accused person taking the plea of the right of private defence is not required to call evidence but can establish that plea by reference to circumstances transpiring from the prosecution evidence itself. But the question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden.[4] No doubt where the accused sets up a plea of private defence and the Court is in doubt whether or not the accused

Accused to make out a case of right of private defence.

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1. Ramchandra Govind Take *v.* State, A. I. R. 1969 Bom. 20 at p. 22 : 70 Bom. L. R. 399.
2. *Ibid.*
3. Rishi Kesh Singh *v.* State, A. I. R. 1970 All. 51 at p. 62.
4. Dhirendra Nath *v.* State, A. I. R. 1952 Cal, 621 at p. 624.

has been able to substantiate completely to its satisfaction the plea set up by him, the accused is entitled to the benefit of doubt.[1] That principle has absolutely no application to a case where an accused person sets up a plea of self-defence but completely fails to establish it or fails to adduce any evidence in support of it.[2]

A plea of right of private defence cannot be based on surmises and speculation. There must be some evidence to establish the circumstances which necessitated the exercise of such a right.[3] The right of private defence must not be assumed. The party, which alleges the right of private defence, has to establish that claim. The Court is bound to decide the question of private defence. It is true that the burden of proof lies upon the accused persons. But this burden is not so heavy as the burden, which lies on the prosecution for establishing its case against the accused persons. It is not necessary for the accused to produce witnesses in defence for making out a case of private defence from circumstances of the case.[4]

11. Self-defence.—It is established that self-defence is not restricted to the person attacked. It has been said to extend to "the principal civil and natural relations". Hale's *Pleas of the Crown*, Vol. 1, p. 484, gives as instances master and servant, parent and child, and husband and wife who, if they even kill an assailant in the necessary defence of each other, are excused, the act of the relative assisting being considered the same as the act of the party himself. But no reported case goes outside the relations indicated, although the editor of Kenny's *Outlines of Criminal Law*, 18th Ed. (1962), p. 198, says that " . . . perhaps the Courts will now take a still more general view of this duty of the strong to protect the weak."[5]

12. Private defence v. Private defence.—There is only a right of private defence against acts which are offences. When the assault is excused by the right of private defence, that is to say, when the assault is not an offence it can give rise to no right of private defence on the part of the accused, in return.[6] Where once it is held that the incident relating to deaths of two persons is an integrated one, and cannot be divided into parts, it follows that the same right of private defence that is available to the accused in causing the death of one, person can also be available to him in respect of the death of another person. It would be wrong to hold the right of private defence in respect of one and not in respect of the other.[7]

13. Right of private defence when a complete defence.—The following are the circumstances in which the right of private defence

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1. Parbhoo *v.* Emperor, A. I. R. 1941 All 402 at p. 406 : I. L. R. (1941) All. 843: 1941 A. L. J. 619 : 43 Cr. L. J. 177 (F. B.).
2. Bodhan *v.* Emperor, A. I. R. 1948 All. 223 at p. 225 : 49 Cr. L. J. 436 : 1948 A. W. R. (H. C.) 173.
3. Dwaru Patra *v.* State, 1968 Cut. L. T. 1107 at pp. 1110-11.
4. Mangalkhan *v.* State, 1960 A. W. R. (H. C.) 173.
5. Regina *v.* Duffy, (1966) 2 W. L R. 229 at pp. 231-32.
6. Gorie Shanker *v.* Sultan, 41 I. C. (L. B.) 832 : 18 Cr. L. J. 864 ; Guptar *v.* Rex, A. I. R. 1949 All. 109 ; Kirpal Singh, A. I. R. 1951 Punj. 137 at p. 140 : 52 Cr. L. J. 1517 : 52 P. L. R. 284 ; *see* also A.I.R. 1950 Cut. 30 : 51 Cr. L. J. 749; Gorie Shanker *v.* Emperor, 41 I. C. 830.
7. State of U. P. *v.* Ram Niranjan Singh, A.I.R. 1971 S. C. 1432 at p. 1439.

will completely absolve the accused from all guilt, even when he has voluntarily caused the death of another person :

(1) Where the right is exercised in the private defence of the body of the accused, it affords a complete defence—

(*a*) if the deceased was the actual assailant of the accused, and

(*b*) if the offence committed by the deceased which occasioned the exercise of the right was of any of the six descriptions enumerated in Sec. 100, Penal Code.

(2) Where the right is exercised in the private defence of the property of the accused, it equally affords a complete defence if the offence the committing of which, or the attempting to commit which, by the deceased occasioned the exercise of the right was of any of the four descriptions enumerated in Sec. 103, Penal Code.[1]

What must be proved to establish right of private defence.

In order that the right of private defence may be established, it is not sufficient for the accused, merely to establish that the right had commenced. He must also further establish that the right had not ended. In other words, in order that the right of private defence may be held to have been established, it is necessary for the defence to prove that reasonable apprehension which had been created in the mind of the accused, as a result of the act of the aggressor, had continued at the time when the impugned injury was caused.[2] As regards the plea of self-defence, though the accused had not actually pleaded self-defence, it is open to him to show from the prosecution evidence itself that the accused had caused the fatal wound under such circumstances as gave him the right of private defence. There is no doubt whatsoever that the burden of proving the right of private defence is on the accused. But, if he fails to establish it, then the accused would be criminally responsible for the bullet wounds on the deceased.[3] The mere fact that the accused were following deceased person with dangerous weapons would justify deceased in attacking them. It is not necessary that he should wait until he himself is attacked.[4]

14. Right of private defence.—When there is a free fight between two parties, which are armed and determined to fight, the members of each party are liable for the offences committed by them unless any of the parties is protected by the right of private defence. In *Picharu Bhati* v. *State of Orissa*,[5] the Orissa High Court observed :

"Even if the complainant's party had constituted an unlawful assembly, the accused would have no valid defence in saying that they would also constitute an unlawful assembly by way of retaliation. When there is a free fight between two parties, each constitute an unlawful assembly."

In *Kabiruddin* v. *Emperor*,[6] their Lordships observed :

"When both parties are armed and prepared for battle and it is not shown that they were acting within the legal limits of

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1. Nga Chit Tin *v.* The King, A. I. R. 1939 Rang 225 at p. 229 : 40 Cr. L. J. 725 : 183 I C. 145.
2. Govind Nath *v.* State, A. I. R. 1961 Guj. 11 at p. 15 : (1961) 1 Cr. L. J. 57.
3. *Ibid.*
4. State *v.* Kolis Hira Bhaga, A. I. R. 1961 Guj 8 at p. 11: (1911) 1 Cr. L. J. 54 (2).
5. (1963) 29 Cut. L. T. 383 : (1964) 1 Cr. L. J. 117.
6. I. L. R. (1908) 35 Cal. 368.

right of private defence, it does not matter who was the first to attack."

It lays down that a right of private defence cannot be pleaded by persons, who expecting to be attacked go out of their way to court an attack. It represents the correct view. The Calcutta decision has been distinguished on facts in many subsequent decisions but has never been dissented from.[1]

15. Who are likely to be aggressors?—If there is a great disproportion between the number of injuries inflicted on the two sides, it certainly indicates that those who had inflicted the larger number of injuries were likely to be the aggressors. It may be that, after an accused person had established his right of private defence the mere excess in the number of injuries caused by the accused persons may not be weighed in what are called "golden scales". This does not mean that they have not to be weighed at all in any kind of scales. Nor does it mean that where the accused persons have miserably failed to establish the alleged right of private defence, they can still invoke the principle that the injuries on the two sides should not be "weighed in golden scales".[2]

16. Non-aggressiveness, proof of.—Unpreparedness for attack is proof of non-aggressiveness.[3]

97. Every person has a right, subject to the restriction contained in Sec. 99, to defend[4]—

Right of private defence of the body and of property.

First.—His own body, and the body of any other person, against any offence affecting the human body;

Secondly.—The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

SYNOPSIS

1. Analogous law.
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7. Aggressor cannot claim right of private defence.
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1. Padia Parta *v.* State, A. I. R. 1966 Orissa 199 at p. 203.
2. Mangat *v.* State, A. I. R. 1967 All. 204 at p. 208.
3. Chellappan Nair *v.* State of Kerala, 1960 Ker. L. T. 965.
4. Person—Sec. 11. Offences affecting the human body—Chap. XVI, Secs. 299—377, *post*. Theft—Sec. 378. Robbery—Sec. 390. Mischief—Sec. 425. Criminal trespass—Sec. 441. Attempt—Sec. 511.

21. Theft—Robbery.
22. Mischief.
23. Cattle trespass and right of private defence.
24. Trespass.
25. Trespasser's right of private defence of property.
26. Co-sharers.
27. Plea of self-defence and plea of *alibi*.
28. Claim of right.

1. Analogous law.—This section lays down the rule as Sec. 99 lays down the exceptions to which the rule is subject. It defines the *extent* of the right, as Sec. 99 prescribes its limitations. This section lays down what a person *may do*; Sec. 99 lays down what he is forbidden to do. The two sections are thus complementary to each other, and together contain a complete enunciation of the rule.

2. Principle.—Broadly stated, the right of private defence rests on three ideas: first, that there must be no more harm inflicted than is necessary for the purpose of defence; secondly, that there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence and, thirdly, the right does not commence until there is a reasonable apprehension.[1] The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said: "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is a noble movement which makes us forget our danger at the first cry of distress . . . . It concerns the public safety that every honest man should consider himself as the natural protector of every other."[2] But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit of lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggressions on property.

Bentham's statement of law.

3. Meaning of words.—"*Every person has a righs to defend*": The right exists to defend his and other's body and property by use of force. But what force is justifiable? That depends upon the circumstances of each case. The amount of violence necessary to repel the aggression of one person will not be the same as is necessary to repel an armed band of twenty. "*Against an offence*": The word "offence" here means an offence made punishable by the Code—and not merely under any special or local law.[3] "The body of any other person" who may be a perfect stranger.[4]

4. Scope.—Section 96 of the Indian Penal Code lays down that nothing is an offence which is done in the exercise of the right of private defence, and Sec. 97 proceeds to divide the right of private defence into two parts: the first part dealing with the right of private defence of person, and the second part dealing with the right of private defence of property.[5] In order that an act may be pleaded a s justified

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1. Dominic Varkey v. State of Kerala, A.I.R. 1971 S. C. 1208 at p. 1210.
2. Bentham's *Principles af Penal Law*; Dalganjan, 2 A. L. J. 81.
3. Section 40, para. 1; Gobardhan Bhuyan, 4 B. L. R. 100.
4. Nga Than v. Emperor, A. I. R. 1933 Rang. 273 atp. 274 Under Sec. 97, I.P.C., a person has the right not only to defend his own body but to defend the body of any other person.
5. Ramchandra Govind Take v. State, A. I. R. 1969 Bom. 20 at pp. 22-23 : 70 Bom. L. R. 399.

by the right of private defence there must be an offence committed or attempted to be committed. The question of the accrual of the right of private defence to a person does not depend upon an injury being caused to him. If the facts and circumstances of a particular case indicate that placed as the accused was he could have had a reasonable apprehension in his mind of a grievous injury being caused to him, then the right of self-defence was available to him.[1] It is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of private defence is not exercised.[2] The right of private defence would become nugatory if it were to be exercised after the commission of an offence. No right of private defence can arise merely because an unlawful or wrongful act has been done. It arises only when that unlawful or wrongful act is an offence.[3] Not only that; it must be an offence of a particular variety. In the case of private defence of property the offence committed or attempted to be committed, must be theft, robbery, mischief or criminal trespass.[4] Right of private defence does not arise merely because an unlawful or wrongful act has been done. It arises only when that unlawful or wrongful act is an offence.[5] Not only that, it must be an offence of particular kind. In the case of defence of person, it must be an offence "affecting the human body"; and in the case of defence of property, it must be either theft, or robbery, or mischief, or criminal trespass, or an attempt to commit any of these offences (*vide* Sec. 97, Penal Code).[6] Though the illegal seizure or detention of the cattle may be an offence within the meaning of Sec. 22, Cattle Trespass Act, nevertheless it could not give rise to the right of private defence of property as it was not an offence of the description given in Sec. 97, Penal Code.[6] Again a resistance to the execution of an illegal warrant of attachment (e. g. which does not give the names of the process-server and the *nazir*) is covered by the plea of right of private defence of property under Sec. 97 and Sec. 99 to which Sec. 97 is subject, is not applicable to such a case as the act of executing such a warrant clearly lacked due care and attention.[7] It would indeed be strange state of things if an *amin* who through inexperience or negligence failed to notice that the duration of his warrant had expired, but who proceeded to attach property honestly believing that he was entitled to do so under the warrant, could be treated as a robber and could be grievously hurt or even killed by the owner of the property in justifiable exercise of the right of private defence.[8]

Actual commission of offence not a prerequisite to the exercise of right of private defence.

Private defence of property under other statutes.

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1. State of U. P. *v.* Jagdish Puttoo Lal, A. I. R. 1966 All 244 at p. 247
2. Pagla Baba *v.* State, A. I R. 1957 Orissa 130 at p. 150 : 23 Cut. L. T. 88 : 1957 Cr. L. J. 769, differing from the decision in the following cases; Sawal Set *v.* Emperor, A. I. R. 1933 Pat 144 : 34 Cr. L. J. 736 ;Chandra Bhan *v.* State, A. I. R. 1954 All. 39 : 1953 A. L. J. 430 ; Nga Nan Da *v.* Emperor, A. I. R. 1920 Upp. Bur 35 : 54 I. C. 577 : 21 Cr. L. J. 97 ; Queen-Emperor *v.* Subha Naik, I. L R. 21 Mad. 249 : 1 Weir 42 & 310.
3. Ganourilal Das *v.* Emperor, I. L. R. 16 Cal 206 at p 218
4. Chandra Bhan *v.* State, A.I.R. 1954 All. 39 at p. 41: 1953 A. L. J. 430.
5. Ganouri Lal Das *v.* Queen Empress, I L R. 16 Cal. 206 at p. 218.
6. Faiyaz Khan *v.* Rex, A. I. R. 1949 All. 180 at p. 183.
7. Nand Singh *v.* State, A. I. R. 1951 Raj. 105 at p. 107.
8. Emperor *v.* Shib Lal, A. I. R. 1933 All. 620 at p. 622 ; 1933 A. L. J. 913.

The right of private defence only arises against acts which constitute an offence except in certain specified circumstances. The right of private defence of person extends to acts which amount to an offence affecting the body of the person exercising the right or the body of any other person. The right of private defence of property covers cases of acts which are offences falling under the definitions of "theft", "robbery", "mischief" or "criminal trespass" or an attempt to commit any of these.[1]

In the above-noted case the disputed plot was delivered to Phooljari and Gangadei by the Court on 8th June, 1950, thereafter on the day of occurrence when Phooljari and Gangadei were cultivating the disputed plot the accused came there armed with *lathis* and three ploughs and began to plough the same field from another corner and asked Phooljari and Gangadei to stop ploughing, and on their refusal to do so they started beating them with *lathis* as a result of which both were severely injured and Phooljari died on the spot and Gangadei in the hospital. *Held* that the accused had no right of private defence even if they had cultivated the land from days earlier and Phooljari and Gangadei had tried to cultivate it on the day of occurrence.

Section 97 of the Penal Code gives the right of private defence of property against an act which amounts *inter alia* to an offence of mischief. In this view of the matter, the petitioner must be held to have acted in exercise of his right of private defence of property. In exercise of such right, the petitioner gave only a slap to the complainant and it is not contended on behalf of the opposite parties that if the petitioner had any right of private defence he had in any manner exceeded it.[2]

A person has a right of private defence of property. When the offences committed by the deceased were only criminal trespass and mischief, the right of private defence of property could not extend to the voluntary causing of death. The exercise of the right of private defence of property is itself subject to restrictions mentioned in Sec. 99, I. P. C., which prescribes that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.[3]

This section is subject to restrictions under Sec. 99.

5. **Defence of another person or his property.**—Under the present section the right of self-defence extends not only to the defence of one's own body against any offence affecting the human body but also to defending the body of any other person.[4] It was, however, held by the Karachi Chief Court in *Budho Sahab's* case,[5] that the law does not give a person right to defend another man's person or property when he finds some unknown persons engaged in a free fight, and when a person does not know, that who are the robbers and who are the robbed has no right whatever to shoot at the crowd not knowing the identity

1. Chandra Bhan *v.* State, A.I.R. 1954 All. 39 at p. 41.
2. Hrushi Sahu *v.* State of Orissa, (1971) 37 Cut. L. T. 159 at p. 162.
3. Bhagirathi Burhia *v.* State, A. I. R. 1960 Orissa 99 at p. 101.
4. Amjad Khan *v* State, A. I. R. 1952 S C. 165 at p. 166 : 1952 Cr. L. J. 848: I. L. R. (1952) S. C. 199 : 1952 S. C. R. 567 : 1952 S C. J. 277 (S C); Nga Than *v.* Emperor, A. I. R. 1933 Rang. 273 : 146 I C. 212 : 34 Cr. L. J. 1248 ; Mothasham Aslam *v.* Emperor, A. I R. 1937 Pesh. 92 : 39 Cr. L. 35 : 1937 Pesh. L. J. 97.
5. Budho *v* Emperor, A I. R. 1945 Sind 38 at p. 42 : I. L. R. (1944) Kar. 420.

of the robbers. The right under Sec. 97 also embraces the protection of property whether one's own or another person's against certain specified offences, theft, namely theft, robbery, mischief and criminal trespass.[1]

General principles.

6. Limitations on the right.—The limitations on the right of self-defence and its scope are set out in the sections which follow. For one thing the right does not arise if there is time to have recourse the protection of the public authorities, and for another, it does not extend to the infliction of more harm than is necessary for the purpose of defence. Another limitation is that when death is caused the person exercising the right must be under reasonable apprehension of death, or grievous hurt, to himself or to those whom he is protecting; and in the case of property, the danger to it must be of the kind specified in Sec. 103. The scope of the right is further explained in Secs. 102 and 105 of the Penal Code. An attempt or threat to commit the offence is enough to give rise to right of private defence, and it is not necessary that the offences must have been actually committed before a person can resort to his right of private defence.[2]

When the Superintendent, Central Excise, not empowered to seize books of accounts not maintained in accordance with rules by the manufacturer takes such registers in his possession in good faith without the criminal intention contemplated by Sec. 378, I. P. C., no right of private defence accrues to the aggrieved party. Further, the general right of private defence given under Sec. 97, I. P. C., is subject to the restrictions contained in Sec. 99, I. P. C. It is clearly provided in Sec 99, I. P. C., that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.[3]

Right of private defence is subject to the provisions of Sec. 99

The right of private defence is, however, subject to the provisions contained in Sec. 99 of the Indian Penal Code which lays down that—

> "There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities."

In cases where there is no urgency and the danger is not imminent and effective help can be secured by having recourse to the protection of the public anthorities, there is no right of private defence. Where, however, there is a sudden attack upon a person it is not expected that he should submit to aggression but he can retaliate and use reasonable force to avert the danger. The question whether mere physical presence of the public authorities at the place of occurrence in all cases would deprive a person of his right of private defence. The principle underlying the restriction on right of private defence is that people should not take the law in their own hands if they can have recourse to public authorities for the adequate protection of their person and property because it is the primary function of the State

Principle underlying the restriction on the right of private defence.

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1. Amjad Khan, A. I. R. 1952 S. C. 165 at p. 166; *see* also Chandra Bhan, A.I.R. 1954 All. 39 : 1953 A. L. J. 430.
2. *Ibid.*
3. Gurucharan Singh *v.* State, A. I. R. 1965. All. 543 at p. 546.

to protect the people from unlawful aggression. But where the public authorities on account of their incompetence, imbecility or any other such cause are unable to avert the danger to the person and property of an individual, his right of private defence is not lost. It cannot, therefore, be laid down as a general rule that a person is deprived of his right of private defence simply because the public authorities are available at the scene of occurrence. It has, therefore, to be seen in each case whether there was any actual threat or not to the person of the individual when the other party or his companions reached the place of occurrence. If the threat was still there and the individual could reasonably apprehend that grievous injury was likely to be caused to him then he was justified in protecting his person from further injuries by using force to the extent of causing death. But if there was no danger to the person of the individual and his assailants had run away from that place or effective protection could be had from the public authorities, present there, in that case the individual would not have any right of private defence.[1]

No general rule when a person may be deprived of his right of private defehce.

When once it is found that the right of private defence was available to the accused it would be necessary and wasteful for the Court to embark upon subtleties as to the modulation of the right, as also to indulge in speculative thoughts on the scope and limits of the right.[2]

In *Raghavan* v. *State of Kerala*,[3] the position boiled up to this, namely that the deceased had not flared up when the accused refused to sell him the articles on credit and not only that he hurled abusive epithets at him but also dealt some blows on him. It was then that the knife was used by him. *Held* that it goes without saying that a person placed in such circumstances would enterain the fear that his life would be in danger unless force was used by him in retaliation. There was also the fact that the deceased was at the time accompanied by P. Ws. 2 and 3 and that would have aggravated his fear that all the three had come to make a joint attack on him. The standard in such circumstances is not the standard of a cool bystander as has been pointed out time and again in reported decisions. The actual assault is not what matters, but it is the apprehension in the mind of the accused that has to be taken into consideration.

7. Aggressor cannot claim right of private defence.—In order to determine whether the accused acted in exercise of the right of private defence of property and person it is absolutely necessary to find out who started the assault first. It is the position in which the *lathis*, the rifles and the revolvers were held at the time of the march that has to be looked into in determining whether the accused had any right of private defence on the assumption that they could have such a right.[4] In the above-noted case it was the police party that was the aggressor and whatever injuries were caused by the accused, if they were caused, were caused in exercise of the right of private defence. The law does not confer the right of self-defence on a man

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1. Dhoora *v.* State, 1963 Raj. L. W. 436 at pp 441-42.
2. Raghavan *v.* State of Kerala, 1967 Ker. L T 71 at p. 74.
3. 1967 Ker. L. T. 71 at 73.
4. Pagla Baba *v.* State, A. I. R. 1957 Orissa 130 at p. 138 : 23 Cut. L. T. 88.

who goes and seeks an attack on himself by his own threatened attack on another, an attack which was likely to end in the death of that other. The right of self-defence conferred by the law or preserved by the law for an individual is a every narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify the exercise of such a right.[1] It cannot be contended that since a death has taken place in the complainant's party it might well be held that the accused persons were aggressors.[2]

Right of self-defence if very narrow.

As observed in *Bhartu* v. *State*[3] : "Where the total number of injuries on the side of the complainant are somewhat more than those on the side of the accused persons the injuries by themselves do not necessarily prove that the accused were the aggressors and had exceeded their right of self-defence. . . ." Where the deceased, who had a *lathi* with him, rushed to the rescue of his cousins who were being beaten by the accused and when the deceased came close to the spot of trouble the accused attacked him with *lathis* and felled him to the ground and the deceased died shortly afterwards, the accused had no right of private defence because they themselves were the aggressors. The agreement that because the accused had finished the beating and the cousins were lying injured on the spot and that therefore the deceased had no right to go there with a *lathi*, was repelled.[4] When the complainant's own examination goes to show that he was aggressor, the accused, therefore, had the right of defence of property. The injuries caused were few and mere scratches and bruises. It, therefore, cannot be said that the accused had exceeded the right of private defence.[5] In the face of an admission by the accused in the first information report that the opposite party in the fight was in peaceful possession since two or three weeks before the fight accused cannot claim the right of private defence as he was the aggressor by his own admission.[6]

Report.

What may amount to sudden fight.

The accused acted in concert with the common object of enforcing the disputed right claimed by the first accused and through him by the 5th accused to pluck the fruits from the trees in the yard by the actual use of criminal force. All these five persons were armed with cudgels which are deadly weapons. Incident resulted in simple injuries and serious injuries which resulted in death of one person at the hospital. *Held*, that every one of the accused must have known that grievous hurt was likely to be caused in the prosecution of their common object. They, therefore, constituted themselves into an unlawful assembly and every one of them would be guilty not only of the offence of rioting armed with deadly weapons punishable under Sec. 148 of the Indian Penal Code but also of the offence of voluntarily causing grievous hurt punishable under Sec. 326 read with Sec. 149 of the Indian Penal Code. There existed no circumstances entitling the accused person to the right of private defence.[7]

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1. Dhanno Khan *v.* State, A.I.R. 1957 All. 317 at p. 318 : 1957 Cr. L. J. 498.
2. Jabbar Dar *v.* State, A. I. R. 1955 J. & K. 9 at p. 11.
3. A. I. R. 1954 All. 35 at p. 37 : 1953 A. L. J. 605.
4. Jai Narayan *v.* State, (1957) All. W. R. (H. C.) 526.
5. Nemkhoting *v.* Kamkhogin of Mata Village, A. I. R. 1957 Manipur 34 at p. 35 : 1957 Cr. L. J. 1426.
6. Allabadia *v.* State. 1959 All. L. J. 340.
7. State of Mysore *v.* Raju Shetty, A. I. R. 1961 Mys. 74 at p. 83: (1961) 1 Cr. L. J. 403.

8. Free fight.—Neither the accused nor the deceased has any right of private defence of body in course of the quarrel. Each of them has time to take recourse to the protection of the public authorities. They cannot attack each other on account of a quarrel. If they include in free fight, none of them in such a case has any right of private defence.[1] The doctrine of "free fight" can apply when both sides mean to fight and there is a pitched battle. In such a situation the question as to who attacks and who defends in such a fight is wholly immaterial and it depends on the tactics adopted by the respective parties. There is no question of free fight at all when the party of prosecution were the aggressors and what the first accused did was merely to defend himself. So far as the party of the accused is concerned they had not made any pre-planned scheme of fighting the other party.[2] In order that a party is not entitled to claim any right of private defence, there must be a free fight suggesting clearly shat both the sides had a determined intention to fight from the start voluntarily and secondly, when there is no reliable and acceptable evidence to show as to how it started and as to who was the aggressor. In other words, if two persons or two factions voluntarily and with determined intention come out to fight and in fact fight and that it is not possible to ascertain with reasonable certainty as to who was the aggressor or as to how that fight started, the rule of law laid down in the various decisions, that neither side is entitled to claim any such benefit arising out of the general exceptions contemplated under Sec. 96 read with Sec. 100 of the Penal Code would prevail. It is then that as to who attacked first would become immaterial.[3] Where two persons or groups of persons determined to fight out their grievances in a free fight and both parties suffered injuries on their persons, the question arises whether any of the parties concerned could take the plea of right of private defence under Sec. 96 of the Penal Code. In *Kallu* v. *State*,[4] the question relating to free fight has been discussed thread-bare. In *Dhoora* v. *State*,[5] the following observations were made : "Every fight between two parties where both sides received injuries cannot be called a free fight. Where the fight is not premeditated and there is no question of vindication of right or supposed rights by force but is only spontaneous arising out of a sudden altercation it would be incorrect to call it a free fight. It cannot be said in the present case that both parties were pre-determined to fight and had gone out to fight." Referring to the above-noted observation the learned Judge says : "No exception can be taken to the correctness of the decision of the learned Judge on the facts and the circumstances of the case. Considering, however, the observations in the background of the facts of the case, I am strongly inclined to think that the learned Judge did not intend to lay down a rigid rule of law that a sudden and unpremeditated fight can never be a free fight. It may be remarked that the learned Judge made these observations after noticing and discussing the case of *Ahmad Sher* v. *Emperor*.[6] In that case, Harrison J., referring to the free fight, observed as follows :

In free fight whether right of private defence is available.

'From the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is

1. Somnath Das *v.* State, 35 Cut. L. T. 165 at p. 169 : A. I. R. 1969 Orissa 138.
2. Lakshmanan *v.* Lakshmanan, A. I. R. 1964 Mad 418 at p. 420: (1964) 1 M.L.J. 41 : 1964 M. L. J. (Cr.) 47.
3. Shantilal Ratnaji *v.* State of Gujarat, 1970 Cr. L. J. 97 at p 100.
4. A. I. R. 1965 Raj. 74 at p. 76.
5. 1963 Raj. L. W. 436.
6. A. I. R. 1931 Lah. 513.

wholly immaterial and depends on the tactics adopted by the rival commanders.'

Supreme Court's observations.

"These observations were cited with approval in *Gajanand* v. *State of Uttar Pradesh*.[1] On the language used by Harrison, J., in *Ahmad Sher* v. *Emperor*,[2] it is hardly possible to carve out a clear-cut exception that a sudden and unpremeditated fight can never be a free fight. In my considered judgment the crucial and the decisive, or at any rate, a more appropriate test to determine whether a fight is a free one or not, is that both the parties should voluntarily enter into a fight and there should be a mutual intent to harm each other. A desire to fight and mutual intent to harm each other can easily be entertained at the spur of the moment and the resulting fight will cetainly be a free fight."

There is a fight, that means, when both the parties come determined to fight without there being corresponding rights of private defence, no party is entitled to the protection of law. Each party and the members thereof are responsible for the illegal acts caused by them. There is, therefore, no question of any exercise of right of private defence on the finding recorded that there was a free fight.[3]

Free fight—Meaning of.

Where two persons quarrel on a petty affair but in the heat of excitement, throw verbal challenges and then enter into a dual and fight such a fight is called a free fight. In *Kallu* v. *State*,[4] the Court observed : "If two enemies, each shown to be determined to injure the other, meet suddenly and go to fight, it will be hardly proper to dispute the existence of free fight and to assume right of private defence for both the parties. It must be remembered that the right of private defence is one of defences and not one of punishment or retaliation. While the grant of the right is intended to discourage cowardice and meek submission to aggression it cannot be extended to encourage private warfare and to substitute for the decision of the Courts the decision by the use of weapons. In this view of the right of private defence, I am wholly unable to accept the tall proposition made on behalf of the defence that a sudden fight can never be a free fight. In this view, I am supported by observation made in a number of cases. In *Sundar Lal* v. *Emperor*,[5] there was a general fight and the three accused had received some injuries and thereafter they could succeed in hitting upon the head of the deceased which resulted in his death. The accused came forward with a plea of right of private defence. Repelling the right of private defence, Kendall, J., observed as follows :

Allahabad decision.

'There was in fact just such a sudden fight as is contemplated in Exception 4 to Sec. 300, Penal Code. Everyone was trying to hit one of the opposite side and nobody thought about the private right of self-defence.'

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1. A. I. R. 1954 S. C. 695.
2. A. I. R. 1931 Lah. 513.
3. Dwarika Misra *v.* State, (1969) 35 Cut. L. T. 255 at pp. 256-57.
4. A I. R. 1965 Raj. 74 at p. 76.
5. A. I. R. 1935 All. 438.

"In *Ghulam Haidar* v. *Emperor*,[1] also Agha Haidar, J., expressed the same view, and summed up the position as follows:

Lahore decision.

'The case is a difficult one and as the learned Sessions Judge has pointed out, the witnesses for the prosecution are not disinterested. In fact, there was a cross-case and the accused in the one case were prosecution witnesses in the other. It is impossible to determine which side attacked first. Both parties wanted a fight and they had it, and the question therefore as to who were the aggressors and which party acted in self-defence does not arise.

"In *In re Erasi Subba Reddi*,[2] it was held that 'where the two parties were spoiling for a fight and each person began to pick up stones and throw at the other party, then the accused's party cannot plead that because the other party was also intent on beating them, every blow they gave was given in self-defence. Where there is a spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object.' In *Jumman* v. *State of Punjab*,[3] the Supreme Court observed:

Madras decision.

Supreme Court's observations.

'Where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, law does not permit the plea of private defence to be taken on either side.' Where in the case of a sudden fight between two persons one of them may decline from a further fight and retreat as far as he can with safety and then faced with a dangerous situation causing reasonable apprehension of death or grievous hurt, recourse to violence, he can certainly claim the right of private defence."[4]

A free fight is one when both sides mean to fight from the start, go out to fight and there is pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders.[5] In such a fight no right of private defence accrues to either party.[6] There can be no question of a free fight where there is a clear finding by the Court that a particular party were the aggressors.[7] If two men are found fighting in a street, one must be able to say that the other attacked him and he was only defending himself. If he was only defending himself and not attacking, this is not a fight and consequently not an affray.[8] Where both parties want to enforce their right to a piece of land and in enforcement of their so-called right, they go armed to plough it, determined to fight

When question of free fight does not arise.

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1. A. I. R. 1934 Lah. 512.
2. A. I. R. 1943 Mad. 492.
3. A. I. R. 1957 S. C. 469.
4. Kallu v. State, A. I. R. 1965 Raj. 74 at pp. 776, 77.
5. *Per* Harrison, J., in Ahmad Sher v. Emperor, A. I. R. 1931 Lah. 513 at p. 519 : 32 I. C. 381 : 32 Cr. L. J. 860, approved in Mohammad v. Emperor, A. I. R. 1947 Lah. 106 : 47 Cr. L. J. 391 : 223 I. C. 427.
6. Parmeshari Das v. Emperor, A.I.R. 1934 Lah. 332 at p. 334 : 35 Cr. L. J. 1319 ; Bhairo Singh v. Emperor, A. I. R. 1935 Nag. 141 : 36 Cr. L. J. 861 : 156 I. C. 120.
7. Gajanand v. State of U. P., A. I. R. 1954 S. C. 695 at p. 698: 1954 Cr. L. J. 1746: State v. Kartar Singh, A. I. R. 1958 All 90 : 1958 Cr. L. J. 129.
8. R. v. Sharp, (1957) 1 All E. R. 577.

for its possession, neither party can claim the right of private defence.[1] Before a man can avail himself of the defence that he used a weapon in defence of his life he must satisfy the Court that the defence was necessary that he did all he could to avoid it and that a man cannot, in any case, justify killing another by pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself.[2] When a body of men are determined to vindicate their rights or supposed rights, by unlawful force, and when they are engaged in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises.[3] Where it is clear from the evidence that the two parties were spoiling for a fight and that each person began to pick up stones and throw at the other party, then the accused's party cannot plead that because the other party was also intent on beating them, every blow they gave was given in self-defence.[4] Similarly, where both the parties take up arms and go out into the open and indulge in a fight, no question of self-defence can arise and it is immaterial which side begins the fight first.[5] In *Banwari Singh's* case,[6] both the parties had been collecting men for a fight from a very early hour and in spite of the fact that the police station was nearby and information had been given to the police who were immediately expected, the parties chose to fight out the matter in the very presence of the police which had arrived and had attempted to prevent the fight. It was held that both the parties were entirely in the wrong and there was no right of private defence on the part of either of the parties.

Premeditated fight when an answer to the plea of defence of person.

It appears, however, that both parties coming in large number for a premeditated fight is an answer to the plea of *defence of person* only. There are circumstances in which one can collect a mob expecting resistance with violence from his opponent and defend his property by violent means and can still get the benefit of the right of private defence. Those circumstances must be (1) immediate danger to the property which, if not immediately protected, would be lost by the time protection of public authorities is obtained; (2) even this justified violence by the mob for protection of property from actual invasion should be exercised within the legal limits of the right of private defence of person or property, that is to say, there must be circumstances existing leading to a reasonable apprehension of a danger arising out of a committed or attempted or threatened offence affecting person or property, as the case may be, justifying the particular injury inflicted.[7]

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1. State *v.* Adra, A. I. R. 1958 Raj. 52 at p. 56 : 1958 Raj. L. W. 24 : 1958 Cr. L. J. 222.
2. Farman Khan *v.* Emperor, A. I. R. 1926 Pat. 433 : I L. R. 5 Pat. 520 : 98 I. C. 394 ; Mohammad *v.* Emperor, A. I. R. 1947 Lah. 106 : 47 Cr. L. J. 391 : 223 I. C. 427.
3. Mohammad *v.* Emperor, A.I.R 1947 Lah. 106 at p. 111; Queen-Empress *v* Prag Dut, 20 All. 459: 18 A.W.N. 117 ; Abdul Latif *v.* The Crown, 48 Cr. L. J. 367 : 229 I. C 293 ; Paras Ram *v.* Rex, A. I. R. 1949 All. 274 : I. L. R. (1949) All. 258: 50 Cr. L. J. 415 ; *In re* Erasi Subba Reddi, A. I. R. 1943 Mad. 492 : 44 Cr. L.J. 665 : 207 I. C. 614: (1943) 1 M.L.J. 583 : 56 L. W. 351 : 1943 M. W. N. 275 ; Matadin, 34 Cr. L. J. 1016: 10 O. W N. 383 : 145 I. C. 137 ; Matte Mandal *v.* Emperor, A I. R. 1932 Pat. 189 : 33 Cr. L. J. 509
4. Erasi Subba Reddi, A. I. R. 1943 Mad. 492 at p. 493.
5. Abdul Latif, *supra*; Matte Mandal, *supra*.
6. 5 D. L. R. Pat. 155 : 4 A. I. Cr. S. 395 : I.L.R. 35 Cal. 368. foll. ; I. L. R. 2 Pat. 595 : 434 P. L. J. 653 ; I. L. R. 36 Cal. 865 : 3 P. L. J. 419, dist.).
7. Dorik Gope *v.* Emperor, A. I. R. 1946 Pat.251 at p. 260 : I. L. R. 24 Pat. 744 : 27 P. L. T. 234.

When the riot is pre-meditated on both sides there is no right of private defence on the part of either of the parties.[1]

9. Sudden fight.—In Russell on *Crime*,[2] the law on the subject is stated thus :

> ". . . . Where a man was assaulted in the course of such sudden brawl or quarrel he might, under certain conditions, protect himself by killing his assailant and rely upon the excuse of self-defence and thus reduce his offence from murder to homicide which only involved forfeiture. The conditions were that he must show, first, that before a mortal stroke (was) given he had declined further combat; and secondly, that he then killed his adversary through necessity in order to avoid his own immediate death." "In all cases of homicide excusable by self-defence or chance medley it must be taken that the fatal blow was struck upon a sudden occasion, and not premeditated, or with malice, and from the doctrine which has been above laid down it appears that the law required that the person who killed another should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant and that not fictitiously or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood."

What may amount to sudden fight.

If some persons deliberately go to another with the intention of attacking him, that can never be a case of free fight or sudden fight. That would be a case where the latter would be entitled to the right of private defence in order to ward off the attack on him by the former. If two persons gather together at a place and some dispute suddenly arises, as a result of which the parties attack each other or one person attacks another that would be a case of sudden fight.[3]

Examples.

Where there is spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequence of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some member of the other party his own blows were given in self-defence.[4]

In an Allahabad case,[5] there was a sudden quarrel with regard to the ownership of a cattle trough between the accused *X* on one hand and the deceased on the other hand. On 14th June, 1947, a quarrel ensued resulting in a fight. Both were armed with *lathis* from before the start of the fight but there was no evidence to show that the parties had made any pre-arranged plan of fighting out dispute that day or had made any preparation to that end before the start of the fight. The deceased *Y* struck the first blow without *X* having assaulted him or having threatened to assault him. *X*'s son *Z* rushed to protect his father. The accused *X* and *Z* struck *lathi* blows on *Y* resulting in the

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1. State *v.* Adwaita Behara, (1961) Orissa J. D. 26 : 27 Cut L. T. 367.
2. 11th Ed., pp. 514, 515 and 516.
3. State *v.* Koli Hira Bhaga, A. I. R. 1961 Guj. 8 at p. 11 : (1961) 1 Cr. L. J. 54 (2).
4. *In re* Erasi Subba Reddi, A. I. R. 1943 Mad. 492 at p 493 : 31 Cr. L. J. 665 : 207 I. C. 614 : (1943) 1 M L. J. 583 ; 56 L. W. 351 : 1943 M.W.N. 273.
5. Paras Ram *v.* Rex, A. I. R. 1949 All. 274 at p. 284 : I. L. R. (1949) All. 258: 50 Cr. L. J. 445.

death of the latter. Both the accused were tried under Sec. 304, read with Sec. 34. *Held* that it was not a case of two people having come pre-determined to fight and measure strength, but was a case in which, as usual, there were bickerings over a cattle trough and exchange of abuses. This conferred no right on the deceased to attempt to strike the accused in the first instance and as such the counter-attack by the accused would be deemed to be in self-defence. It could not in the circumstances be held that the accused *X* and his son *Z* executed any right of self-defence.

Where it is difficult for the Court to accept the allegation of the prosecution that it were the accused who started the fight. On the other hand, it could safely be inferred from the evidence which had been brought on the record, as well as from the circumstances of the case that *D*'s party was unlawful from the inception and that they used dangerous weapons including a gun against the accused who were not members of an unlawful assembly and who had a right to hold the disputed fields in their possession until their eviction by process of law. It was held that the accused had, therefore, the right to defend their property and to that right was added the right of private defence of person when *D*'s party resorted to violence with deadly weapons. Some of the accused received grievous injuries, nothing to say of an apprehension of such injuries. They also saw *D*'s party using a 12 bore gun. Their right to defend their person, therefore, commenced as soon as a reasonable apprehension of danger to their person and property arose not merely from the threat given by *D*'s party but by the actual use of violence by its members. And once such a right arose, the accused could not possibly be blamed if they made their defence effective. In the fight which developed between the parties when force was met with force, it could not be expected that the accused would nicely assess the extent of their right of private defence of person and property and modulate their reprisal accordingly. As has been observed by their Lordships of the Supreme Court in *Amjad Khan* v. *State*,[1] in determining whether the force employed in the exercise of the right was or was not more than what was actually necessary, and whether the circumstances in which a person was placed were or were not such as to warrant the causing of death, it is not right to weigh the facts of the case "in too fine a set of scales, or as some learned Judges have expressed, in golden scales".[2]

Right of private defence arrising not merely by the threat but by the actual use of force.

10. Exchange of abuses and threats.—An exchange of abuses on both sides does not give any of them a right to strike the other by a *lathi*. No danger to person arises when one is merely abused, and as such no right accrues to the person abused to strike another with a *lathi*. If, however, abuse is accompanied by a threat to assault, it would be another matter.[3] But mere threat, not carried out, and later completely abandoned followed by retracing of steps by the threatener, would not justify any assault from the person threatened, as he must have been convinced that the person threatening did not mean to carry

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1. A. I. R. 1952 S. C. 165.
2. Mangia *v.* State, 1962 R. L. W. 657 at p. 665.
3. Paras Ram *v.* Rex, A. I. R. 1949 All. 274 at p. 284; Kbetri Bewa *v.* State, A. I. R. 1952 Orissa 37 : 17 Cut. L. T. 220.

out the empty threat.[1] There is no provision in the Indian Penal Code where an accused person can be excused for insulting outburst in the exercise of the alleged right of private defence.[2]

11. Defence of person.—The use of the words "offences affecting the human body" both in Sec. 97, which gives the right of private defence, and in the beginning of Chapter XVI of the Code makes it clear that the right of private defence of person arises in favour of a person in cases when any of the offences mentioned in Sec. 299 to Sec. 377 is contemplated to be committed against the person who seeks to exercise that right.[3] The right of private defence consists of the right of self-defence and the defence of another person's body and property against the four offences of theft, robbery, mischief or criminal trespass. The right of such defence commences as soon as a reasonable apprehension of danger to person[4] or property[5] arises and it continues so long as the danger lasts or the property stolen is not recovered. The amount of force, justifiable in the exercise of the right is such as was strictly necessary for the purpose.[6] The right to defend one's own, or another's person is absolute and unqualified.[7] Where the whole conduct of the deceased was aggressive from the beginning, the presence of *lambardars* on the occasion, who did not take any step to protect the accused from assault by the deceased does not take away the right of private defence which the accused had. In such cases it is difficult to judge the extent of the right of private defence by any hard and fast rule and the accused cannot, as has already been remarked by the Lahore High Court in some decided cases, be expected to regulate the extent of force to be used by him by any precise standard.[8] A person may be on bad terms with another and may be on the prowl to have his revenge. The fact that his act was actuated by malice and a spirit of revenge is nothing if he was well within his right under this section. Such, indeed, was the case of one Dhuman Teli who had been on inimical terms with one Itwari Teli owing to the latter's intrigue with his wife. One night he lay in wait for him with a friend and on Itwari appearing, subjected him to merciless beating. They were prosecuted, but the Court acquitted them observing: "I think Dhuman Teli and Karu Lal are much to be commiserated. The former has defended his house and honour against the trespass of a would-be adulterer; and admitting on the meagre record that there was very violent retaliation, I think that under Secs. 96 and 104 of the Penal Code, he should be held to have committed no offence, as he was justified in causing any harm short of death to a person committing house-trespass. With respect to Karu Lal, I would give him the benefit of considering him to have aided Dhuman Teli to commit no offence."[9]

When the right of private defence commences and continues.

What amount of force is justifiable in right of self-defence.

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1. Khetri Bewa *v.* State, A. I R. 1952 Orissa 37 at p. 40 : 17 C. L. T. 220; *see* also *In re* Ganpathia Pillai, A. I. R. 1953 Mad. 936 : 54 Cr. L. J. 1730: 1953 M. W. N. 558.
2. Serei Behra *v.* Bipin Behari Roy, A.I.R. 1959 Orissa 155 at p. 157 : I.L.R. (1959) Cut. 104 : 25 Cut. L. T. 184.
3. Ram Saiya *v.* Emperor, A. I. R. 1948 All. 205 at p. 208 : 49 Cr. L. J. 422 : 1948 A. L. J. 138 : 1948 A.W.R. (H. C.) 122.
4. Section 102; Pancham, 52 I.C. (Oudh) 887.
5. Section 105.
6. Section 99.
7. Rose, (1884) 15 Cox. C. C. 5.
8. Kala Singh *v.* Emperor, A. I. R. 1933 Lah. 167 at p. 168 : 34 Cr. L. J. 1175 (2) : 54 P. L. R. 259.
9. Dhuman Teli, 6 W. R. 203.

A person is, of course, entitled in resist by force his seizure for service or employment.[1]

No right of private defence till at least an attempt to commit an offence.

It will be observed that the right of private defence postulates the attempt to commit or the commission of an offence specified in the section. There is, therefore, no right unless there was at least an attempt to commit an offence. To suppose in the last case, Itwari had been set upon before he entered Dhuman's house, the two accused could not have justified their beating for the right had not then come into existence. And it would have ceased to exist as soon as Itwari had effected his retreat after the commission of the crime.[2] Giving full effect to the meaning of the fifth clause of Sec. 100 when the appellant's sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.[3] The right is, indeed, a right of *defence*, and not of *punishment* for past and prospective iniquities. And the use of force sanctioned is, therefore, proportioned to that purpose and not to the gravity of the crime.

A party established to be in possession of land is entitled to the right of private defence of person and property against an aggressor party even though that party claimed a right to the possession of the land.[4]

It is maintained by Mr. Rajendra Singh that the party of the accused believed *bona fide* that they were in possession and it was for the purpose of defending that possession that they used force, if it be held that they actually used force. On that basis right of private defence was claimed. *Held* the accused had no right of private defence in the circumstances of the instant case. In the exercise of right of private defence it must be established that the accused was in physical possession so that he was entitled to resist or repel aggression in order to maintain that right. If a party is forced to maintain or defend his right, it cannot be said that he was determined to vindicate his right by show of force or use of force so that the right of private defence was not available to him. When a person defends his possession, even by using the minimum force necessary, it cannot be described as enforcing any right or supposed right. On the other hand, no person is entitled to take the law in his own hand and vindicate his "right to possession" of any property by resorting to criminal force. The distinction is clear: one is the right to defend the property and person, while the other is to enforce any right or supposed right. The former cannot be deemed to be enforcing any right or supposed right. The latter is not permissible under the law. The accused and his father went to the disputed field in order to enforce their right and to take possession

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1. Pancham, 52 I. C. (Oudh) 887.
2. Balackee Jolahed, 10 W. R. 9; *cf.* Banke Behari, 20 I. C. (Pat.) 602; Keshar Lal, 1930 M. W. N. 502.
3. Vishvanath *v.* State of U. P., A. I. R. 1960 S. C. 67 at p. 70 : 1960 S. C. J. 26: 1959 A. L. J. 884 : (1960) 1 S.C.R. 646, overruling Emperor *v.* Ram Saiya, A.I.R. 1948 All. 205 : I. L. R. (1948) All. 165: 49 Cr. L. J. 422, and reversing State *v.* Badri, A. I. R. 1957 All. 714 :1957 Cr. L. J. 1195.
4. Jagannath Biswal *v.* State, 24 Cut. L.T. 332.

not only of the field, but also of the crop which had not been sown by them, but had been sown by others and was being harvested by others, and in doing so there was a premeditated plan to use violence if they were obstructed in removing the harvested crop. Therefore, the accused had no right of private defence.[1]

Test.

The right of private defence of body commences as soon as a reasonable apprehension of danger to person arises and continues so long as the danger lasts.[2] Whether a person has a right of private defence or not has got to be answered with reference to the provisions contained in Sec. 97 of the Indian Penal Code and that section, in so far as it deals with the right of private defence of persons, clearly states that every person has a right, subject to the restrictions contained in Sec. 99, to defend his body against "an offence". This section, which contains the law relating to private defence, clearly states in terms that the right is given to protect one's body against "an offence" only.[3] Where in a charge for committing murder of the deceased by striking him with a bamboo stick on the head, it appears most probable that the deceased had struck the accused on his back with a stick part of *ballam* causing injury and a swelling on it, and if, under these circumstances, the accused hit the deceased on his head with a stick in his hand, it could not be said that he had no justification for it or that he had exceeded the right of private defence. Faced with a situation where the deceased was an aggressor and was armed with a *ballam* which he could have used as such, even though his first stroke was with the handle part of it,[4] it may be held that the accused could have a reasonable apprehension of danger to his life and was therefore justified in completely disabling his adversary. If in that attempt he happened to inflict the injury with a little more force than absolutely necessary, he could not be held liable. It is for such a situation that it is often said that one cannot weigh in golden scales what maximum amount of force is necessary to keep within the right of private defence.

The law makes every allowance to a person who apprehends a reasonable danger to his life from his adversary, and with intent of self-preservation strong upon him pursues his defence a little further than what to a perfectly by-stander may seem absolutely necessary.[5]

The burden on the accused of establishing circumstances which bring the case under an exception is not as onerous as the burden on the prosecution of establishing its case beyond reasonable doubt.[6]

Once the accused's party are held to be the aggressors it is immaterial as to who gave the first blow. The complainant's party would be justified in taking such measures as may be necessary to prevent further attack on that party and merely because one of the complainant's party retaliated after the first blow had been given by the accused's party, the latter cannot claim any right of private defence.[7]

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1. Jaganlal Anjordas *v.* State, (1963) 2 Cr. L. J. 570 at p. 572.
2. Naye Nahak *v.* State of Orissa, (1962) 4 Orissa J. D 17.
3. State *v.* Bharat Singh Odhar Singh, (1961) 1 Cr. L J. 649 at p. 651.
4. In Beard *v.* United States, (1895) 158 U. S. 550 at p. 558, Holmes, J., observed that detached reflection cannot be demanded in presence of uplifted knife.
5. *See* Amjad Khan *v.* State, A. I. R. 1952 S. C. 165.
6. Bala Prasad Dhansukh *v.* State of M. P., A. I. R. 1961 M P. 241 at p. 244 : 1961 M. P. C. 31 : 1961 M P. L. J. 71: 1961 Jab. L. J. 353.
7. Sajjandas *v.* State, A. I. R. 1964 Orissa 251 at p. 253.

Factors to be considered by the Court in deciding the plea of private defence.

It is true that, when applying the law of private defence, Court must make all reasonable allowances in favour of the accused and not apply the law in such a manner that persons would become cowards. It is also true that, in deciding cases of this type, the mental condition of the assailant must be taken into account and not the views which are formed by the by-stander or in the cool atmosphere of the court-room. It is also true that the action of the accused must not be weighed in golden scales nor should we assess the actions of the accused step by step in the course of the struggle. But, in applying all these principles and facts, the central point which must be borne in mind is, that the right of private defence continues only so long as a reasonable apprehension of the danger persists. Whenever a number of injuries come to be inflicted by an accused person in the exercise of the right of private defence, the important point which has got to be determined is as to whether in the circumstances in which the accused was placed, the apprehension had persisted in his mind when he inflicted a particular injury or injuries that his life was in danger and whether, under the circumstances in which he was placed, that apprehension was a reasonable one.

It is true that one of the tests which may be safely and usefully applied would be to discover whether the accused was still acting under the instinct of self-preservation or whether other feelings such as those of anger, malice and reprisals had intervened. In the former case, the accused would be entitled to right of private defence, but not in latter cases.[1]

12. Restrictions on right.—Section 97, Penal Code, is subject to Sec. 103, under the relevant provisions of which the right of private defence of property extends to the voluntary causing of death or of any other harm to the thief under such circumstances as may reasonably cause the apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. This section is itself subject to the restriction contained in Sec. 99 that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. So far as the right of defence of person is concerned, Sec. 97 is subject to that restriction and to the provisions of Sec. 100 in which it is laid down that the right extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right is *inter alia* such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault.[2] When a man is being attacked he is not in a position to distinguish which person in the party of aggressors is his real assailant and which is merely an onlooker and he is not deprived of his right of private defence merely because a person in the party of aggressors has not attacked him.[3] Where an accused armed with a *gandasa*—deadly weapon—made a violent attack on another who was sitting unarmed in the middle of the road the fact that under these circumstances his father

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1. Umar Khan *v.* State, (1961) 1 Cr. L. J. 653 at pp. 653, 654.
2. Madra Damri *v.* Emperor, A. I. R. 1946 Nag. 221 at p. 224 : 1946 N. L. J. 198.
3. Bhabuti *v.* Emperor, A. I. R, 1948 Oudh 25 at p. 27 : 231 I. C. 396 : 48 Cr. L. J. 783 : 1947 A. W. R. (C. C.) 205 : 1947 O. W. N. (C. C.) 295.

and his brother came to his rescue would not give the accused any right of private defence against the rescuers.[1]

The right of private defence of the body extends to the voluntary causing of death to the assailant, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. In the present case, the situation was this : M. O. 1 *katti* (knife), which the deceased has in his hand while chasing the accused, —was a deadly weapon capable of causing death. When evidently there was reasonable apprehension in the mind of the accused that he was going to be killed by his chasing father the deceased and when the deceased had approached him while chasing with a knife all the while shouting that he would kill the accused,—the accused had the right of private defence of the body even to the extent of causing the deceased's death.[2]

Where the deceased was the aggressor, who questioned the accused, caught his hair and exchanged blows with him ; and that P. Ws. 1 to 4 who happened to be nearby at the time went against the accused with a view to support the deceased ; and that the accused had reason to apprehend that the deceased and P. Ws. 1 to 4 would make common cause and manhandle him. However, none out of the deceased and P. Ws. 1 to 4 was armed with any weapon. *Held* it is true that a right of private defence of the body accrued to the accused under the first clause of Sec. 97, I. P. C., during his scuffle with the deceased. But he had no reason to apprehend an assault of any of the descriptions in Sec. 100, I. P. C., and the right ceased when his scuffle with the deceased terminated.

In *Re Garugu Ramayya*,[3] the facts were that three men trespassed by night into the house of the accused, seized him and tried to drag him forcibly out of the house. There was a scuffle between the accused and his assailants. The latter were unarmed and the accused had no reason to believe that he was in danger of grievous hurt but he believed that he could not escape from his assailants without using a knife which he picked up and used, stabbing one to death and wounding another of his three assailants. On his trial for murder, the accused did not plead that he had used the knife in his self-defence.

A Division Bench of the Madras High Court held that as it was in evidence that the accused had to struggle against three persons, the Court was not only entitled but bound to take into consideration the accused's right of self-defence and to decide the case on the facts proved in his favour, though he had not set up those facts in framing his defence. On the facts the accused was found to have exceeded his right of private defence but being within the 2nd Exception to Sec. 300, he was not found guilty of murder. He was convicted under Sec. 304, I. P. C., and sentenced to rigorous imprisionment for seven years.

While the deceased was holding the accused by hair and was exchanging blows with him, P. Ws..1 to 4 who were closely related to the deceased approached with the intention of helping the deceased. The

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1. Indar Singh *v.* Emperor, A. I. R. 1943 Lah. 163 at p. 166 : 207 I. C. 447 : 44 Cr. L. J. 657 : 45 P. L. R. 155.
2. State of Orissa *v.* Sanyasi Madi, 29 Cut. L. T. 464 at pp. 466-67.
3. 8 I. C. 1088 (Mad.).

accused might well have thought that he could not escape, except by using against the deceased before P. Ws. 1 to 4 pounced upon him, the penknife (M. O. 1) which happened to be in his possession. Although the accused acted in the exercise of his right of private defence of the body, he exceeded that right and comes under Exception (2) to Sec. 300, I. P. C.[1]

13. Proof.—When an accused person commits an act of violence upon another person in circumstances which prove that he is apprehending further violence from that person, nothing further need be proved to establish that the accused is acting in the exercise of his right of self-defence. Circumstances themselves show that unmistakably, and the Court is wrong in throwing upon the accused the burden of proving that he had in fact consciously exercised his right of self-defence when he used his knife. Of course, situations are conceivable in which, in spite of the fact that some violence is being used against an offender, he regards that violence as negligible and he acts with the deliberate intention of killing, and without any intention at all of defending himself. It all depends upon the circumstances proved to exist.[2]

Circumstances proved to exist.

When the evidence in the case clearly shows that the accused was responsible for the infliction of two injuries on two victims, he can be exonerated from the blame only if he shows that he had justification for inflicting those injuries or rather that he acted in self-defence and the burden is clearly on the accused.[3]

In order that the prosecution should succeed, its evidence must be such as to negative conclusively the plea of self-defence. Even if the plea of self-defence is not positively established but the Court is left in doubt that the killing may well have been in self-defence, the accused is entitled to be acquitted.[4]

Prosecution in order to succeed must negative the plea of self-defence.

14. Cases.—In *Ashrafuddin's* case,[5] there was enmity between the deceased and the two accused. The deceased went to a tea shop when he was attacked by the two accused. The deceased at the time of the attack, had hatchet, accused 1 caught hold of the hatchet with one hand and began to stab the deceased with the other while the accused 2 was holding him from behind. It was held that the aocused were not acting in the exercise of right of private defence but commiting murder.

In another case from the same High Court the accused had gone to the house of the deceased to commit an offence, he knew that the men of the family might discover him and the accused went prepared

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1. *In re* Harijana Dontala Gadu, (1965) 2 Cr. L. J. 440 at p. 442.
2. *In re* Ammu Pujary, A. I. R. 1942 Mad. 295 at pp. 295-96 : 43 Cr. L. J. 753: 1942 M. W. N. 172 : 201 I. C. 609 : (1942) 1 M. L J. 200 : 55 L. W. 125.
3. Lukka Ulahannan *v.* State of T. C., A.I.R. 1955 T. C. 104 at p. 106 (D. B.) : I. L. R. (1954) T. C. 1308 : 1954 Ker. L. T. 920 : 1955 Cr. L. J. 852.
4. Sumran *v.* State, 1959 M.P.L.J. (Notes) 101, relying upon Woolmington *v.* Director of Public Prosecutions, 1945 A. C. 462 : 104 L. J. K. B. 433 and Holia Budhoo Gowara *v.* Emperor, A. I. R. 1949 Nag. 163 : I.L.R (1948) Nag. 903 : 1948 N. L. J. 565 : 50 Cr. L. J. 465.
5. A. I. R. 1941 Lah. 451 : 193 I. C. 594 : 42 Cr. L. J. 450.

for that eventuality. He armed himself with a dagger with every intention of using it if discovered. The accused having been discovered and apprehended used that knife and killed an inmate. It was held that under any circumstances it could not be said that he had the right of self-defence. The plea of self-defence having therefore hopelessly broken down the result was that the accused was guilty of murder.[1]

In the case reported in *Ata Mohammad* v. *Emperor*,[2] the deceased lost his temper with his brother, the accused had picked up a *datu* (big scythe) and threatened to strike him with it. The accused apprehending that he was to be hit on the head with a scythe aimed a blow with a *lathi* at the deceased in self-defence. This was the fatal blow which caused deceased's death. *Held* that in the absence of any other evidence to the contrary the accused could not be held to have exceeded his right of self-defence.[3]

In *Nawaz Ali* v. *Emperor*,[4] a police officer went out to apprehend a proclaimed offender whose name was Piare. Misguided by inaccurate information this police officer accidentally pursued another man whose name is Iso. Iso was following his lawful occupations on the King's highway when he became aware that he was being pursued by an armed and mounted man. Iso belonged to a fighting tribe and he happened to have hatchet in his hand. He stood on guard and showed a bold front. Flourishing his hatchet in the air he shouted to his pursuer to keep his distance or it would be the worse for him. The police constable believed himself to be face to face with a dangerous proclaimed offender. He had his carbine in his hand; he attempted to fire a shot over the head of his antagonist. He gave his piece what he supposed to be the necessary elevation but the distance was so great that the dropping shot struck the man himself. The wound was enough to infuriate but not enough to disable. Iso charged; the constable who must have been attempting to reload his carbine, pulled back his horse, and the blow which Iso delivered struck the horse, not the man. But by this time the constable had reloaded his weapon. It appears that Iso's charge must have carried him past the man on horseback. The constable turned and fired into the back of his assailant. The wound was fatal. The question was what was the legal liability of the man who fired the fatal shot. It was held that the police officer had a right of private defence even to the causing of death.

Where the evidence did not warrant the conclusion that the accused party had gone prepared for a fight but showed that the fight resulted from the prosecution party rushing at them armed with *thengas* and assaulting them, the conduct of the accused party in beating some members of the prosecution party which resulted in the death of one of them amounted to an exercise of the right of private defence of their person. In the circumstances it was not possible to hold that the accused exceeded the right by causing the death. At any rate when the evidence raised a doubt with regard to that, the accused were entitled to be acquitted.[5] Where the clear finding of the Sessions Judge ruled

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1. Mohd. Khan Abbas Khan *v.* Emperor, A. I. R. 194 Lah. 82 at p. 82 : I. L. R. (1940) Lah. 564.
2. A. I. R. 1934 Lah. 995.
3. Ata Mohammad *v.* Emperor, A. I. R. 1934 Lah. 995 at p. 996 : 153 I. C. 622 : 36 Cr. L J. 415.
4. A. I. R. 1933 Sind 193 at pp. 195-96 : 34 Cr. L. J. 751.
5. Raghunath Padan *v.* State, 24 Cut. L. J. 215.

out the question of a free fight and the complainant's party was found to be the aggressor, the accused enjoying the right to take water on the date of occurrence and expecting armed aggression from the other party was justified in arming himself and holding himself in readiness to defend his property or right against the expected aggression. It was not a case where the enjoyment of a right was not to be protected or defended ; nor was it a case where the acoused and his party can be said to have gone to the spot to measure their strength, and the protection of property or right was a mere pretext.[1]

Where the accused, suspected to be drunk, was attempted to be forcibly dragged to a dispensary for medical examination and the accused resisted by giving blows to the constables and made good his escape, the police constables who had been ordered by the head constable to take the accused for medical examination, were not doing their duty in taking the accused against his will and as they initially assaulted the accused by attempting to drag him forcibly to the dispensary, the accused had *prima facie* the right of private defence against that action under this section.[2] Medical evidence derived from the examination of the accused without him is not admissible. If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop. It is quite contrary to the spirit of the law, that evidence should be obtained in this way. It is clearly incumbent upon the Crown to prove that the accused consented, before such evidence is received. Any such examination without the consent of the accused would amount to an assault and the police are not entitled without statutory authority to commit assaults upon prisoners for the perpose of procuring evidence against them. If the Legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination.[3]

The pursuing party consisting of 60 to 70 persons were fully armed with *kulharis* and *kirpans*, etc. They were all brandishing their weapons. Waryam Singh was ahead of the party and was armed with a *kulhari*. On reaching the accused the pursuit party surrounded them. Darshan Singh was attacked and was injured with sharp-edged weapons and was killed on the spot. The accused Kartar Singh was found to have received eight injuries when he was arrested. It was held that in the circumstances it could not be said that the accused Kartar Singh did not have reasonable apprehension that he was likely to be killed by the members of the pursuit party. He was therefore justified in defending himself. He gave only one blow with his spear which unfortunately proved fatal. In the circumstances it could be said that the accused exceeded their right of private defence.[4]

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1. State *v.* Kartar Singh, A.I.R. 1958 All. 90 at p. 95 : 1958 Cr. L. J. 129.
2. Deoman Shamji Patil *v.* State, A. I. R. 1959 Bom. 284 at p. 286 : 61 Bom L. R. 30 : 1959 Cr. L. J. 825, distingushing the decision in State *v.* Yamanappa Limbaji, I. L. R. (1956) Bom. 661 : 58 Bom. L. R. 551, as in that case, unlike the present case, the Sub-Inspector of Police was carrying out an apparently lawful order.
3. Bhondar *v.* Emperor, A. I. R. 1931 Cal. 601 at p. 602 : 33 Cr. L. J. 11 : 33 C. W. N. 1212
4. Kartar Singh *v.* State, A. I. R. 1956 Punj, 122 at p. 125 (D. B.) : 1956 Cr. L. J. 654.

In the case of *Brundaban Swain* v. *State*,[1] the disputed fields known as Keutabari Chak were in possesion of the Karamala people who had grown the crop and the accused persons belonging to Kante came to reap the paddy with the help of a large armed mob. Their common object was to enforce supposed right and claim over the produce of the disputed fields. They attacked Karamala people. *Held* that the accused were not protected by the right of private defence.

15. Defence of property.—So, as regards property, whether his own or another's, every person has the right to defend it by peaceful means if he can, by show and use of force if he must. But when it is said that a person has a right of private defence as regards property all that is implied is, that a person in peaceful possession of property is entitled to maintain that possession even by use of force, if necessary.[2] The question whether they had or had not the right to possession is immaterial.[3] A person who has no possession over the property cannot have any right of private defence of property.[4] It is not the business of criminal law to protect titles, it does so when it can. But its chief function in this respect is to maintain peace, and for that purpose it protects peaceful possession irrespective of title. A person in such possession is then entitled to collect men to defend his property, and the concourse of such men does not constitute an unlawful assembly.[5] And as it is sometimes impossible to exercise such right successfully without preparation, a person in possession may prepare himself againt an expected aggression.[6] But this view is controverted in some of the Allahabad cases where the right of preparation is denied.[7] It is difficult to concede the right without conferring the power to use it with any degree of success. It may be conceded that in case of disputed possession no person has the right of using force against another, for the right of private defence postulates the existence of at least undisputed prior possession. Where, therefore, two factions, each of whom had been more or less in possession of a field, turned out with armed forces and had a free fight, the case would be different. But where possession is with one party and title in the other, could the person with title turn out the

Chief function of criminal law is to maintain peace.

Right of preparation against expected aggression.

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1. A. I. R. 1957 Orissa 117 at p. 120 : I. L. R. 1957 Cut. 275.
2. Summa Behera *v* Emperor, A. I. R. 1945 Pat. 283 at p. 285 : 46 Cr L. J. 672 ; Paras Ram *v*. Rex, A I.R. 1949 All. 274: I. L. R. (1949) All. 258 : 50 Cr. L. J. 445 ; Nathu Mahto *v* Emperor, A I. R. 1947 Pat. 51 : 47 Cr. L. J. 749. Possession may be proved by legal presumption ; Jainath *v*. Emperor, A. I. R. 1927 Pat. 181 : 28 Cr. L. J 303. Party relying upon possession must, of course, prove it; Sulleman, A.I.R. 1927 Sind 92.
3. Sachee, 7 W. R. 112, followed in Gooroo Churn, 14 W. R. 69 ; Toolsee Singh, 10 W. R. 64
4. Qamrul Hasan, A. I. R 1942 Oudh 60 : 43 Cr. L. J. 115 : 197 I. C 121 ; Hariram, A. I. R. 1942 Pat. 96 at p. 98 : 43 Cr. L. J. 41 : 196 I C. 587.
5. Birjoo Singh *v*. Khub Lal, 19 W. R. 66 ; Shunker *v*. Burma, 23 W. R. 25 ; Ganouri Lal Das, I. L. R. 16 Cal. 206 ; Gulshah, 6 S. L. R. 120 ; Fouzdar Rai *v*. Emperor, A. I. R. 1918 Pat. 193 : 3 P. L. J 419 : 19 Cr L. J. 24 ; Summa Behera, *supra* ; Paras Ram, *supra* ; Dorik Gope *v*. Emperor, A. I. R. 1946 Pat. 251 : I.L.R. 24 Pat. 744.
6. Jagannath, I. L. R. 25 Cal. 324 ; Pachkori. I. L R. 24 Cal. 686 ; Uma Churn Singh, I. L. R 29 Cal. 244 at p. 246 ; Poresh Nath Sircar, I. L R. 33 Cal. 295; Narsan Patbabai, I. L. R. 14 Bom 441 ; Bhaglu Ragula Bheemappa, I. L. R. 26 Mad. 249 ; Hira, I L R. 45 All. 250.
7. Prag Dat, I. L. R 20 All 459 : Kaliji, I. L. R. 24 All. 143 ; Khadu Singh, I. L R 24 All. 298 ; Bechor Anop, I L.R. 40 Bom. 106, Jaipal, 38 I. C. (O.) 820 ; *contra* Hira, I. L. R. 45 All. 250 ; Paras Ram *v*. Rex, A. I. R. 1949 All. 274 : 50 Cr. L. J. 445 : I. L. R. (1949) All. 258.

person in possession by main force, and has not the person in possession any right to repel the aggression? That he has such a right is undisputed and undisputable.[1] It has been held that where a person kills a wild animal or a wild bird on the property of another, the latter has property in the game and may enforce his right by the use of force, if necessary.[2] But the Allahabad Court denies that he has, under the circumstances, any right to repel force by adequate force. The reason why he should have the one right and not the other has not been stated in any reported case.

That he has such right can no longer be denied.[3] Any other view would be subversive of the elementary right of self-defence. That it may, and at times does, cause bloodshed and that it is a right which is apt to be abused is no ground for denying it.

Circumstances when violence to defend property is justifiable.

As already stated there are circumstances in which one can collect a mob expecting resistance with violence from his opponent and defend his property by violent means and can still get the benefit of the right of private defence. Those circumstances must be (1) immediate danger to the property which, if not immediately protected, would be lost by the time protection of public authorities is obtained; (2) even this justified violence by the mob for protection of property from actual invasion should be exercised within the legal limits of the right of private defence of person or property, that is to say, there must be circumstances existing leading to a reasonable apprehension of a danger arising out of a committed or attempted or threatened offence affecting person or property, as the case may be, justifying the particular injury inflicted.[4]

Where in a proceeding under Sec. 145, Cr. P. C., the Magistrate passes an *ex parte* order ordering that the property be released in favour of Smt. Manbhai, then merely because the order of the Magistrate is *ex parte* it is not possible to say that it has no legal effect and that the accused party to the dispute can ignore it and beat her when she went to cultivate the land in dispute after having obtained the order of the Magistrate.[5]

In the case reported in *Birdha* v. *State*,[6] Johari, a forest guard saw cattle grazing within the area of protected forest and before he could round them up, the accused drove them away out of the area of the forest. After the accused drove away the cattle Johari pursued them and was beaten when he had gone in the field of one of the accused. *Held* that Johari had no right to chase the cattle outside the area of the protected forest and the accused person being the owners of the cattle had a right to obstruct the seizure of the cattle in their own field. The accused person would have had a right of self-defence of their property and would have escaped the liability for having caused injuries to Johari if they had not exceeded their right of indulging in the act of beating Johari even when not required for the purpose of

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1. Josuram, 74 I. C. (Pat.) 73; Muhammad Khan *v* Crown, A. I. R. 1949 Lah. 128.
2. Artur, I. L. R. 3 Pat. 549.
3. Hira, I. L. R. 45 All. 250; *see* Fateh Singh, A. I. R. 1946 Pat. 251 : I. L. R. 41 Cal. 43.
4. Dorik Gope *v.* Emperor, A. I. R. 1946 Pat. 251 at p. 260 : I. L. R. 24 Pat. 744.
5. State *v.* Shanker, A. I. R. 1958 All. 432 at pp. 434, 436 : 1958 A. L. J. 193.
6. A. I. R. 1959 Raj. 124 at p. 126; 1959 Raj. L. W. 120.

the exercise of the right of private defence. Johari had fallen down on the ground and one of the accused was sitting on him. Under these circumstances, there could be hardly any justification for the other accused beating Johari and continuing to do so for some time, for Johari while he was lying down could not have persisted in rounding up the cattle. Causing injuries to Johari in that situation can only be understood to have been done aggressively and not in exercise of the right of private defence of property of the accused persons.

Right of private defence if both parties armed for trial of strength.

The principle which is well-settled by precedents is that, if neither party can be held to be in actual possession of the property in dispute and if both parties go armed to have a trial of strength, then neither party can be held to have acted in exercise of the right of private defence irrespective of whether the one or the other party was the aggressor or the first to attack. If, however, a party is held to be in actual possession, it cannot be deprived of its right of private defence of property simply because it goes armed to defend its property after seeing the other party committing or on feeling a reasonable apprehension that the other party would commit any of the offences referred to in the 2nd clause of Sec. 97 of the Penal Code. The right has undoubtedly to be exercised within the limits and subject to the restrictions contained in the Penal Code.[1] Where the appellants, the party in possession must have apprehended that the prosecution party had come with the intention of committing mischief on the plot of land in the possession of the appellants, they must also have had a reasonable apprehension that, unless they acted in exercise of their right of private defence, the members of the prosecution party would cause grievous hurt or death to one or more of them. In those circumstances the appellants were justified in exercising their right of private defence of person and property which they had not exceeded.[2] Stray acts of tethering one's cattle on another's land do not entitle the person to use force against another person who is in rightful possession. Even if such stray acts amounted to possession, the right to defend one's property arises only in the circumstances given in Cl. (2) of Sec. 97. Where the deceased had gone to his land, and protested against the action of the accused in tethering cattle on the land, this act is neither theft, nor robbery, nor mischief, nor again criminal trespass.[3]

There is nothing in Secs. 96 to 106 of the Penal Code which can lend support to the view that a person entitled to exercise his right cannot exercise it until he has failed after taking other reasonable steps to avoid causing harm to his assailant.[4] In the case of *Hukam Singh* v. *State of Uttar Pradesh*,[5] the appellants, along with three other persons, were alleged to have forcibly taken two carts loaded with sugarcane from the field of Suraj Bhan through the field of Harphool, in transporting the sugarcane from the field, about a furlong and a half away, to the public passage running by the side of Harphool's field, and to have beaten Harphool and others on Harphool's protesting against the conduct of the appellant's party at the damage caused to his wheat

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1. Barisa Mudi *v.* State, A. I. R. 1959 Pat. 22 at p. 26 : 1957 B. L. J. R. 756 : 1959 Cr. L. J. 71.
2. *Ibid.* at pp. 27, 28.
3. Kundan *v.* State, 1959 Raj. L. W. 857.
4. Mozan Ansari *v.* State, 1961 B. L. J. R. 824.
5. A. I. R. 1961 S. C. 1541 at pp. 1541, 1542 : 1961 A. L. J. 587.

and gram crop. Ram Chandra, one of the appellant's was armed with a hatchet (*kulhari*) and the others were armed with *lathis*. Harphool and others who came to his help struck the appellant's party also in self-defence. Harphool died as a result of the injuries received in this incident. The two carts had not left Harphool's field when the incident took place. They were near the boundary of Harphool's field. *Held* that they must in the circumstances have been several yards inside the field. Criminal trespass had not therefore come to an end and therefore Harphool had the right to prevent the appellant's party from continuing to commit criminal trespass for whatever short distance they had still to cover before reaching the public pathway. It was true that the appellant's party had to get out of the field and that this they could not have done without committing further criminal trespass. But it does not follow that this difficult position in which the party found itself gave them any right for insisting that they must continue the criminal trespass. They had to abide by the directions of Harphool, whatever be the degree of patience required in case they were not allowed to move in any direction in order to leave the field.

The occurrence took place in the land in possession of one Mansur Ali. There was a fight in the land between Mansur Ali's party and Bajlu Mia's party. In the course of fight both parties got injuries. Torab Khan had a *dao* while the rest had *lathis* in Mansur Ali's party. Bajlu Mia's party had *lathis*. Because Mansur Ali's party had a *dao* more severe injuries were caused to Bajlu Mia's party than to Torab Khan's party. *Held* that Mansur Ali's party by inflicting injuries by means of a *dao* and *lathis* must be held to have known or to have reason to believe that they were likely to cause hurt. But it took place in the course of fight between the two parties in which some of the members of Mansur Ali's party themselves got injured with the *lathis* of Bajlu Mia's party. Again the occurrence took place in the land of Mansur Ali when Bajlu Mia's party had entered. Thus whatever happened in the exercise of the right of private defence of the property and it will not amount to an offence even if some members of Bajlu Mia's party got injured. Thus members of Mansur Ali's party would not be convicted under Secs. 323 and 326.[1]

Under Sec. 105, Evidence Act, the onus is on the accused to prove the existence of circumstances bringing the case within any of the general exceptions, and a court shall presume the absence of such circumstances. It is, however, well settled that the burden on the accused is not of the same nature as one on the prosecution to establish existence of the offence beyond reasonable doubt. The nature of the burden on the accused to bring its case within the general exceptions is analogous to that resting on the plaintiff in civil cases. The juristic principle in civil matter is that preponderance of probability is the basis of success. It is also well accepted that the accused need not prove the general exception by adducing positive evidence. The same can be established through the prosecution evidence also. If from the entire evidence on record it is probable that the defence version may be true, they are entitled to a verdict in their favour even though the truth of the version might not have been proved beyond reasonable doubt.

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1. Mansur Ali *v.* Union Territory of Tripura, A. I. R. 1964 Tripura 45 at p. 48

The dictum "that the accused need merely make out of a *prima facie* case" means nothing else other than that a preponderance of probability is to be established by the accused as in civil cases.[1]

There was a dispute over plot of land between the accused and the deceased. The land was in the cultivatory possession of the deceased. Accused wanted to oust him and recover possession. Deceased was doing the ploughing. At this moment accused arrived and fired crackers. On the bang of crackers deceased stepped back. One of the accused plunged his spear into the left thigh of the deceased and it went right through. After spearing his victim, he callously held him down as one would a harpooned beast.

Held, that it was not a case of persons exercising the right of self-defence and exceeding it. The plea of self-defence was not available to any of the accused.

All the accused were guilty of an offence under Sec. 326, I. P. C., read with Sec. 149.

The accused who had thrust his spear into the thigh of the deceased was guilty under Sec. 304 (1).[2]

An easement does not come within the purview of property in Sec. 425, Penal Code.[3] An obstruction to the easement of light and air cannot give a right of private defence of property.[4]

16. Conditions for exercise of right.—In order to justify use of force in self-defence there must be invasion of property either actual or threatened. A mere protest from a distance does not amount to such an invasion.[5] Where the evidence in the case showed that the *arhar* field on which the crop was being harvested was at a distance of 50 yards from the eastern bank of river and *M* who was still on the western bank protested against the cutting of the *arhar* crop, it was held that such a protest did not amount to an invasion of the property of the accused persons and there was no right of private defence of body in the circumstances in which the assault was made on *M*.[6] Right of private defence does not arise when there is time to have recourse to public authorities.[7]

In the above-noted case one Narayan was in possession of the land on the day of occurrence. The land was not under crop at the time of occurrence. Bujhawan and his men went to the land on the day of occurrence for the purpose of ploughing it and dispossessing Narayan. Narayan inflicted a fatal blow on Bujhawan. The weapon he used was a *bhala*. *Held* that all that the prosecuting party were doing was to plough land. They were not doing any immediate harm. There was, therefore, ample time for Narayan to have recourse to the public authorities for the prosecution of his rights. Narayan was not entitled to

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1. State of Orissa *v.* Chakradhar Behera, A. I. R. 1964 Orissa 262 at p. 267 : (1964) 2 Cr. L. J. 696
2. Ambika Singh *v.* State, A. I. R. 1961 All. 38 at p. 45 : 1960 A. L. J. 782.
3. Punjaji Chandrabhan *v.* Maroti, A. I. R. 1952 Nag. 193 at p. 193 : 1951 Nag. L.J. 239.
4. Rao Nihalkaran, *In re*, A. I. R. 1958 M. P. 341 at p. 342 : 1959 M.P.L.J. 674 : 1958 Cr. L. J. 1316.
5. Sidhu Gope *v.* Emperor, A. I. R. 1946 Pat. 84 at p. 89 : I. L. R. 24 Pat. 578 : 228 I. C. 144 : 48 Cr. L. J. 63.
6. *Ibid.*
7. Narayan Raut *v.* Emperor, A. I. R. 1948 Pat. 294 at p. 295 : I. L. R. 27 Pat. 35.

exercise the right of private defence.[1] But as pointed out in *Abdul Hadi's* case,[2] if the act of mischief has already begun, there is more than an apprehension of danger to the property and the right of private defence has come into existence. If the right of private defence has already arisen, it is not expected that a person entitled to exercise it should have recourse to the protection of the public authorities. He is entitled in view of the immediate danger of injury, to defend it by exercising his right instead of having recourse to the public authorities. Where there is a direct encroachment on the subsisting right of a party he is not deprived of the right of private defence merely because he anticipated it and prepared himself to resist the encroachment. There is hardly any principle of criminal law which prevents people from getting themselves prepared if necessary with arms when they anticipate attack upon their subsisting right by an armed set of people.[3]

Right to get prepared against anticipated attack.

There was a mango tree in the yard of the accused in respect of the usufruct of which the incident occurred. The plea of private defence was raised by the accused. *Held* that it was necessary first to decide whether the right to the usufruct of the tree belonged exclusively to the accused.

At the same time, an answer to this question in favour of the accused is not sufficient to dispose of the matter. It has further to be investigated and decided whether any member of the opposite party committed any act which is an offence against body or property of the type described in Sec. 97 of the Indian Penal Code, against which that section confers upon the accused a right of private defence.[4]

17. Extent of right.—As provided under Sec. 97, Indian Penal Code, the right of private defence is not limited only to persons who are in actual possession of the property, but extends to such other persons who act in helping the former to protect their right in the property.[5] The right given to the owners of property under Sec. 97, Penal Code, is subject to Sec. 103, under the relevant provisions of which the right of private defence of property extends to the voluntary causing of death or of any other harm to the thief under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. This section is itself subject to the restriction contained in Sec. 99 that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.[6] The accused were alleged to have ordered *R* and *J* to assault the first informant when the informant was trespassing into the land which was found to belong rightly to and in possession of the accused party. The accused never ordered *R* and *J* to cause grievous hurt to the first informant. It was held that the accused did not exceed the right of private defence.[7]

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1. *See* also Hariram Mahatha *v.* Emperor, A.I.R 1942 Pat. 96.
2. A. I. R. 1934 All. 829 (2) at p. 832 : 35 Cr. L. J. 730 : 148 I. C. 649.
3. Nathu Mahto *v.* Emperor, A. I. R. 1947 Pat. 51 at p. 53 : 47 Cr. L. J. 749.
4. State of Mysore *v.* Raju Shetty, A. I. R. 1961 Mys. 74 at p. 81 : (1961) 1 Cr. L.J. 403.
5. Pitei Bewa *v.* State, (1971) 37 Cut. L. T. 1164 at p. 1168.
6. Madra Damri *v.* Emperor, A. I. R. 1946 Nag. 221 at p. 224: I. L. R. (1946) Nag. 326 : 47 Cr. L.J. 348: 1946 N. L. J. 198.
7. Janki Pasban *v.* Emperor, A. I. R. 1943 Pat. 6 at p. 7 : 204 I. C. 271: 44 Cr. L.J. 172.

18. Protection of another's property.—A person whose duty it is to guard a public building is in the same position as a person employed to guard a private building; that is to say, it is his duty to protect the property of his employer, and he may take such steps for this purpose as the law permits. Section 97, Penal Code, declares that every person has a right, subject to certain restrictions mentioned in Sec. 99, to defend the property of himself or any other person against any act which is an offence falling within the definition of theft, robbery, etc. Section 105 declares that the right of private defence of property commences when a reasonable apprehension of a danger to the property commences, and Sec. 103 says that the right of private defence of property extends, under the restrictions mentioned in Sec. 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions therein enumerated. Among the offences therein enumerated are theft, mischief and house trespass. A person employed to guard the property of his employer, therefore, is protected by these provisions of the law, if he causes death in safeguarding his employer's property when there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in Sec. 103, or to attempt to commit one of those offences. The fact that the property to be guarded is public property does not extend the protection given to a guard. A public constable on guard duty at a magazine or other public building is not entitled to fire at a person merely because he does not answer his challenges.[1]

19. Right of private defence—Construction of.—Law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen. There is nothing more degrading to the human spirit than to run away in the face of peril.

In *Jai Dev* v. *State of Punjab*,[2] the Supreme Court while dealing with the right of defence of property and person observed (at p. 500 of S. C. R.)1 (at p. 617 of A.I.R.) :

> "In appreciating the validity of the appellant's argument, it would be necessary to recall the basic assumptions underlying the law of self-defence. In a well-ordered civilised society it is generally assumed that the State would take care of the persons and properties of individual citizens and that normally it is the function of the State to afford protection to such persons and their properties. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available the

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1. Emperor *v.* Jamuna Singh, A. I. R. 1945 Pat. 150 at p. 152: I.L.R. 23 Pat. 908.
2. (1963) 3 S. C. R. 489: A. I. R. 1963 S.C. 612.

> individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious."

In *Horam* v. *Rex*,[1] a Division Bench of the Allahabad High Court observed that where a trespasser enters upon the land of another, the person in whom the rightful possession is vested, while the trespasser is in the process of acquiring possession, may turn the trespasser out of the land by force and if in doing so, he infiicts such injuries on the trespasser as are warranted by the situation, he commits no offence. His action would be covered by the principle of private defence embodied in Secs. 96 to 105, I. P. C. Similar was the view taken by a Division Bench of the Hyderabad High Court in *Sangappa* v. *State*.[2] Therein it was held that if some body enters on the land of a person who does not acquiesce in the trespass he would still retain possession of the land and as the possessor of the land, is entitled to that possession. If he brings friends with him and with force of arms resists those who are trespassing on the land, who are also armed, he and his friends would not be guilty of forming themselves into an unlawful assembly, for those who defend their possession are not members of an unlawful assembly. If the person acquiesces in his dispossession and subsequently, under claim of title, comes again to dispossess his opponents, then he and his friends would be members of an unlawful assembly. That is also the view taken by the Madras High Court in *In re Mooka Nadar*.[3]

The proposition that a person in physical possession of land and in whose presence criminal trespass and mischief is being committed by force (and without any semblance of a right a permanent water-course is being constructed thereon) is nevertheless obliged to retreat therefrom and resort to the fitful relief he might secure from a police station ten miles away, is wholly untenable. The right of private defence of property cannot be whittled down to something so inconsequential.

In *Summa Behera* v. *Emperor*,[4] Sinha and Das, JJ., had held that a person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which amounts to an offence under the Indian Penal Code and it would be lawful for such a person who has seen an invasion of his right, to go to the spot and object. It was also observed as follows :

> "It is not the law that the rightful owner in peaceful possession of a piece of property must run away, if there is an actual invasion of his right and an attempt on his person."

This view was reiterated again in *Barisa Mudi* v. *State*,[5] wherein K. Sahai, J., on difference of opinion between C. P. Sinha, J. and

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1. 50 Cr. L. J. 868 : A. I. R. 1949 All. 564.
2. I. L. R. (1955) Hyd. 406.
3. A. I. R. 1943 Mad. 590 ; Munshi Ram v. Delhi Administration, A I. R. 1968 S. C. 702 at pp. 706-7 : (1968) 2 S. C R. 455 : 1968 M. L. W. (Cr) 90.
4. A. I. R. 1945 Pat. 283.
5. A I.R. 1959 Pat. 22,

K. Ahmad, J., whilst agreeing with Sinha, J., held that the right of private defence in similar circumstances was attracted and had not been exceeded. In *Mozam Ansari* v. *State*,[1] after a consideration of the earlier authorities Ramratna Singh, J., summed up the law in the following terms :

> "The law applicable to such cases is well settled. It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code, and when there is no time to get police help. It is lawful for a person who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such persons, if the opposite party is armed, to take suitable weapons for his defence.[2] The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence."

Lastly their Lordships of the Supreme Court whilst considering the ambit and the scope of the right of private defence in *Jai Dev* v. *State of Punjab*,[3] have observed as follows :

> "This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property."
>
> ". . . . So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require, as Mayne has observed, that 'he should modulate his defence step by step according to the attack, before there is reason to believe the attack is over.' The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force."[4]

20. Section not exhaustive.—Under Sec. 97, I. P. C., the right of private defence of property arises only against an act which falls under the definition of one of the four offences specified therein, namely, theft, robbery, mischief or criminal trespass, or an attempt to commit any of those offences.[5] It will be observed that so far as regards the defence of one's right to property the section mentions only four offences against which the right is said to exist. But the enumeration of these

1. 1961 B. L. J. R. 824.
2. *See* A. I. R. 1945 Pat. 283.
3. A. I. R. 1963 S. C. 612.
4. Het Ram Lallu Singh *v.* State, 1970 Punj. 85 at pp. 90, 91-92.
5. Ramchandra Govind Take *v.* State, A.I.R. 1969 Bom. 20 at p. 23 : 70 Bom. L. R. 399.

offences is apparently inexhaustive. Indeed, it is not intelligible why the section should have mentioned theft and robbery and omitted to mention house-breaking and dacoity. Indeed, if the two offences mentioned were intended to be referred to only generally, then the mere mention of "theft" without "robbery" would have been sufficient. As it is, the right being declared to exist against theft must be deemed to exist against all offences *ejusdem generis*. And the same may be said of mischief and criminal trespass. As against the thief the right of the owner is not only to recover his property but also to secure the thief, and in securing him he is entitled to use such force and violence as may be necessary.[1] So where a man seized a thief in the act of committing theft in his house, and on the villagers assembling, the thief was found to be dead, and medical evidence showed that death was probably caused by strangulation due to the prisoner holding the deceased with his face downwards as he was getting into the house, it was held that the prisoner had not exceeded the right of private defence, which he had against the thief, and he was consequently acquitted.[2] So in another case the accused had a field of chillies which had frequently been stolen; one night he found the deceased stealing chillies from his field, whereupon he struck him a heavy blow with a stick from which he died. He was held to have acted within his right. As the Court observed : "No man finding a plunderer in his field by night in a place where others may be within call is expected to deal his blows very gently."[3] Besides, it must not be forgotten that when a man is surprised by a thief or finds himself surrounded by robbers, he cannot be expected to be cool and calculating. His first impulse is to strike a decisive blow. It may have been unnecessarily severe, but then the Court has to consult his feeling at the moment.[4]

use-breaking and dacoity if included within the scope of the section.

Jusification for more force in circumstances.

As it was observed in a case, the amount of force justifiable may then depend not only upon the nature of danger actually present, but also upon the nature of the danger apprehended. And in judging of the necessity of the violence used the feelings of the man at the time, his exaggerated sense of danger, the want of self-possession, and the disconcerted state of mind, must all be taken into account.

In order to entitle the accused persons to the exercise of the right of private defence of property, it is, therefore, necessary for them to establish, that Nabisaheb entered the land in question on the morning of the 1st of October, 1966, with the intention of committing the offence of mischief or criminal trespass or with the intention of attempting to commit those offences. If Nabisaheb came upon the said land in *bona fide* assertion of the right, which he claimed to the same, however ill-founded that right may be, it cannot be said that his dominant intention in making the entry was to commit, or attempt to commit, the offence of mischief or of criminal trespass.[5]

21. Theft—Robbery.—The right of private defence against theft and robbery or an attempt to commit theft or robbery calls for no

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1. Section 105, Comm.
2. Karim Bux, 3 W. R. 12.
3. Makee, 12 W. R. 15.
4. Bhut Nath, 3 I. C. (C.) 867 ; *see* also Ahmad Din *v.* Emperor, A. I. R. 1927 Lah. 194 : 28 Cr. L. J. 252.
5. Ramchandra Govind Take *v.* State, A.I.R. 1969 Bom. 20 at p. 23 : 70 Bom. L. R. 399.

comment, since the right exists, is declared by the section and is otherwise supported by sound sense. But a case on the borderline may sometimes create difficulties. Such was the case of one *A* whose cow had trespassed into the field of *B*, whereupon *B* seized it and proceeded to take it to the cattle-pound. He was waylaid by *A* and his two companions and as *B* would not give up the cow, there was a fight, in the course of which, one of *A*'s men speared *B* through the heart, and killed him. They were convicted; but *B*'s men who had inflicted injuries upon *A* and *A*'s men were acquitted on the ground that *B* being in lawful possession of the cow, its attempted rescue by *A* and his men presumably amounted to an attempted theft. This case can be held rightly decided only if *A*'s act in rescuing the cow is held to amount to an attempted theft within the meaning of Sec. 378, which was probably taken for granted.[1]

22. Mischief.—The same principles govern cases relating to mischief. Where, for instance, the prisoner found that a number of persons from another village had assembled to cut open a *bund* whereupon he took counsel of the villagers with whom he proceeded to oppose the mischief, he was held to be justified. In such a case the assemblage of men for organising a defensive campaign cannot be held to be unlawful.[2] So where the villagers of *A* paraded a procession through the village of *B*, carrying with them a pot of consecrated water, to which the villagers from *B* objected, and who consequently obstructed the procession, whereupon the party of *A* retaliated and used some violence causing grievous hurt to one of the obstructros and hurt to several others, it was held that inasmuch as the villagers from *A* had a perfect right to pass through *B*, and as the latter could not legally object to their carrying the water in their procession their obstruction was unlawful, and amounted to wrongful restraint, or at least to attempted mischief in respect of the pot of water against which the other party had the right of private defence and which justified the force used by them.[3] A person has a right to use reasonable force to protect his property against trespass by cattle. Where, therefore, a buffalo having trespassed into his field, he threw a big stone at it and the buffalo died as a result, it was held that he was within his right in throwing the stone and was not guilty of mischief, as the intention and knowledge necessary to constitute the offence under Sec. 425, I. P. C., were wanting.[4] The digging and removal of earth by a party from part of a piece of land of another will diminish its value or utility and at all events affect it injuriously and would therefore amount to criminal trespass and mischief and that other person will have every right to prevent the digging and removal of the earth.[5]

Use of force to prevent mischief.

If the act of mischief has already begun, there is more than an apprehension of danger to the property and the right of private defence has come into existence. If the right of private defence has already arisen, it is not expected that a person entitled to exercise it should

If mischief has already begun right of private defence has come into existence.

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1. Tanoo Shikdar, 3 W. R. 47 ; Nyein, 38 I. C. (Bur.) 316 ; Devi Dass, 45 I. C. (Lah.) 683.
2. Brijoo Singh *v.* Khub Lall, 19 W. R. 96.
3. Reghula Bheemappa, I. L. R. 26 Mad. 249.
4. Bhagwan Rana *v.* State, A. I. R. 1953 Sau. 158 at p. 159.
5. Abdul Hadi *v.* Emperor, A. I. R. 1934 All. 829 (2) at p. 831 : 1934 A L. J. 689 : 148 I. C. 649 : 35 Cr. L. J. 730.

have recourse to the protection of the public authorities. He is entitled, in view of the immediate danger of injury, to defend it by exercising the right of private defence instead of having recourse to the public authorities.[1]

23. Cattle trespass and right of private defence.—Every person has a right to use reasonable force to protect his property against trespass by cattle so long as the trespass continues.[2] Seizure of the cattle some time after the trespass (24 hours in the present case) amounts to theft.[3] A person driving the cattle trespassing on his field to the cattle-pound is not guilty of mischief,[4] or theft.[5] Even if the seizure of the cattle by him under the *bona fide* belief that he had a right to take them to the pound is unlawful, it may be an offence under the Cattle Trespass Act, but it is not theft, and the owner of the cattle has no right of private defence of property against it.[6] The ruling to the contrary in *Dayal* v. *Emperor*[7] is of doubtful authority.

Illegal seizure of cattle with a view to impound them is theft because though the person who has seized the animals had no intention to cause wrongful gain to himself, nevertheless his intention was to cause wrongful loss to the owner of the animals. In such a case the owner of the cattle would be justified in exercise of the right of private defence of property in rescuing them. If a person knowing that the cattle have not damaged his crops seizes them and drives them towards the pound his intention is obviously to compel the owner of the animals to incur some expenditure in releasing them from the pound and also to deprive the owner temporarily at any rate of the use of the animals. If they are milch cows he deprives the owner of the supply of milk for some days. Similarly, if they are bullocks he deprives the owner of their use for ploughing or other agricultural purposes. Thus his intention to cause wrongful loss to the owner is clear from the definitions given in Secs. 23 and 24 of the Indian Penal Code.

The position may, however, differ if the seizure of the cattle, though not justified was due to *bona fide* mistake. In such an event, no offence of theft may be said to have been committed by their being driven to the pound because the necessary criminal intention and knowledge are wanting as was found in *Faiyaz Khan* v. *Rex*,[8] where when the cattle entered the sugarcane field, the owner of the field in good faith thought that his sugarcane had been damaged but it was subsequently found that no damage was done. In such circumstances, the learned Judge of the Allahabad High Court held that the seizure was done under *bona fide* belief because the cattle had trespassed into the field

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1. Abdul Hadi *v.* Emperor, A. I. R. 1934 All. 829 (2) at pp. 831, 832: 1934 A.L.J. 689.
2. Bhagwan Rana *v.* State, A. I. R. 1953 Sau. 158 at p. 159.
3. Madra Damri *v.* Emperor, A. I. R. 1946 Nag. 221 at p. 223 : I L. R. (1946) Nag. 326 : 47 Cr. L. J. 348 : 1946 N. L. J. 198 : 228 I. C. 123.
4. Emperor *v.* Ramjiwan, 1881 A W. N. 158.
5. Ardhun Mundul *v.* Maya Khan, 24 W. R. (Cr.) 7 ; Jhamman Lal *v.* Emperor, 10 C. W. N. C. C. XXVIII ; *see* Dayal *v.* Emperor, A. I. R. 1943 Oudh 280 : 44 Cr. L. J. 640 : 1943 O. W. N. 202 : 207 I. C. 374 ; Faiyaz Khan *v.* Rex, A. I. R. 1949 All. 180 : I. L. R. (1949) All. 211 : 50 Cr. L. J. 232 : 1948 A.W.R. (H. C.) 296.
6. Faiyaz Khan *v.* Rex, A. I. R. 1949 All. 180 at p. 183 : I. L. R. (1949) All. 211 : 50 Cr. L. J. 232 : 1948 A. W. R. (H. C.) 296.
7. A.I.R. 1943 Oudh 280 : 44 Cr. L. J. 640 : 1943 O. W. R. 202 : 207 I. C. 374.
8. A. I. R. 1949 All. 180.

of the person who seized the animals. Hence, there was no dishonest intention and no right of private defence against such seizure.[1]

24. Trespass.—Similarly, the right of private defence against criminal trespass entitles the person in actual physical possession to use such force as is necessary to maintain his own possession and to turn away the intruder,[2] even by the use of force if necessary.[3] The question whether he had, or had not the right of possession is immaterial.[4] In the first place, however, there must be at least peaceful possession with the party employing force, for where there is no possession, there is no legal protection to the use of violence. But the possession which the law protects is not the possession of a theft. If *A* owns a house and leaves it open whilst he goes out for a drive, and *B*, a thief walks into it and takes possession during *A*'s absence, *B* has physical possession but not judicial possession so as to entitle him to legal protection. In fact, *B* is not in such a case in possession at all; for possession in criminal law means at least prior peaceful possession. If, for instance, on his return, *A* finding *B* in the occupation of his house suffers to let him remain in possession, the possession of *B* would then develop into judicial possession against which *A* will forfeit the right of private defence.

There must be peaceful possession with the party employing force.

In the case reported in *Aher Karna Rukhad* v. *State*,[5] the applicant was in possession of certain field. He was faced with a party of four persons determined to prevent him from carrying on sowing operations. The party did not use actual force against the applicant. Some quarrel preceded the attack by the applicant. *Held* that the party committed criminal trespass and the applicant had a perfect right to eject them by force and if in so doing he caused some injuries he had not exceeded his right of private defence.

In the case of *Brundaban Swain* v. *State*,[6] the disputed fields known as Keutabari Chak were in possession of the Karamala people who had grown the crop and the accused persons belonging to Kante came to reap the paddy with the help of a large armed mob. Their common object was to enforce supposed right and claim over the produce of the disputed fields. They attacked Karamala people. *Held* that the accused were not protected by the right of private defence.

25. Trespasser's right of private defence of property.—It is true that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in due course of law he is entitled to defend his possession even against the rightful owner. But stray

1. Lokenath v. Kahan Beura, A. I. R. 1963 Orissa 52 at p. 53 : I. L. R. (1962) Cut 781 : 28 Cut. L. T. 613.
2. Fatch Singh, I. L. R. 41 Cal. 43 ; Ponthala, 24 I. C. (Mad.) 327 (F. B.) ; Gorie Shankar, 41 I. C (L. B.) 832 ; Fouzdar Rai v. Emperor, A. I. R, 1918 Pat. 193 ; Paras Ram v. Rex, A. I. R. 1949 All. 274 : I. L. R. (1949) All. 258 ; Abdul Hadi, A. I. R. 1934 All. 829 (2) : 1934 A. L. J. 689 ; Janki Pasban, A. I. R. 1943 Pat. 6 ; Summa Behara, 1945 Pat. 283 : 46 Cr. L. J. 672 ; Mudra Damri v. Emperor, A. I. R. 1946 Nag. 221 : I. L. R. (1946) Nag. 326 : 47 Cr. L. J. 346 : 1946 N. L. J. 198.
3. Bachan Singh v. State, A. I. R. 1955 Pepsu 162 at p. 165 (D. B.) : 1955 Cr. L. J. 1617.
4. *Ibid*, at p. 165.
5. A. I. R. 1955 Sau. 2 at p. 3 : 7 Sau. L. R. 53.
6. A. I. R. 1957 Orissa 117 at p. 120 : I. L. R. (1957) Cut. 275.

or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a resistance to an intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time to remove the obstruction even by using necessary force.

The law relating to defence of property is set out in Sec. 97, I. P. C., which says that every person has a right, subject to the restrictions contained in Sec. 99, to defend—First, his own body, and the body of any other person, against any offence affecting the human body; Secondly —the property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. Section 99 of the Code lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. It further lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen. There is nothing more degrading to the human spirit than to run away in the face of peril.[1]

In *Jai Dev* v. *State of Punjab*,[2] the Supreme Court while dealing with the right of defence of property and persons observed (at p. 500 of S. C. R.) : (at p. 617 of A. I. R.) :

> "In appreciating the validity of the appellant's argument it would be necessary to recall the basic assumptions underlying the law of self-defence. In a well-ordered civilized society it is generally assumed that the State would take care of the persons and properties of individual citizens and that normally it is the function of State to afford protection to such persons and their properties. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual

1. Munshi Ram *v.* Delhi Administration, A. I. R. 1968 S. C. 702 at pp. 705-6.
2. (1963) 3 S. C. R. 489: A. I. R. 1963 S. C. 612.

citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious."

In *Horam* v. *Rex*,[1] a Division Bench of the Allahabad High Court observed that where a trespasser enters upon the land of another, the person in whom the rightful possession is vested, while the trespasser is in the process of acquiring possession, may turn the trespasser out of the land by force and if in doing so he inflicts such injuries on the trespasser as are warranted by the situation, he commits no offence. His action would be covered by the principle of private defence embodied in Secs. 96 to 105, I. P. C. Similar was the view taken by a Division Bench of the Hyderabad High Court in *Sangappa* v. *State*.[2] Therein it was held that if somebody enters on the land of a person who does not acquiesce in the trespass he would still retain possession of the land and as the possessor of the land, is entitled to that possession. If he brings friends with him and with force of arms resists those who are trespassing on the land, who are also armed, he and his friends would not be guilty of forming themselves into an unlawful assembly, for those who defend their possession are not members of an unlawful assembly. If the person acquiesces in his dispossession and subsequently, under claim of title, comes again to dispossess his opponents, then he and his friends would be members of an unlawful assembly. That is also the view taken by the Madras High Court in *Re Mooka Nadar*.[3] Even if accused are trespassers and have wrongly cultivated the northern portion of the plot after cutting the *chari* crop, the complainants have no right to take the law into their own hands and beat the accused in order to dispossess them from the field. If the complainant's party are the aggressors, and beat the accused first, there can be no doubt that they had a right of self-defence.[4] But the possession which a trespasser is entitled to defend against a rightful owner, must be a settled possession extending over a sufficiently long period indicative of acquiescence on the part of the true owner.[5] When it is established that the accused were actually in possession of the land where the the fighting took place and they were ploughing it and the deceased and his sons went there to take possession forcibly on the basis of certain compromise decree and a judgment and order of mutation, the accused would not be guilty of either committing rioting or for causing injuries or even for committing murder, if they merely tried to maintain their possession.[6] A casual act of possession or a mere entry on a vacant part of the land cannot have the effect of interrupting the possession of the rightful owner.[7] A person in such possession cannot claim the right of defence of property.[8] A mere trespasser, said

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1. 50 Cr. L. J. 868 : A. I. R. 1949 All. 564.
2. I. L. R. (1955) Hyd. 406.
3. A. I. R. 1943 Mad. 590.
4. Bhatru *v.* State, 1954 All. 35 at p. 37 : 1953 A. L. J. 605.
5. Muhammad Khan *v.* Crown, A. I. R. 1949 Lah. 128: 50 Cr. L. J. 530 ; Bachan Singh *v.* State, A. I. R. 1955 Pepsu 162 at p. 165 : 1955 Cr. L. J. 1617.
6. *Vide* also Thommen *v.* State of Kerala, A. I. R. 1958 Ker. 74 ; State *v.* Kattar Singh, A. I. R. 1958 All. 90 and Diljan Chaudhary *v.* State of Bihar, A. I. R. 1958 Pat. 492; Union Territory *v.* Tarani Das, 1968 Cr. L. J. 1676 at pp. 1678-79.
7. Bachan Singh *v* State, A.I.R. 1955 Pepsu 162 at p. 165.
8. *Ibid.*

Lord Denman, cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title if he can without delay reinstate himself to his former possession.[1] It depends on the facts in each case what can be considered to be reasonable delay. The owner may, if he does not acquiesce, re-enter upon the land and reinstate himself provided he does not use more force than is necessary. He must not commit a breach of the peace so as to render himself liable for an indictment under the statutes of forcible entry and this entry will be viewed as a resistance to intrusion upon a possession which he had never lost.[2] After carefully considering the case-law on the point Justice Agarwala laid down the following propositions in *Paras Ram's* case[3] :

Proposition of law dealing with trespasser's right of private defence of property explained.

(1) There can be no danger to property if the accused is not in possession. If he has merely a bare title to the property, his remedy is to seek possession from a court of law and not to enforce it by force himself.

(2) If the accused was previously in peaceful possession but the other side has dispossessed him and the accused has acquiesced in the dispossession for sometime, then again he must have recourse to law and not to enforce his right to take back possession by his own force.

(3) The accused may have lost possession but if immediately on coming to know of the other side having entered on his land or taken possession of his property he rushes to oust the trespasser, he is entitled to oust him by force. He is not bound to have recourse to the lengthy process of a trial in a civil court. But this rule cannot be applied to a case in which the trespasser has already peacefully established himself in the enjoyment of property for some time.

(4) If, however, there is no question of permanent deprivation of one's possession over property and the question is of infringement of enjoyment of a mere right over property, then in that case, unless the injury to be caused by the obstruction of the enjoyment to one's right is expected to be enhanced if recourse is had to public authorities for protection, one is bound to take such recourse.

(5) In every case, however, if one is already in possession of one's property or in enjoyment of a right, one is entitled to reach the spot earlier than the other party with arms and reinforcements and to wait in readiness to defend such property or right from the expected aggression from the other side.

(6) If the information of the expected aggression is of a definite kind it would be proper for the party in possession to inform the public authorities and seek their help but one is not bound to seek such help unless an apprehension of danger to such property has actually commenced.

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1. Browne *v.* Dawson, (1840) 12 A. & E. 624 : 10 L. J. Q. B. 7 : 4 P. & D. 355.
2. Emperor *v.* Bandhu Singh, A. I. R. 1928 Pat. 124 at p. 126 : 106 I. C. 69.
3. A. I. R. 1949 All. 274 at pp. 283-84 : I.L.R. (1949) All. 258 : 50 Cr. L. J. 445: 1948 A. W. R. (H. C.) 280.

(7) If the apprehension of danger has actually commenced and if one can have recourse to public authorities before an actual injury is caused to the property or right, he must do so, or else he will lose his right of private defence. This contingency usually arises when one has got definite information about the other side proceeding towards the land in dispute and the public authorities are within such a reach that one could inform them before actual damage to the property is done, e. g. when the police station falls on the way to the land in dispute and the accused can inform them while proceeding towards it for its protection.

(8) When a fight takes place not because property or person has to be protected but because parties want to measure their strength, and protection of property is merely a pretext, no question of self-defence arises, but this finding can be arrived at only when the possibility of either party fighting for the protection of his property has been excluded.

(9) When the determination to fight is *bona fide* in the desire to protect one's property, that would not be a case in which it can be said that the right of self-defence is excluded. In this connexion, it would be important to note whether one is fighting for maintaining one's possession or maintaining one's enjoyment of a right which has been enjoyed for some time previously, or one tries to obtain possession of a property which he thinks belongs to him, or to enforce a right which may be his but which he had never enjoyed before. In the latter class of cases there is no right of self-defence. In the former class of cases there is.

(10) Again, where a fight takes place in an open field, not on or near the property to be protected but far away from it, this fight cannot be said to be one for the protection of that property and there will be no right of self-defence in such cases.

(11) Again, where one party challenges the other party for a fight then also the right of private defence is excluded even though the fight be near or on the property. One is, however, entitled to say to the aggressor "if you attack you will be met by force" but it would be challenging another to fight if one were to abuse him and say "come on, try strength if you like".

(12) Where there is a dispute over ownership or possession of property and parties quarrel, and there is an exchange of abuses, but thus party out of possession has neither attempted nor threatened to take possession immediately, nor attempted or threatened to cause injury to the party in possession, the party in possession has no right to strike first, and if he does so, he gives the other party the right to strike back in self-defence.

In *Ram Sumer Ahir's* case,[1] the complainant obtained a civil court decree for ejectment and vacant possession. The Nazir having obtained specific instructions from the Court removed the furniture and live-stock into the road adjoining and gave vacant possession to the complainant. He locked up the premises, erected fences and put two Nepali Durwans in-charge. After some days when the complainant got to the premises he found no one there but the locks and fences had been

1. A. I. R. 1934 Cal. 273 at p. 276 : 38 C. W. N. 43

broken and some of the broken furniture had been put back. The complainant regained the possession both peacefully and easily because no one was on the premises to resist. After the possession had been obtained accused came upon the complainant and his men with *lathis* and iron bars whereupon the latter used force to resist trespassers.

Held that the complainant had every right to put the furniture out without going to any Court, either civil or criminal. The accused were trespassers and complainant's men had every right to use force if necessary to resist them. No question of private defence on the part of the trespassers could arise. According to the Nagpur High Court,[1] a rightful owner or his agent has very right to eject a trespasser by all lawful means. That would include prevention of the trespasser from persisting in his trespass and the trespasser has no right of private defence against the owner or his agent.

There is nothing illegal or criminal in a rightful occupier who has never acquiesced in a trespasser's wrongful act quietly re-entering his own land while the trespasser is away and resuming his possession of what belonged to him.

The right of self-defence of property under Sec. 97, Indian Penal Code, is available to a trespasser only against some act of the rightful occupier which amounts to theft, robbery, mischief or criminal trespass or any attempt to commit any of these four crimes. But if the rightful owner somehow resumed possession of his own land in the absence of the trespasser he commits no crime and the trespasser on his return cannot invoke the right of self-defence to oust the rightful occupier. The property does not belong to him, he is no longer in possession, and there is nothing which he can defend. The question of self-defence may arise if a vigilant trespasser keeps ceaseless watch over the property and prevents the rightful occupier from making a re-entry.

But if he is not vigilant and permits the owner to regain possession of what still belongs to him, his right to defend his wrongful possession is gone, for the simple reason that there is no possession.[2]

Before an accused person can set up the plea of defence of property in answer to a charge of homicide, he must prove that he had a right of property which had to be defended.

The right of self-defence is confined to the protection of person and property. In respect of property it is limited to resistance to specified criminal acts. Section 97 does not use the word "possession" but "property". Now, what is property ? By no stretch of legal imagination can the word be extended to forcible possession usurped by a rank trespasser against a protesting owner which is too weak to resist. If Sec. 97 were to throw its protective mantle over this kind of possession it will be converted into the reverse of what the Legislature intended the right to be.

From being a shield for the protection of property it will become a weapon for its destruction. Nothing is more likely to undermine the foundations of property than an interpretation of self-defence which will assure every *goonda*, ruffian or bully in the land that Sec. 97 will come to his aid after he has turned out the rightful occupier by force.

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1. Anant Ram v. Emperor, A. I. R. 1940 Nag. 117 at p. 118 : 186 I. C. 469 : 1939 N. L. J. 564 : 41 Cr. L. J. 315.
2. Ambika Singh v. State, A.I.R. 1961 All. 38 at p. 44 : 1960 A. L. J. 782.

Such an interpretation will be destructive of the cardinal principle of law that no man can derive any benefit under the law from his own wrongful or criminal act.

A person who has sown the crops without let or hindrance is in cultivatory possession, but one who uproots another's crops and follows this act of *goondaism* by sowing his own crop cannot claim that he is in such cultivatory possession as will entitle him to the right of self-defence under Sec. 97, I. P. C. If this were so it may lead to somewhat startling results in a country like India which abounds with small fragmented holdings capable of being ploughed in a single day.

A cultivator who leaves his village for a few days may find his own crops gone and someone else in "cultivatory possession" of his land. If the law were to permit a trespasser in these circumstances, in the name of "self-defence of property", to resist any attempt by the rightful owner or occupier to regain what belongs to him Sec. 97 will become in lawless hands a weapon of aggression. The right to protect one's property is the foundation of law and order as it confers upon every person in peaceful possession an immunity against criminal law if he beats off any attack on it.

Self-help is permitted by law as a deterrent against lawless aggression, not in aid of it. It was never intended to be a charter of immunity for any ruffian to acquire possession by a surprise move backed by overwhelming force and then claim the right to defend the fruits of his robbery.

A trespasser who is in peaceful and settled possession of the property in dispute is entitled to defend his right of possession against physical attack. But a trespasser does not require this right from his own act of trespass or taking forcible possession. No person can derive any benefit from his own wrongful or criminal act. His rights, if any, flow from the conduct of the rightful owner or occupier who may acquiesce in the trespasser's possession.

It may, therefore, be considered settled law that a trespasser acquires the right to defend his possession against physical attack only if he has come to it by the acquiescence, express or implied, of the rightful owner and his possession has become peaceful and settled. The passage of time does not necessarily confer any right on the trespasser. For example, a man may be away when another takes forcible possession of his property behind his back, and on his return he can assert his right of property by throwing out the trespasser. The question of lapse of time becomes relevant only if the rightful owner or occupier sits quiet and does nothing to assert his rights even after knowing that the trespasser is in possession of his property.

A person does not lose his right to regain his property from a trespasser merely because, before taking any action, he informed the guardians of law and order of what was taking place under the regime. On the contrary, he does the right thing as a good citizen if before proceeding to help himself he brings the situation to the notice of those who have a primary responsibility to prevent and punish acts of criminal trespass against property. The law permits citizens to defend their property but does not insist, as a condition of the exercise of this right, that it should be exercised behind the back of the authorities.[1]

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1. Ambika Singh *v.* State, A. I. R. 1961 All. 38 at pp. 41, 42, 43 : 1960 A. L. J. 782

26. Co-sharers.—A co-sharer may be guilty of criminal trespass giving his co-sharer a right of private defence of property. Thus it has been held that one of the co-sharers in constructive possession of joint land has no right to dig part of it with a view to appropriating it for his exclusive use. If he does in the teeth of opposition by another who is also in constructive possession the act amounts to criminal trespass and his co-sharers have every right to prevent him from doing so.[1]

Rule regarding criminal trespass.

A person in possession does not forfeit his right by the mere disturbance of his possession, as distinct from dispossession.[2] The case would be otherwise if such disturbance was occasioned by the lawful owner effecting a re-entry upon his property. Where the owner of the land, having trees standing upon his tenant's land, entered upon it and used force necessary to prevent the tenant from removing a tree which had been blown down and severed from the ground by the action of the wind, his action was held justified.[3] So a lawful entry in an unlawful manner may entitle the party in possession to exercise the right of private defence. Where, therefore, a zamindar was entitled to levy distress after written notice to the tenants, and the zamindar's servants entered upon the crops without such notice, the tenants were entitled to consider such an entry as trespass, against which they were held to have the right of private defence.[4] In this case there was an unlawful entry. But suppose that there had been no such entry, then the mere fact that there was persistence in demand of rent would not have amounted to a trespass justifying the use of force.[5]

Reasonable amount of force.

The rule as regards criminal trespass is that a person in actual peaceable possession of land cannot be dispossessed by mere use of force; and that he has right to maintain his possession by use of force if anyone attempts to assail it.[6] In such a case party in possession may use such force as is necessary to prevent a forcible entry by another and as is necessary to compel him to desist.[7] But it does not justify more. It will not, for instance, justify the confinement of the would-be trespasser.[8] Nor does the right include the wanton infliction of harm, as where a person went out to shoot and found the deceased committing real or supposed cattle trespass, whereupon there was an altercation in the course of which the deceased struck the accused with a heavy club who thereupon fired without any particular aim, but lowering the muzzle of the gun so as not to hit a vital part but death nevertheless ensued, from the wounds thus inflicted, it was held that the accused's act was not a legal exercise of the right of private defence as he had only to stand back and he was safe.[9] So there is no right of private defence, in a case of premeditated riot where the primary object of the opposing factions is to fight, the complaint about trespass being merely a pretence.[10] Indeed, the right of private defence only commences when there is a reasonable apprehension of danger; where, therefore, person fire guns from five

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1. Abdul Hadi *v.* Emperor, A. I. R. 1934 All. 829 at p. 831 (2) : 1934 A L. J. 689.
2. Bindeswari, 46 I. C. (Pat.) 413 ; Chandulla, 22 I. C. (Cal.) 993.
3. Padu, 10 N. L. R. 38.
4. Kanhai Shah, 23 W. R. 40.
5. Mahomed Jan *v.* Kadi Sheikh, 16 W. R. 64.
6. Tulsi Singh, 10 W. R. 64 ; Sachee, 7 W. R. 76.
7. *Ibid.*, p. 77.
8. Sharafoodin *v.* Kassinath, 13 W. R. 64.
9. Kureem Buksh, (1868) P. R. No. 13.
10. Jeolall. 7 W. R. 34 ; Sikander, (1918) P. R. No. 36 : 48 I. C. 883.

and twenty yards at their accepted assailant and injure him, their act is not protected as they had fired and injured a man before they could apprehend any danger from him.[1]

There is, of course, the right of private defence against one forcing another to work or engage into any service against his wish,[2] or against the imprisonmens of one's cart or cattle for the service or benefit of a public servant.[3]

27. Plea of self-defence and plea of alibi.—Where accused raised an express plea of *alibi* a plea of self-defence on their behalf is inconsistent with the express plea raised by them. However, if on the material placed on record the plea of private defence could be made out consistent with the provision of Sec. 105 of the Indian Evidence Act, there will be no justification to deny the benefit of it to the accused.[4]

28. Claim of right.—A claim of right exists whenever a man honestly believes that he has a lawful claim, even though it may be completely unfounded in law or in fact. The question is whether that defence to larceny applies equally when the offence with which one is concerned is really an aggravated larceny, such as robbery, or whether the honest belief must extend to being entitled to take the money by force. Both on principle and on the cases, it is clear that it can be a defence. So far as principle is concerned, it can be stated in the simple form that larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defence to larceny, then it negatives one of the ingredients in the offence of robbery, without proof of which the full offence is not made out. That principle simply stated as such has been upheld in case after case.[5]

If one takes as an illustration Glanville William's *Criminal Law* (2nd Ed.), the General Part, p. 326, one finds explicitly stated :

> "Claim of right, being a defence to larceny, is also a defence to other crimes in which charge of intent to commit larceny enters, e. g. robbery and burglary."

The only exception is to found in Russel on *Crime* (12th Ed.), Vol. 2, p. 855, where the editor states, without setting out any argument or reasons for the principle there stated that :

> "A creditor who assaults his debtor and compels him to pay his debt cannot be convicted of robbery if he does so under honest but mistaken belief that he is entitled to extract the money in this way."

As already stated, no reasons for coming to that conclusion are given by the editor, and indeed thereafter he refers to the case of *R.* v. *Hemmings*[6] and the case of *R.* v. *Boden*.[7] In the footnote on that page, he, however, takes the view that because the principle is as stated by him, the Judges in those cases must have overlooked the point. This matter is plain, namely that claim of right is a defence to robbery, or any aggravated form of robbery, and that it is unnecessary to show that the defendant must have had an honest belief also that he was entitled to take the money in the way that he did.

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1. Hussainuddy, 17 W. R. 46.
2. Pancham, 52 I. C. (O.) 887.
3. Ram Harakh, 24 I. C. 172 ; Pershadi *v.* Balji, 20 I. C. (O.) 233 ; Asa, 20 I. C. (Lah.) 992.
4. State of Mysore *v.* Raju Shetty, A. I. R. 1961 Mys. 74 at p. 80 : (1961) 1 Cr. L J. 403.
5. R. *v.* Skivington, (1967) 1 All E. R. 483 at pp. 484-85.
6. (1864) 4 F. & F. 50.
7. (1844) 1 Car. & Kir. 395.

The only case which throws any doubt on the matter is a recent case tried at Glamorgan Assizes, by Mocatta, J., *R.* v. *King-Jones and Gladdy*.[1] The report does not indicate whether any authorities were quoted.

Right of private defence against the act of a person of unsound mind, etc.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(*a*) *Z*, under the influence of madness, attempts to kill *A*; *Z* is guilty of no offence. But *A* has the same right of private defence which he would have if *Z* were sane.

(*b*) *A* enters by night a house which he is legally entitled to enter. *Z*, in good faith, taking *A* for a house breaker attacks *A*. Here *Z*, by attacking *A* under this misconception, commits no offence. But *A* has the same right of private defence against *Z*, which he would have if *Z* were not acting under that misconception.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.

1. Analogous law.—This section means that the right of private defence exists irrespective of the physical or mental incapacity of the person against whom it is asserted. Illustration (*a*) furnishes an example of the right against a person who is *non compos mentis*. Illustration (*b*) is taken from an English case,[2] discussed elsewhere.[3]

2. Principle.—As the right of private defence is the right of the preservation of one's life and property against all comers it follows that the defender cannot permit a lunatic, or in an inebriate to kill him or rob him of his property without protest. Having the right to preserve his life and possess his property it is a right which from its very nature admits of no exception and may be asserted against any assailant whether sane or insane, competent or incompetent against a person mistaken, or otherwise. In short, the rights prevail against overt attacks irrespective of their intention and meaning.

3. Meaning of words—"*Or by reason of any misconception*", such as in Ill. (*b*). "*Every person has the right,*" i. e. in judging of the right of private defence, the exceptions which make offences non-penal should be ignored. Accused was the proprietor of land in the occupation of a tenant upon which a tree was felled by the wind. Such trees belonged to the accused but the tenant under a misconception that it belonged to him was cutting and staking the wood. The accused entered on the land to remove the wood but the tenant resisted whereupon the accused assaulted him. The Court held that as, but for the misconception, the tenant's act would amount to theft, it was an offence against which the

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1. (1966) 1 W. L. R. 1077.
2. Devett's case, Cro. Car. 538.
3. Section 79,

accused had the right of private defence, and the force used was therefore justified by this section.[1]

Acts against which there is no right of private defence.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which right may be exercised.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts or, if he has authority in writing, unless he produces such authority, if demanded.

SYNOPSIS

1. Analagous law.
2. Principle.
3. Meaning of words.
4. "Public servant."
5. Reasonable apprehension of death or grievous hurt.
6. Right against public servants—Paragraph 1.
7. Good faith.
8. There must be jurisdiction.
9. "Under colour of office."
10. Not strictly justifiable by law.
11. Cases.
12. Explanation 1.
13. Acting under orders—Paragraph 2.
14. General warrants.
15. Explanation 2.
16. Recourse to authorities—Paragraph 3.
17. Extent of private defence.
18. Nearness of police station.
19. Protection of public authorities.
20. Burden of proof.
21. Commencement and extent of the right.
22. Limits of the rule.

1. Analogous law.—This section has been misplaced. Its appropriate place is after Sec. 100, which defines the extent of the right. The section defines its limitations. Indeed all the following sections might be more logically rearranged in this order : Secs. 102, 110, 106, 105, 103, 104 and 99. The section itself would have been more logical if the third and fourth paragraphs had

1. Padu, 10 N. L. R. 38 : 23 I. C. 704

preceded the first two. The latter refer to a special class and the explanations would then be better placed. As it is the third clause of this section must be read as subject to Sec. 105.[1] The first clause was enacted to meet cases which would not fall within Sec. 332 by reason of the public servant in Sec. 332 not being at the time when the assault was committed on him in discharge of a duty imposed on him by law.[2]

2. Principle.—This section lays down the limits within which the right of private defence must be exercised. It does not arm the party wronged with fire and sword, but allows him to help himself only when there is a reasonable apprehension of danger.[3] Other sections define the extent to which the right may be pushed. This section limits the general rule there laid down, and its object is to lay down certain restrictions; the first two of which are specially intended to protect public servants, the remaining two paragraphs being more general.

Reasons for affording protection to public servants.

The clauses in favour of public servants rest partly on the probability that their acts will be lawful, in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary since the law will set right what has been wrongfully done in its name, and, lastly, on the ground that it is good for society that public servants should be protected in the execution of their duty even where they are in error. But in order to secure the protection of Sec. 99, I. P. C., it is essential that the act done or attempted to be done by a public servant must be (*a*) in good faith, (*b*) under colour of his office, (*c*) though that act may not be strictly justifiable by law.[4]

3. Meaning of words.—"*Under the colour of his office*," that is *bona fide* believing that it was his duty to perform the act whether he was acting lawfully or unlawfully in the discharge of his duty.[5] "*Strictly jusitified by law*" means that there must be jurisdiction, though the act complained of may not be within that jurisdiction.[6] "*More harm than is necessary for the purpose of defence*," that is, the harm inflicted must be no more than is necessary to avert the danger. It may even be deterrent, but must not be excessive.

4. "Public servant."—Where a court appoints a *vakil* to make attachment before judgment as the application required immediate attachment and the Court cannot secure an *amin* or *bailiff* to make the attachment the *vakil* while effecting the attachment is a public servant acting in good faith under the colour of his office. The mere omission to record the reasons in the order appointing him does not give rise to any right of private defence.[7]

5. Reasonable apprehension of death or grievous hurt.—Both paragraphs 1 and 2 of the section speak of an act "which does not reasonably cause apprehension of death or grievous hurt" and against such an act there is no right of private defence. Before the right of private defence can be exercised there must be a reasonable apprehension of death or grievous hurt

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1. Narsing Pathabbai, I. L. R. 14 Bom. 441.
2. Dalip *v.* Emperor, I. L.R. 18 All. 246.
3. Section 102 at p. 105.
4. *In re* Ganpathi Pillai, A.I.R. 1953 Mad. 936, at p. 937. 1953 Cr. L. J.1730 : 66 L. W. 361 : 1953 M.W. N. 558.
5. Dalip *v.* Emperor, I. L. R. 18 All. 246. at p. 252.
6. Jograj Mahto *v.* Emperor, A. I. R. 1940 Pat. 696 at p. 698: 222 P. L. T. 80; *see* also Puna Mahton *v.* Emperor, A. I. R. 1932 Pat. 315 : I. L. R. 11 Pat. 743; Nand Singh *v.* State, A. I. R. 1951 Raj. 105.
7. Tej Singh *v.* Emperor, A. I. R. 1935 All. 490 at p. 491 : 36 Cr. L. J. 545.

at the hands of the person against whom the right is exercised. Whether the apprehension was reasonable or not is always a question of fact to be determined from the surrounding circumstances. The test in such a case is not whether there was actual danger but whether there was reasonable apprehension that such danger existed.[1]

Test.

It is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of private defence is not exercised.[2] The right of private defence has been provided for self-protection. Therefore, if by exercise of this right a person escapes grievous hurt or death, it cannot be said that he had no apprehension that grievous hurt or death would follow even if he did not act in self-defence.[3]

There can be no doubt that if a person reasonably apprehends that his assailant is attempting to strangulate him, exercise of the right of the defence of person extends even to causing death of the assailant. Thus where *N* pleaded that he had fallen down and *B* attempted to strangulate him and therefore he caused injuries to *B* in exercise of the right of self-defence. It was held that this plea had to be considered as a composite plea; it was not open to the Court to investigate whether *N* could have reasonably apprehended such injury to himself as justified him in causing the death of *B*. Where a person accused of committing an offence sets up at his trial a plea that he is protected by one of the exceptions, general or special, in the Indian Penal Code, or any other law defining the offence, the burden of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. The prosecution case, however, did not by reliable evidence establish affirmatively that *N* had done any act which rendered him liable for the offence of murder. His responsibility, if any, arose only out of the plea raised by him: if the plea amounted to a confession of guilt the Court could convict him relying upon that plea, but if it amounted to admission of facts and raised a plea of justification, the Court could not proceed to deal with the case as if the admission of facts which were not part of the prosecution case was true, and the evidence did not warrant the plea of justification.[4]

6. Right against public servants : Paragraph 1.—It is incorrect to say that a person has no right of private defence of his property even though the act of the public servant concerned is not strictly justifiable by law. The public servants who are empowered to take search are presumed to know the law and if the act is done in contravention of the mandatory provisions of law, it must be held to have been done without due care and attention and cannot be said to be done in good faith. That being so Sec. 99 of the Indian Penal Code does not come to the aid of the Inspector or the members of his party who attempted to enter the petitioner's house for taking search.[5] The first two clauses of this section limit the right of private defence, against public servants due to the reason that law presumes their acts to be legal, and when in fact they are illegal, law undertakes to remedy them.

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1. Devi Singh Bapu Singh *v.* State, A.I.R. 1955 M.B. 34 at p. 36 (D.B.): 1954 Madh. B.L.R. Cr. 112: 954 Madh. B. L. J. H.C.R. 908: 1955 Cr. L.J. 471.
2. Pagla Baba *v.* State, A. I. R. 1957 Orissa 130 at p. 150 : 23 Cut. L.T. 88.
3. Bhujram *v.* State, 1958 M. P. L. J. (Notes) 119.
4. Narain Singh *v.* State of Punjab, (1964) 1 Cr. L. J. 730 at p. 733.
5. Mithukhan *v.* State of Rajasthan, A.I.R. 1969 Raj. 121 at p. 123.

The first clause limits the right of self-defence of a person when the party against whom that right has to be enforced happens to be a public servant. In other words, this clause confers an exceptional immunity on public servants against the attacks of persons in the exercise of their right of private defence. As regards the latter, the clause evidently confers no right to the defence of one's *property* against the acts of public servants unless the seizure of property was accompanied by the use of force giving rise to the apprehension of death or of grievous hurt.[1] But this is on the assumption that the public servant was acting within his legitimate powers, which it is for him to show.[2] When this is the case, there will scarcely be any necessity to invoke the aid of the section, for there is no law to justify a public servant in causing death or grievous hurt in the discharge of his duties. Such hurt he is no doubt entitled to cause when illegally resisted, but then there is no right of private defence, when one is legally liable to arrest and is using force to resist it. Nor are the persons who aid and abet such a person exempt from punishment. They cannot plead that they were justified in rescuing a thief by assaulting a policemen charged with the duty of arresting him. The question of private defence has then no application in such a case. The only question that may then arise is that raised in the two explanations, *viz.* that the person resisting did not know that the person resisted was a public servant, or was acting under the directions of a public servant. But the question attains prominence only when the public servant concerned had acted without jurisdiction or having jurisdiction he had abused it. In order to earn the protection of this clause two things at least are essential : (*i*) that he should have acted in good faith, and (*ii*) that he should have acted "under the colour of his office."

Exceptional immunity to public servant.

Perequsite condition for protection to public servants.

The exception contained in the first paragraph of Sec. 99 of the Indian Penal Code applies where a public servant acts irregularly in the exercise of his powers[3] and not where he acts outside the scope of his powers.[4]

Under Sec. 99 of the Indian Penal Code no right of private defence is available as against the act of a public servant who does anything in good faith under the colour of his office if such act does not cause apprehension of death or grievous injury.[5] In the above-noted case it was clearly established on the evidence of P.W. 1 that he was discharging his duty as a forest guard and was acting in good faith. There was nothing to show that he did any act which reasonably cuased the apprehension of death or of grievous hurt to either of the petitioners. *Held* thus neither the right of private defence of person or property was available to the petitioners since such right is always subject to the restrictions contained in Sec. 99 of the Indian Penal Code.

7. Good faith.—"Good faith" in Sec. 99, Indian Penal Code, has to be read with Sec. 52, Indian Penal Code, wherein it is provided that "nothing is said to be done or believed in good faith which is done or believed without due care and attention.[6] The question makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of "good faith" and which are predominant in the positive definition enacted

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1. Pontha, 24 I. C. (Mad.) 327, but *see* Adhar, 5 C. W. N. 391.
2. Bahal, I. L. R. 28 All. 481; Samlat, 15 A. L. J. 566.
3. State *v.* Yamanappa Limbaji, 58 Bom. L. R. 551.
4. Deoman Shamji Patil *v.* State, A. I. R. 1959 Bom. 284 at p. 286: 61 Bom. L.R. 30: 1959 Cr. L. J. 825.
5. Aruja Sahu *v.* State, (1965) 31 Cut. L. T. 851 at p. 856.
6. Raju *v.* Emperor, A. I. R. 1946 Sind. 17 at p. 19 : I. L. R. (1945) Kar. 103 : 222 I. C. 495.

in the other Acts of the Legislature.[1] Good faith does not require logical infallibility but due care and caution which must in each case be considered with reference to the general circumstances and the capacity and intelligence of thi person whose conduct is in question.[2] "Good faith" in criminal law es different from "good faith" as understood in civil law. If an act is done without due care and attention, it cannot be said to be done in good faith as far as criminal law is concerned. Accordingly where the police without legal authority either to arrest or effect a search in a *math* acted without good faith as required by law, their action was such so as to give rise to a right of private defence on the part of the inmates of the *math* under this section.[3] But apart from that section the act of the public servant must be supported by the positive presence of care, caution and circumpection and an honest endeavour to discharge his public duty with strict compliance with the requirements of law. This must depend upon the facts of each case. The provisions of Sec. 99 are not applicable where the police officers were not acting in good faith.[4]

Good faith in criminal law is different from that in civil law.

Public servant not protected if he does not act in good faith.

It is an established principle of law that the right of private defence cannot be claimed by an aggressor; in fact it is the person aggressed upon who is on the defensive. The assailant cannot say that although he had begun the attack he should be protected if the opposite party uses force in repelling it.[5]

In the case of *Prag* v. *Emperor*,[6] warrants were issued by an Assistant Collector on 21st August, 1940, authorising a *kurk amin* Samiuddin to execute them. The warrants authorised the *kurk amin* to realise from certain persons arrears of land revenue by attachment of their property. The warrants were made returnable on or before 30th September. On 10th September the *kurk amin* endorsed on the warrants his liability to execute them on account of offer of resistance by the defaulters. The warrants were received back in the Tashil and thereupon instead of returning them to the Assistant Collector for further orders the Naib Tahsildar on his own inititative asked for police help and ordered another *kurk amin* named Gajadhar Prasad who had succeeded Samiuddin, to execute the warrants. An attempt was, however, made to execute the warrants on the orders of the Naib Tahsildar. Certain cattle were arrested, but where recovered as they were being taken away, and there was a fight between the police and other officials on the one side and the persons recovering the cattle on the other. It was held that the Naib Tehsildar if he had examined the warrants he would have seen at once that only the *kurk amin* named in it, namely Samiuddin was authorised to execute them and if he had considered the matter for a moment he must have realised that it was not within his power to authorise any other *kurk amin* to execute them. It was difficult to hold that he acted without due care and attention, and if he did not act with due care and attention, he could not be said to have acted in good faith.

In *Sukar Sao* v. *Emperor*,[7] a Magistrate directed proceedings under Sec. 147, Cr. P. C., and made the following order to the local police to see that the

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1. *See* Sec. 3 (22), General Clauses Act, 1897.
2. *In re* Ganpathi Pillai, A. I. R. 1953 Mad. 936 at p. 937 : 1953 Cr. L. J. 1730 : 1953 M. W. N. 558 : 66 L. W. 361.
3. Pagla Baba *v.* State, A.I.R. 1957 Orissa 130 at pp. 147-48: 23 Cut. L. T. 88 : 1957 Cr. L. J. 769.
4. Ramji Lal *v.* Emperor, A. I. R. 1935 All. 913 at p. 913 : 36 Cr. L. J. 1501 : 1935 A.L. J. 95 (2) : 1935 A.W.R. 935.
5. Z. D. Samuel *v.* Emperor, A. I. R. 1937 Pesh. 23 at p. 27 : 167 I. C. 564.
6. A. I. R. 1942 Oudh 256 at p. 257 : I. L. R. 17 Luck. 591.
7. A. I. R. 1941 Pat. 560 at pp. 560-61 : 195 I.C. 593 : 42 Cr. L. J. 753.

status quo is maintained. The police went to the spot and entered into the building of the accused and attempted to demolish the wall which was alleged to have blocked a drain. The accused resisted the police in their attempt to demolish the wall. It was held that the accused could not be guilty under Secs. 147 and 353 of the Penal Code, as the police officer could not be said to have acted in good faith because he did not understand the meaning of the expression *status quo* which was used by the Magistrate and did not take proper steps to ascertain what orally the Magistrate intended him to do. Cases decided on the point will be found set out under Secs. 521 and 183 and other sections relating to public servants.

8. There must be jurisdiction.—Section 99 applies to cases where there is jurisdiction to do an act, but that jurisdiction has been in some respect exercised wrongly. The words "under colour of office" refer to irregular as distinguished from illegal acts. They show that the act was within the jurisdiction but that the jurisdiction had been exercised irregularly or on insufficient grounds. In other words, the clause is not intended to cure the want of jurisdiction but only an erroneous exercise of it and that when the error affects the procedure rather than the principle such an irregularity, for example, an initialling of warrant instead of signing it, the mode of delivering possession or the like, it would be covered by this clause. The protection in favour of public servants rests partly on the probability that their acts will be lawful in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name; and lastly on the ground that it is good for society that public servants should be protected in the execution of their duty when they are in error.

Section does not intend to cure want of jurisdiction.

Thus where there was convincing evidence in the case that the Sub-Inspector of Police to whom the warrant was issued endorsed it to P. W. 2 noting the number of the constable in the warrant. P. W. 2, was in uniform. It had come out in evidence that P. W. 1 had already told the first accused that a warrant had been issued by the Court for his apprehension and that he should appear in Court and not create trouble for the sureties. P. W. 13 had deposed that when the police officers were sighted the first accused was told by the second accused that policemen were coming to arrest and the first accused said "let them come, we will see". P.W. 2 on meeting the first accused appraised him of the contents of the warrant thereby satisfying the provisions of Sec. 80 of the Criminal Procedure Code and caught his hand thereby showing that he was under arrest. Therefore, it was held that P. W. 2 was acting in good faith under colour of his office and the first accused had, therefore, no right to private defence as laid down in Sec. 99 of the Penal Code.[1]

As regards the exercise of good faith the law requires that the public servant acting in the discharge of his duties must exercise due care and attention. Now, no one can be said to be possessed of good faith when he consciously arrogates to himself a jurisdiction which he does not possess. For instance, a person (*A*), obtained a decree for a portion of land from a court which had no jurisdiction to effect partition, and the Court therefore asked the Collector for advice as to how to execute the decree, and

Illustrative examples.

1. Ouseph Varkey *v.* State of Kerala, (1964) 1 Cr. L. J. 592 at pp. 595-96

the Collector thereupon took upon himself to excute the decre by appointing a surveyor to measure the land and give possession of it to the decree-holder. The surveyor went, but was resisted by the accused who questioned his jurisdiction, whereupon he was prosecuted, but the Court acquitted him, observing that the protection given by this section to a public servant, does not extend to an act which is altogether illegal.[1]

So where the *kurk amin* and his peons were assaulted while effecting an attachment of property in execution of a warrant long after the expiry of the period fixed in the warrant of attachment, the Court held that the persons resisting the execution of such warrant were acting in the exercise of the right of private defence and did not commit any offence.

It has been held in several cases that a *kurk amin* is not acting legally when he executes a warrant after the expiry of the time allowed to him for its execution. It was held by this Court in *Mahadeo* v. *Emperor*,[2] that when the date fixed in a warrant of attachment has expired, the warrants no longer in force and capable of execution and if any person offers resistance to its execution purporting to be made under the time expired warrant, he is not guilty of any offence under Sec. 186. The Nagpur Judicial Commissioner held in *Nand Lal* v. *Emperor*,[3] that if a revenue peon is assaulted while executing an expired warrant of attachment no offence under Sec. 353 is committed.

In *Kishori Lal* v. *Emperor*,[4] it was held that an execution warrant sought to be executed is bad if the date on or before which it is to be executed and the date on or before which it is to be returned to the Court is not specified in it and a person resisting the execution of such a warrant commits no offence under Sec. 353.[5] So where the partition *amin* of one village being empowered to measure land proceeded to measure the land of an adjoining village and was obstructed, the obstruction was held to be justifiable.[6] So while a District Magistrate has jurisdiction to summon a witness to appear before himself, he has no jurisdiction to arrest a witness for the purpose of giving evidence before the police. If, therefore, a person be so arrested, his resistance would be justifiable.[7] So where a person applied for a search warrant under Sec. 100 of the Criminal Procedure Code (which empowers the search for persons wrongfully confined), but the Magistrate issued a search warrant under Sec. 96 (which empowers the issue of a search warrant for the production of document or thing which the Court thinks will not be produced on summons), the police empowered to execute it were not protected under this section, as the issue of the warrant was not only "not strictly justifiable by law", but wholly illegal and *ultra vires*.[8] So while a vaccinator is empowered to take lymph from persons who do not object to it, he has no right to take it as of right, and his attempt to take it without consent was illegal, and such as would justify an assault committed to prevent its removal.[9]

Customs officers are entitled to stop, search and seize smuggled goods which are brought into India without payment of duty, and the smugglers have no right of private defence against them.[10] As already stated, there is no right

1. Tulsiram, I. L. R. 13 Bom. 168; Lila Singh, I. L. R. 22 Cal. 286 ; Jogendra Nath Mookerjee, I. L. R. 24 Cal. 320; Sit Nyein, 8 I. C. (Bur.) 988, followed in Gopi Mahto, I. L. R. 10 Pat. 821.
2. 4 O. W. N. 43 : A. I. R. 1927 Oudh 91 : 99 I. C. 413 : 28 Cr. L. J. 157 : 2 Luck. 40.
3. 76 I. C. 655: A. I. R. 1924 Nag. 68 : 25 Cr. L. J. 223 : 19 N.L. R. 183.
4. A. I. R. 1934 All. 1016 : 153 I. C. 157 : 36 Cr. L. J. 295.
5. Raghubir *v.* Emperor, A. I. R. 1942 Oudh 57 at p. 58.
6. Lilla Singh, *supra*.
7. Jogendra Nath Mookerjee, *supra*.
8. Bisu Haldar *v.* Probhat Chandra, 6 C. L. J. 127.
9. Mangobind, 3 C. W. N. 627.
10. Suryanarayan Reddi, 1937 M. W. N. 741.

of private defence against a police officer effecting an arrest in good faith under colour of office.[1]

But where a police constable could not have rightly exercised the authority he did in arresting *A* unless he had promoted himself to be an officer-in-charge of a police station to the rank of a Sub-Inspector there is no legal basis to his action and it cannot be said that his act was nothing more than an act not strictly justifiable by law within the meaning of Sec. 99, I. P. C.[2] If the constable is struck with the bullet of a gun by *B* while arresting *A*, the constable is not entitled to protection of Sec. 99. Again, a Sub-Inspector of Police is not entitled to give verbal instructions to private individuals to arrest persons whom it is his own duty or the duty of the subordinates to arrest. To such a case Sec. 99 will not apply.[3]

In *Ghulam* v. *Emperor*[4] the bailiff's party went to attach judgment-debtors' wheat in execution of the decree. Some members of the bailiff's party entered the hut of the judgment-debtor and broke open the lock of the *kothri*. *Held* that this was an act done by a public servant or under the direction of a public servant acting in good faith under the colour of his office though that act might not be strictly justifiable by law. Therefore, under Sec. 99, I. P. C., the judgment-debtor had no right of self-defence.[5]

In *Government of Bengal* v. *Alimuddin*,[6] the Nazir of a civil court went with a party to give possession of certain land and after allowing a substantial time for the auction-purchaser to come to terms with the judgment-debtor, ordered the judgment-debtor to remove the huts that existed on the property but on their objecting on the ground that the writ was not to give delivery of possession of the house, the Nazir ordered the decree-holder's men to remove the huts. It was held that in giving directions that the huts should be taken down, the Nazir acted in good faith and that there was no question of private defence available to the accused judgment-debtor.

9. "Under colour of office".—The words "colour of office" refer to irregular as distinguished from illegal acts. If what has been done is done in good faith under colour of his office no right of pivate defence would arise.[7] The words "colour of office" show that the act was within jursidiction, but that the jurisdiction has been exercised irregularly or on insufficient grounds. In short, the act has been done wrongly though it might have been done rightly. In other words, the clause is not intended to cure the want of jurisdiction but only an erroneous exercise of it and that when the error affects the procedure rather than the principle such an irregularity for example as initialling a warrant instead of signing it, the mode of delivering possession or the like—it would be covered by this clause.[8]

10. Not strictly justifiable by law.—Unlike Sec. 183, the operation of Sec. 99 extends to acts which are not strictly justifiable by law. Section 99 is designed to protect a public servant, and to limit the amount of resistance which may be offered to him. Section 183, on the other hand, is not a section for the protection of the public servant, but enables him to

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1. *See* under Applicability and Scope.
2. Bhairo Murid Jagirani *v.* Emperor, A.I.R. 1941 Sind. 82 at p. 83: I.L.R. (1941) Kar. 324.
3. Razu *v.* Emperor, A. I. R. 1946 Sind 17 at p. 19 : I. L. R. (1945) Kar. 103 : 222 I. C. 495 : 47 Cr. L. J. 487.
4. A. I. R. 1936 Lah. 39 P. L. R. 293.
5. Ghulam *v.* Emperor, A. I. R. 1936 Lah. 851 at pp. 852-53 : 38 Cr. L. J. 186 : 39 P. L. R. 293.
6. A I. R. 1933 Cal. 469 at pp. 469, 470, 471 : 144 I. C. 817 : 34 Cr. L. J. 826.
7. Kizhakkethil Sulaiman *v.* State of Kerala, A. I. R. 1964 Ker 185 at p. 189.
8. *In re* Ganapathia Pillai, A. I. R. 1953 Mad. 936 at p. 938: 1953 Cr.L.J. 1730 : 1953 M. W. N. 558 : 66 L. W. 361 ; *see* also the cases cited therein.

take the offensive and prosecute anybody who resists the taking of property by lawful authority. It is one thing to provide that a public servant who is acting *bona fide* ir the exercise of his office, though in excess of his authority in fact, is to be protected from acts of violence. It is quite another thing to say that such a public servant, being in fact in the wrong, may prosecute anybody for resisting peaceably his wrongful act. Resistance to the act of a public officer acting *bona fide* though in excess of his authority may well give rise to some charge in the nature of assault, but it cannot afford any foundation for a prosecution under Sec. 183. The language of Sec. 183 is perfectly plain. It applies to resistance to the taking of property by lawful authority of a public servant, and there are no words in that section, as there are in Sec. 99, extending the operation of the section to acts which are not strictly justifiable by law.[1] The word "strictly" in this section has been deliberately inserted by the Legislature to show that this section was not intended to apply to cases where the act was wholly unjustified. It does not extend to cases where there is a complete want of jurisdiction.[2]

Sections cures only erroneous exercise of jurisdiction and not want of jurisdiction.

The section protects a public servant against the right of private defence even if authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular.[3] The use of the words "though that act may not be strictly justifiable by law" shows that the section does not contemplate a case of initial want of jurisdiction. Therefore, if there was no jurisdiction to issue the warrant of arrest or to make an arrest, Sec. 99 cannot be of any help to the public servant.[4] It is for the prosecution to show that the Court or officer issuing the warrant in question had jurisdiction to do so and it is not for the defence to prove the negative. The words show that the act was within jurisdiction, but that the jurisdiction had been excised irregularly or on insufficent grounds. In short, the act has been done wrongly, though it might have been done rightly. They do not apply to an act which was done wrongly and could not possibly have been done rightly.[5] In other words, the clause is not intended to cure the want of jurisdiction but only the erroneous exercise of it, and that when the error affects the procedure rather than the principle—such an irregularity, for instance, as initialling a warrant instead of signing it,[6] or issuing it without complying with the preliminary procedure prescribed by the Civil Procedure Code,[7] for the mode of delivering possession,[8] or the like—would be covered by the clause.

Section 99 of the Indian Penal Code specifically says that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by the direction

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1. Sakharam Rawaji *v.* Emperor, A. I. R. 1935 Bom. 233 at p. 234 : I. L. R. 59 Bom. 545 : 157 I. C. 859 : 37 Bom. L. R. 362 : 36 Cr. L. J. 1263.
2. Jograj Mahto *v.* Emperor, A. I. R. 1940 Pat. 696 at p. 698 : 43 Cr. L. J. 199 : 191 I. C. 590 ; *see* also Puna Mahton *v.* Emperor, A. I. R. 1932 Pat. 315 : I. L .R. 11 Pat. 743 : 42 I. C. 160: 34 Cr. L. J. 269; Anand Ballabh Prasad *v.* State of Bihar, A. I. R. 1953 Pat. 313 : 1 53 B. L. J. R. 364 Nand Singh *v.* State, A. I. R. 1951 Raj. 105.
3. Puna Mahton *v.* Emperor, A. I. R. 1932 Pat. 315 at p. 317 : 142 I. C. 160; Nand Singh v. State, A. I. R. 1941 Raj. 105.
4. Anand Ballabh Prasad *v.* State of Bihar, A. I. R. 1953 Pat. 313 : at l. 315 : 1953 B. L. J. R. 364.
5. Mangobind, 3 C. W. N. 629; Attar Singh, 1918 P. R. 9 : 44 I. C. 742; Gaman, 1913 P. R. 16 : 18 I. C. 894; Bhairo Murid Jagirani *v.* Emperor, A. I. R. 1941 Sind 82 : 42 Cr. L. J. 623.
6. Janki Prasad, I. L. R. 8 All. 293.
7. Sahibulla, I. L. R. 51 Cal. 1 ; Rajani Kanta, I. L. R. 58 Cal. 940; Puna Mahton *v.* Emperor, I.L.R. 11 Pat. 743: 1932 Pat. 315 : 142 I. C. 160 : 34 Cr. L. J. 269.
8. Preolal Mukerjee, 18 C. W. N. 548 : 24 I. C. 163, followed in Puna Mahton *v.* Emperor, A. I. R. 1932 Pat. 315 : I. L. R. 11 Pat. 743 Rajani Kanta, I. L. R. 58 Cal. 940.

of a public servant acting in good faith under colour of his office. The protection extends even to acts which will not be strictly justifiable by the law.[1]

11. Cases.—The simple safeguards incorporated by the Legislature in Sec. 165, Cr. P. C., are mandatory, and must be carried out immediately and fully, or as nearly so as they can be in the exigencies and circumstances of each case. Unless this is done the search is without jurisdiction and bad in law. Section 99, Indian Penal Code, will in no way cure this, for the Police Officer who carries out a search under Sec. 165, Cr. P. C. without complying with its requirements, which are intended to be mandatory is acting without due care and attention.[2]

A police officer executing a bailable warrant is bound to give the person arrested the option of bail, and if he fails to do so, he is not protected by this section against the rescurers who use force to liberate the person so arrested.[3] So where a subordinate police officer deputed by the officer-in-charge of the police station to make a search entered a house in search of persons as well as property, though, the search for the property required a search warrant from the Station House Officer, it was held that though the search of the house for property without a search warrant was illegal still the inmates could not offer resistance especially as the policeman had charged those persons with theft and the resistance offered to the police was as much to the search as to their own apprehension.[4] So where the accused were arrested by the police at midnight lurking armed, in a village inhabited by dacoits, it was held that even if the arrest be not justifiable under Sec. 100 of the Criminal Procedure Code of 1861,[5] still the resistance could not be justified under this section.[6] The sergeant who arrested the accused whom he found armed with guns, and who were reported against as dacoits was fully within his rights under Secs. 45(6) and 54 (1) of the Criminal Procedure Code, and the accused who resisted him and fired at men assisting him, wounding and killing several, were clearly guilty of murder under aggravating circumstances.[7]

Such was also the case of a policeman whose cart had been stopped by some camel-drivers whose camels had been trespassing on the Government canal banks, and through whose action a prisoner in lawful custody effected his escape, and further threatened the officer with personal violence, who thereupon fired a shot without taking careful aim wounding one of his assailants.[8] The same view was taken in another case in which a Sub-Inspector of Salt and Abkari had attempted to enter a house in search of property the illicit possession of which was an offence under the Madras Abkari Act,[9] and which he could not legally do without obtaining a warrant from the Abkari Officer, who could only issue a warrant after recording "his reasons and the grounds of his belief".[10] This case probably carries the doctrine of immunity too far. In another case, an Excise Sub-Inspector was empowered to search only for "excisable" article under the Bengal Excise Act,[11] and he attempted to search a house for "*foreign* excisable article," for which he was not empowered to search; it was held that his entry being unlawful, the accused who assaulted him were justified.[12] The section would, however, clearly protect a person

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1. Kanwar Singh *v.* Delhi Administration, A. I. R. 1965 S. C. 871 at pp. 875-76.
2. Mithu Khan *v.* State of a Rajasthan, I. L. R. (1969) 19 Raj. 559 at p. 563 : A. I. R. 1969 Raj. 121.
3. Shyama Charan, 15 I. C. (Cal.) 1006.
4. Vyankant Rao, 7 B. H. C. R. 50; Gaman, 1913 P. R. 16 : 18 I. C. 894; Mirshah Newae Khan, 8 S. L. R. 1; Chander Kumar, 3 C. W. N. 344.
5. Now Sec. 54, Act V of 1898.
6. Gateea Meena, 1869 P. R. No. 69.
7. Bhagna Singh 1900 P. R. 21.
8. Mukherjee, (1901) P. R. No. 5.
9. Madras Act I of 1886.
10. Section 41, Madras Act 1 of 1886.
11. Bengal Act VII of 1858, Sec. 40.
12. Pukot Kolo, I. L. R. 19 Mad. 349.

who attaches articles exempts from attachment, as where a bailiff attaches agricultural cattle and grain which are under the Civil Procedure Code exempt from attachment.[1] In the case of a defaulter under the Local Boards Act, a warrant of distress was issued, and a bucket and spade belonging to him attached. The defaulter was a potter and the articles attached were his tools exempt from attachment.[2] The potter resisted the attachment, and it was held that his resistance was illegal.[3] So where on a Magistrate having been satisfied that certain persons accused in a case were keeping out of the way, and he accordingly issued a proclamation under Sec. 87 of the Code of Criminal Procedure and an order for the attachment of their property under Sec. 88, in execution of which the police officer was informed that the property he was seizing in attachment did not belong to the absconding accused but the *patwari* who was present, having stated the contrary, the police officer proceeded with the attachment, and he was molested, it was held that even assuming that the property attached did not belong to the absconders, the rightful owners had no right to private defence.[4]

Order XXXVIII, rule 7 states that save as otherwise expressly provided the attachment before judgment shall be made in the manner provided for the attachment of property in execution of a decree, i.e. under rule 43, Order XXI; rule 105, Order XXI provides that such attachment shall be made through a civil court *amin* or bailiff unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

So where a *vakil* was appointed to make attachment before judgment without recording reasons in the order it was held that the provisions in Order XXI, rule 105 for recording the reasons, were not mandatory but directory consequently the order of appointment of *vakil* to make the attachment before judgment was a good order and the attachment was not illegal or without juisdiction that being so no right of private defence arose for the accused persons.[5]

So where the Magistrate ordered the police to take charge of paddy pending proceedings before him under Sec. 145 of the Code of Criminal Procedure which he had no right to do, whereupon the police in pursuance of the order proceeded to guard it, but were resisted by armed violence, it was held that the violence was excessive and unjustified, especially as the police had acted in an open and straightforward manner, simply announcing what the orders they had received were.[6] But where the officer of the Salt Department, being empowered to make searches for contraband salt without a warrant only in cases in which the delay in obtaining a magisterial warrant would defeat the object, searched a house without a warrant when there was time to apply for a legal warrant, it was held that their search was illegal and resistance to it was consequently justifiable.[7] There was, of course, no pretension to acting under the colour of their office by the Deputy Commissioner's peons who forcibly seized the bullocks of the accused to pull their own cart out of a rut into which it had fallen, and the conduct of the accused in forcibly retaking his property was of course amply justified.[8] The law imposes no duty on Government officials, nor, indeed, gives them power to seize animals belonging to

1. Madras Act V of 1884.
2. *Ibid.*, Sec. 94.
3. Poomalai, I. L. R. 21 Mad. 296.
4. Bhai Lal Chowdhary, I. L. R. 29 Cal. 417.
5. Tej Singh, A. I. R. 1935 All. 490 at p. 491, following Sahebulla, I. L. R. 51 Cal. 1.
6. Bhola Mahato, 9 C. W. N. 125; Preola Mukerjee, 11 C. W. N. 543: 24 I. C. 163
7. Kalian, I. L. R. 19 Mad. 310.
8. Ram Harakh, 24 I. C. 172.

private persons for the purposes of camp transport. Consequently, the owner of such property is well justified in resisting its forcible seizure by such officers or their servants, and this section has no application to a case of abuse of power, and a proceeding wholly illegal and without jurisdiction.[1]

Where in the absence of a written order from the Investigating Officer, an Assistant Sub-Inspector seeks to arrest the accused, the latter has no right to resist the arrest and has no right of private defence against the act of arrest, as such the act was clearly done under colour of office, though not strictly justifiable by law.[2] In *Narasayya's* case,[3] a police officer, who had with him an invalid warrant of arrest told the accused that there was a warrant against him and he should surrender. The accused refused to come out of the house and said that he would do so next morning. The police officer tried to arrest him *bana fide* believing that it was his duty to execute the warrant. It was held that the right of private defence did not extend to the act of kicking and beating with stick to the police officer. In another case from the same High Court,[4] a revenue peon who was armed with a warrant of attachment of the moveable property of the accused had tried to attach the property. The accused resisted the attachment by pushing the peon. The warrant was defective in that it did not bear any seal of Court. In the trial of the accused for assault on the peon, it was held that the peon was acting in good faith and under colour of his office and that, therefore, the accused had no right of private defence against the attachment.

Police constables carrying out the illegal order of a head constable and dragging or attempting to drag the accused against his will towards the local dispensary for his examination by the medical officer as to his drunken state are not protected by the first paragraph of this section. It cannot be said that right of private defence cannot be exercised against public servants who carry out the orders of their superiors, however manifestly illegal the orders may be.[5] Where a sub-inspector was carrying out the order of a superior officer, which was *ex facie* lawful though unlawful for a technical defect, the accused who resisted him were deprived of the right of private defence under the first paragraph of Sec. 99.[6]

In a Punjab case some members of the police party entered the house at night in which the accused was sleeping having in his possession unlicensed arms. The accused on being awakened probably by the barking of the dog picked up his gun and went out. On seeing figures outside he fired the gun either aiming at his supposed adversaries or in the air merely to frighten them. On this, the policemen retreated and began to fire at him. He fired a second shot in self-defence as a result of which one of the policemen was killed. It was held that the police having failed to tell him that they were policemen and had come to arrest him because they had reason for believing that he was in possession of unlicensed arms.[7]

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1. Asa, 20 I. C. (Lah.) 992; Parshadi *v.* Baljit Singh, 20 I. C. (Oudh) 233.
2. Superintendent and Remembrancer of Legal Affairs, Bengal *v.* Sona Mia, A.I.R. 1948 Cal. 95 at p. 97 : 229 I. C. 611; Narasayya Lachmayya *v.* State, A. I. R. 1953 Nag. 292 : 1953 N. L. J. 351; Mohammad Ismail *v.* Emperor, A. I. R. 1936 Rang. 119: 37 Cr. L. J. 462: 161 I. C. 459 : I.L.R. 13 Rang. 754; Public Prosecutor *v.* Amirtham Servai, A.I.R. 1940 Mad, 18: 41 Cr.L.J. 250: (1939) 2 M. L. J. 776 : 1939 M. W. N. 1004.
3. A. I. R. 1953 Nag. 292 at p. 295: 1953 N. L. J. 351.
4. Kishan Lal, 1939 N.L. J. 397.
5. Deoman Shamji Patil *v.* State, A. I. R. 1959 Bom. 284 at p. 287: 61 Bom. L.R. 30.
6. State *v.* Yamanappa Limbaji, I.L.R. (1956) Bom. 661 : 58 Bom. L. R. 551.
7. Dhara Singh *v.* Emperor, A.I.R. 1947 Lah. 249 at pp. 251-52.

In the case of *Ramjit* v. *Emperor*[1] resistence was immediately offered when the police went to arrest a woman. The resistance on her part and on the part of her associates created such a disturbance that communication of the substance of the warrant by the police for the moment was impossible. The warrant was shown as soon as the police had over run resistance and effected the arrest. *Held* that the police acted correctly in over-coming the resistance and then in showing the warrant and communicating its substance. The freedom followed in effecting the arrest could not be said to be so irregular as to take the case outside the purview of Sec. 99 and give the accused a right of private defence.

12. Explanation 1.—Explanation 1 goes with this paragraph and it is intended to protect persons who may have acted in ignorance of the fact that the person they were dealing with was a public servant.[2] Where a public servant has a distinctive badge or uniform, his position will be manifest to all who have to deal with him. But if a public servant has no distinctive badge or attire, he has to state who he is, before he can claim exceptional treatment. If he was, however, attended by persons whose badges proclaimed his position, or if he was already known in the locality, it would be sufficient.

Identity of public servant should be made known to accused.

It is not only proper and advisable, but really necessary that when police officers act in the discharge of their official duty, they should be clothed in their uniforms so that the public should always know that they are officers of the law acting in the discharge of their duty. The rule undoubtedly applied to ordinary cases and one can easily conceive of emergent cases in which police officers might act without being clothed in their uniform; but in such cases it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. If they fail to do so, they cannot validly seek the protection of the Court.[3]

A Magistrate in convicting the accused under Sec. 353, must deal with the question of guilty knowledge on their part and these should be a finding by him on the question whether they were aware that the person assaulted was a public servant.[4]

13. Acting under orders : Paragraph 2.—Next to the acts of public servants there are acts done under the direction of public servants which are similarly entitled to privileged treatment. Such acts may not be done by persons who are themselves public servants, but they must be done under their direction, and that direction must be legal, though it may not be strictly justifiable by law (*see* para No. 10 above). This is apparent from the tenor of the first clause, and from the language of which it is evident that an act which would be unjustifiable if done by a public servant, could be no less so if done by another under his authority.

Directions must be legal though not strictly justifiable by law.

So where the warrant issued by the Civil Court was not in the prescribed form, but was generally worded, and it did not authorise the peon charged with its execution to enter into the accused's house or seize his property, resistance to execution was held to be justifiable, though the accused in the case

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1. A. I. R. 1938 All. 120 at p. 121 : 1938 A. W. R. 17.
2. *In re* Ganpathia Pillai, A. I. R. 1953 Mad. 936 at p. 938: 1953 Cr. L. J. 1730 : 1953 M. W. N. 558 : 66 L. W. 361.
3. Emperor *v.* Abdul Hamim, A. I. R. 1942 All. 74 : I. L. R. (1942) All. 35 : 43 Cr. L. J. 338 : 198 I. C. 264.
4. Emperor *v.* Bhopo, A. I. R. 1933 Sind 174 at p. 175 : 146 I. C. 43 : 34 Cr. L. J. 1147.

had exceeded his right by inflicting more injury than was necessary under the circumstances of the case.[1] Similarly, the law does not empower a police officer to search an accused's house for anything but the specific article which has been or can be made the subject of a summons or warrant to produce. A general search for stolen property is not authorised and the law cannot be circumvented by the use of such an expression as "stolen property relevant to the case". Consequently a police officer searching a house in execution of such a warrant is not making a legal search, and any resistance offered to him is not subject to the limitation enacted in this section.[2]

Public servants have no right to commondeer private property for their own use.

Public servants have no legal right to commendeer private property for their own use.[3] Where, therefore, a Forest Settlement Officer deputed a peon "to impress fifteen carts for his use" to which he was apparently entitled under the executive orders of Government, contained in a Revenue Handbook, it was held that the executive rules of Government not having the force of law the action of the peon in imperssing the carts was illegal being an offence under Sec. 374 of the Code, and the resistance offered was therefore justifiable.[4] But where a warrant was issued for the arrest of one Dalip under Sec. 114 of the Code of Criminal Procedure which was addressed to one thana, the officer in temporary charge of which endorsed it over to one Nazir Husain and others who arrested Dalip when they were not in possession of their warrant, whereupon they were set upon by his friends who caused hurt to the police and rescued him, it was held that though the arrest of Dalip was not strictly justifiable by law, still it was one, the irregularity of which was covered by this section and the accused had, therefore, no justification in offering the resistance.[5] In this respect the English law takes a stricter view of official duties. For in England a person is held justified in offering resistance to a public servant making an arrest, if the warrant or writ is not with him ready to be shown to the person to be arrested, or if it is in any way defective, as if the name of the officer or party is entered without due authority.[6] This was conceded by Edge, C. J., in *Dalip's* case in which, however, he considered the Indian rule to be divergent and wider, inasmuch as while good faith will not atone for the absence of a warrant in England, good faith without a warrant is in this country said to be sufficient, provided, of course, the officer had the necessary authority.

(*See* also "Right against Public Servants.")

14. General warrants.— A general warrant is a warrant either issued in blank or without particulars sufficient to identify the person sought to be apprehended. The illegality of such warrants has long since been settled in England. All the writers upon the Crown law agree "that there must be an accusation, that the person to be apprehended must be named, and that the officer is not to be left to arrest whom he thinks fit."[7] So where the Secretary of State had issued a warrant for the apprehenosion of the author, printer and publisher of a paper called *North Briton* generally, without naming or,

English law.

1. Uma Charan Singh, 6 C. W. N. 164; Bahal, I. L. R. 28 All. 481.
2. Bajrangi, I.L.R. 38 Cal. 304; Prankhang, 17 I .C. (Cal.) 76; Iswar Chandra, 12 C.W.N. 1016; Ram Parves, 45 C. L. J. 802 (resistance to search effected without authority is justifiable).
3. Asa, (1913) P.L.R. 325; 20 I. C. 992; Parshadi *v.* Baljit, 20 I. C. (O.) 233; Ram Harakh, 24 I. C. (O.) 172.
4. Rakhmaji, I.L.R. 9 Bom. 558.
5. Dalip, I.L.R. 13 All. 246; Parshadi *v.* Baljit, *supra*.
6. Chaman, 12 Cox. 4.
7. 1 Hale P.C., pp. 580, 586; 2 Hawk P. C. 81 at p. 82.

describing them, Lord Mansfield declared the arrest of one Leach as its printer illegal. As he remarked: "It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The Magistrate ought to judge and should give certain directions to the officer. This is so, upon reason and convenience."[1] Not only the name of the person to be apprehended but the offence for which he is charged should be clearly stated on the warrant. This was settled in the reign of Charles I who claimed it as his prerogative to commit by his own power, which power was said to devolve in point of execution upon the Secretary of State.[2] The Parliament disputed the King's authority to commit, either by himself or by his Council, without shewing the cause, and it condemned the practice by a resolution of the House passed on the 25th April, 1766. This resolution was passed after the practice of general warrants had been condemned and its illegility declared by three Courts in 1763-1765,[3] in the first of which[4] Pratt, L. C. J. (afterwards Lord Camden), considered the practice "as totally subversive of the liberty of the subject". And when it is said the the warrant must contain the name, what is meant is that the name should be so given as to leave no room for ambiguity. The insertion of a surname without the Christian name, the space therefore being left blank, would not be a sufficient description, though the name of the father be inserted, if it appears that more than one person answered the surname.[5] If the Christian name of the person cannot be ascertained some other description sufficient for identification should be inserted.

Where a constable went to execute a warrant directing the arrest of one John, H., instead of Richard, H., the person really intended and who was supposed to be called John, H., which was, however, the name of his father, it was held that the arrest of Richard under the colour of the warrant was unjustifiable,[6] though the complainant had pointed him out as the man who had stolen his mare and against whom he had laid the information; but in such a case it would have been perfectly open to the constable to justify the arrest independently of the warrant. The case would have been again different if the warrant had been a writ of execution, in which case the Sheriff would be bound to execute it notwithstanding that the defendant was therein wrongly described.[7]

Indian law.

It is thus settled that a warrant which does not contain the name or a sufficiently clear description of the person, who is to be arrested or whose house is to be searched, is wholly illegal.[8] But the question whether such a warrant should also state the cause remains. In the three cases last cited the warrant under the signature of the Secretary of State for the search of papers in the office of the paper *North Briton* had stated no cause, and this fact was animadverted

1. Leach *v.* Money, 19 St. Tr. 1000 (1027); Entick *v.* Carrington, 19 St. Tr. 1029 at p. 1069; Wilkes *v.* Wood, 19 St. Tr. 1154.
2. This authority was said to be based upon the Statute of Westminister, the first of which recites an arrest by the command of the King to be one of those cases that were irreprovable by the common law,—Standford Pl. fo. 72 G.
3. Wilkes *v.* Wood, (1763) 19 St. Tr. 1154; Leach *v.* Money, (1765) 519 St. Tr. 1000; Entick *v.* Carrington, (1765) 19 St. Tr. 1069.
4. Wilkes *v.* Wood, 19 St. Tr. 1154 at p. 1167.
5. Hood, R. & N.C.C.R. 281.
6. Hoye *v.* Bush, 1 M. & G. 775 at p. 780.
7. Reeves *v.* Slater, 7 B. & C. 486; Fisher *v.* Magnay, 6 Sc. N.R. 588; *see* also Sundar, Lal, A I.R. 1932 Oudh 276: 34 Cr. L. J. 732 (warrant of attachment signed by Deputy Collector instead of Collector—*bona fide* execution by Kurk Amin—apprehension not justified.)
8. Prankhang, 17 I. C. (Cal.) 76; but *See* Gamau, (1913) P. R. No. 16: 18 I.C. 894; Mirza Shah Nawaz Khan, 8 S. L.R. 1.

upon by the Judges, who, however disposed of the case on the ground that the Secretary of State had no power to issue a general warrant. The question, however, came up for decision in another case in which the plaintiff had been arrested by the Sergeant-at-Arms of the House of Commons on a warrant which set out no reason for the arrest. It was held by Coleridge, J., that it gave no protection to the officer executing it, but it was held, on appeal,[1] that a distinction must be drawn between the warrants issued by the Superior Courts and those issued by the inferior Magistracy. In the former case jurisdiction to issue such warrants would be presumed, in the latter case it must be proved.[2] "The superior Courts, observed Parke, B., "wield their jurisdiction by the authority of common law, the Magistrates derive their power by statute by which their authority must appear on the face of the warrants. The rule of jurisdiction consequently is that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so, and nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged." If the analogy of these cases be applied to India the High Courts would be considered the superior Courts within the meaning of the rule, all other Courts being Courts of limited jurisdiction and bound by the terms of their creation, whose warrants must comply with the strict requirements of the law which authorises their issue.

15. Explanation 2.—It is equally illegal to issue a general search warrant. In this connection reference may however, be made to Expl. 2, according to which a person is not deprived of his right of private defence against an act done, or attempted to be done by the direction of a puplic servant, (*a*) unless he knows or has reason to believe that the person doing the act is acting by such direction; or (*b*) unless such person states the authority under which he acts; or (*c*) if he has authority in writing, unless he produces such authority, if demanded. In the case of a person executing a warrant, the written authority, if demanded, must be produced. If he is unable to produce the authoority he is disqualified from enforcing it. Supposing, however, that the public servant is able to satisfy this requirement of law, is he then entitled to execute the process, though it may be othrewise illegal? In lone case Princep and Stephen, JJ., have indeed permitted themselves to use tanguage which would seem to countenance this conclusion : "They say that even supposing, that the property attached was not the property of the absconders,[3] the rightful owner had no right of private defence of his property, inasmuch as the evidence shows that the police officer was acting in good faith under colour of his office; and even supposing that order of attachment might not have been properly made, that would in itself be no sufficient ground. The law, as expressed in Sec. 99, Expl. 2, is clear on this point."[4] If this is intended, to suggest that as soon as a person produces his authority, he becomes entitled to the protection of Cl. 2, whatever may thave been the defects in the authority, than the proposition cannot be correcme For as has been observed before, the delegatee cannot acquire greater immnnity by virtue of his delegation than the delegator. And all that Expl. 2 is intended to lay down is that a person may have been deputed to execute the order of a public servant but no one is bound to take notice of him as such, unless the fact is known or brought to one's notice in the manner stated in the Explanation The combined effect of the second paragraph, and the second Explanation is

Combined effect of the paragraph and Explanation.

1. Howard *v.* Gossett, 10 Q. B. 377: 14 L. J. (Q.B·) 375.
2. Howard *v.* Gossett, 10 Q. B. 452.
3. Whose property alone the officers were entitled to attach.
4. Bhai Lal Chowdhury, I. L. R. (1902) 29 Cal. 417.

to cast on the person claiming special protection the burden of proving that the other knew about his status. This is clear from the use of the words "knows or has reason to believe," words which mean that the information must be conveyed to him directly or indirectly unless the fact was already known to him.

16. Recourse to authorities : Paragraph 3.—The third clause of the section places a noticeable restriction upon a person's right to private defence. It lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. A large number of cases have clustered round the words "in which there is time" words which are perhaps ambiguous and misleading. In one sense there is always time to have recourse to the protection of the public authorities, the only danger is that the offender may in the meantime escape, or the property lost may never be found. But as the object of the private defence is both to protect person recover property, it follows that any abstinence which defeats that object could not have been contemplated by the law. It may then be safely asserted that the clause has no application to a case in which the authorities are available, but not availed of, because of the delay and the consequent risk of further harm thereby apprehended. At the same time cases are conceivable in which there was manifestly time to have recourse to the authorities. Such would be the case where the opposite-party was preparing to fight, or where forebodings of a coming struggle were otherwise received. In such case the proper procedure would be not to oppose force, by force, but to report the matter to the guardians of peace, whose duty it is then to prevent a disturbance. This may appear to be a curtailmemt of the right of private defence, but it is well justified. As Holloway, J., observed quoting the observations of Pollock, C.B.[1] :

"The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self-help and it is certain that no other principle can be safely applied to a country abounding in sects inflamed with the bitterness engendered by small theological or ceremonial difference." Quoting these observations Rampini J., in another case remarked: "The right of self-help when it causes, or is likely to cause, damage to the person or property of another person must be restricted, and recourse to public authorities must be insisted on. If a person prefers to use force in order to protect his property when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code. No matter what the intention of that person may be, the law says that he must not use force in such a case. To hold otherwise, would be to encourage and put a premium on offence of rioting."[2]

Tendency of law in all civilized States to narrow the right of self-help.

It comes simply to this, that our law does not permit rival claimants to enter in cold blood into battle to settle a dispute which can be settled in a lawful manner. This is possible where the combatants are aware of the preparation made by each other. But a preparation to defend one's possession is not necessarily a preparation to attack another. And the right of person to collect an armed force would then seem to depend (*i*) upon his prior peaceful possession, (*ii*) upon the necessity of defending it by force, and (*iii*) upon the

Rival claimants to settle dispute in lawful manner.

1. Hyde *v.* Grahan, 1 H. & C 593.
2. Kabiruddin, I. L. R. 35 Cal. 368, following *per* Holloway, J., in 7 M. H. C. R. (App.) 35; Jairam Mahton, I. L. R. 35 Cal. 103; *see* also Prem, I. L R. (1950) All. 167; Paras Ram *v.* Rex, A. I. R. 1949 All. 274 : 50 Cr, J.. J. 445,

reasonable expectation of an aggression. There is nothing in Sec. 141 of the Code to render such an assembly unlawful. On the other hand the assembly of five or more persons, the common object of which is by means of criminal force to take or obtain possession of any property is by that section declared to be unlawful,[1] from which it may be inferred that while the employment of force to take possession is undoubtedly unlawful, the maintenance of one's possession by use of force is not necessarily unlawful. But this is not the view on which the Courts here are agreed though probably some of the cases may be distinguished on this ground. There are some cases in which the Courts have clearly laid down that a person in possession has undeniably the right of self-defence against another to oust him[2] but a different note has been sounded in other cases,[3] in which the view taken is that while one has certainly the right of repelling an unpremeditated attack, one has no right to prepare for a fight, whether it be in a righteous cause or otherwise. This view is justified on the ground that the country would be "deluged with blood"[4] if an offender, who could get relief by recourse to law, where allowed to take the law into his own hands.[5] The other view is that a person in possession is entitled to defend his possession against all comers, and he is not bound to take the risk of referring his case to the police.

Expression "there is time" to have recourse to authorities—Interpretation of.

So far as this clause is concerned, the question really turns upon the meaning to be assigned to the words when "*there is time*" to have recourse to the authorities. Now it has been held that this clause must be read with the first paragraph of Sec. 105,[6] consequently the right of private defence of property commences when a reasonable apprehension of danger to the property commences. "Before such apprehension commences the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought generally to be based on some information of a definite kind, as to the time and place of the danger actually threatened."[7] Where therefore, the owner received information that the accused's party were, coming next day to plough up the land, he was not thereupon bound to go and lay information to the police. And when in the morning the raid was made, his first duty was to go to his field and not run for the police, unless he passed them on his way. For if he were to go the police, it may be that the mischief threatened to his property may, in the meantime, be completed.[8] This view, the soundness of which has never been questioned, shows when a person

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1. Section 141, "fourth".
2. Sohun, 2 W. R. 59; Mitto Singh, 3 W. R. 41; Sachee, 7 W. R. 112: Tulsee Singh; 10 W. R. 64; Birjoo Singh *v.* Khub Lall, 10 W. R. 66; Shunkur Singh *v.* Burmah Mahto, 23 W. R. 25; Ganauri Lall, I. L. R. 16 Cal. 206; Mahesh Sheikh, I. L. R. 21 Cal. 392; Pachkauri, I. L. R. 24 Cal. 686; Anaut Pandit *v.* Madhusudhan, I L. R. 27 Cal. 574 : Paresh Nath, I. L. R.33 Cal. 295 ; Bepin Behari *v.* Pranakul, 11 C. W. N. 176; Ambika Lal I. L. R. 35 Cal. 443; Baij Kualee, I. L. R. 36 Cal. 297; Silajit, I. L. R. 36 Cal. 365; Fateh Singh, I. L. R. 41 Cal. 43; Narsingh, I. L. R. 14 Bom. 441; Pulimuthu, I. L. R. 24 Mad. 124; Gouri Shankar, 41 I. C. (L. B.) 830; Paathala, 24 I. C. (Mad) 327 (F. B.); Penumetza, 44 I.C. (Mad.) 40; Fouzdar Rai *v.* Emperor, A. I. R. 1918 Pat. 193: 19 Cr. L. J. 241; Sunder Baksh Singh, A. I. R. 1918 Pat. 359; Lashkari Khan, 8 S. L. R. 343 29 I. C. 664.
3. Nawabdee, (1864) W. R. 11 ; Joolali, 7 W. R. 34 ; Manu Singh, 7 W. R. 103; Kalee Beparec, 1 C. L. R. 521 ; Kabiruddin, 7 C. L. J. 359 ; Prag Dat, I. L. R. 20 All. 459; Kaliji, I. L. R. 24 All. 143; Kadhu, I. L. R. 24 All. 298.
4. *Per* Holloway, J., in 7 M. H. C. R. (App.) 35 at p. 36.
5. *Per* Holloway, J., cited *per* Rampini, J., in Kabiruddin, 7 C. L. J. 359 at p. 366.
6. Narsingh Fathubai, I. L. R. 14 Bom. 441.
7. *Ibid.*
8. *Ibid.*, Chandulla Sheikh, 22 I. C. (Cal.) 993 ; Penumetza, 44 I. C. (Mad.) 40.

is said to have time to have recourse to the authorities, he is not to carry idle gossip to them; if he does so he runs the risk of being himself prosecuted for making an accusation, the truth of which he may be unable to establish. His information must be definite and precise, and it is then his duty to lay his case before the authorities, before entrusting his defence to his strong right arm. For when it is said that a person having time to have recourse to the authorities has no right of private defence, what is meant is that having two equally good alternatives the owner must choose the submission of his case to the authorities rather than enter the lists with his adversary. He is not bound to have recourse to the authorities at the sacrifice of his interest. He is not bound to abandon his property to the mercy of marauders, with a view to making application to the police for assistance.[1]

So where the owner found some hostile claimants taking away his saltpetre, he was held justified in reclaiming the property by force, if the circumstances were such that the wrong-doers would have successfully made off with the property if the owner had, in the meantime, gone to report to the police.[2] So where a person is assaulted, he is not bound to escape further injury by resorting to less violence or run away to have recourse to the protection of the public authorities.[3] Indeed, the right of private defence would have been a mockery if the law were otherwise, for the right of private defence is founded on the doctrine of self-help, and its underlying principle is to allow people to help themselves. Moreover, the law could not be invoked to oppress persons who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exert the privilege of private defence as provided and restricted by the law, or submit to a forcible invasion of a right of person or property in case in which, under Sec. 97, the law does not require any such submission.[4]

Doctrine of self-help—Underlying principle.

In *Hazara Singh* v. *State*,[5] G. L. Chopra, J., observed :—

> "When once Resham Singh had taken possession of cultivated and sown *bajra* in the field and had remained in possession of it for a couple of months, Hazara Singh even though he was the owner was not entitled to take the law into his own hands and use force in ousting the trespasser. He had ample time to have recourse to the protection of public authorities. He was himself liable for committing criminal trespass and mischief by taking forcible possession of the land and uprooting the crop and would not therefore be entitled to the fight of private defence of property.
>
> "Right of private defence does not exist in cases in which there is time to have recourse to the protection of public authorities and therefore a person when dispossessed of land, can claim no right of defence of property as against the complainant assuming him to be a trespasser who had just entered the land.[6]
>
> "In *Bhartu* v. *State*,[7] it was held that even if a person is a trespasser and has wrongfully cultivated a certain portion of a field of which he was bound in law to deliver possession to another person, the latter person had no right to take law into his own hands and beat the former in order to dispossess him from the field and that if the latter person is an

1. Anumantan, (1881) 1 Weir 144; Shamsher Khan, (1896) A. W. N. 170.
2. Shamsher Khan, (1896) A, W. N. 170; Chandula Sheikh, 22 I. C. (Cal.) 993.
3. Hafiz Ali *v.* Emperor, (1907) O. C. 196: 6 Cr. L. J. 271; Alingal Kunhinayan, I. L. R. 28 Mad. 454; Nga Hla Tun U (1896) P. L. J. B. 219.
4. Nga Hla Tun U, *supra*.
5. A. I. R. 1959 Punj. 570 at p. 571: 1959 Cr. L. J. 1358.
6. Phula Singh *v.* Emperor, A. I. R. 1927 Lah. 705.
7. A. I. R. 1954 All. 35.

aggressor, there is no doubt that the former person, though a trespasser, has a right of self-defence. Hazara Singh and his party would not be entitled to the right of personal defence if they used force in order to meet the resistance offered to their own unlawful acts."

The question whether a person had, in a given case, time to have recourse to the public authorities, is naturally a question of fact dependent upon (*i*) the antecedent of the attack; (*ii*) its precision and reliability; (*ii*) the opportunity it gave to report to the authorities; which again depends upon (*iv*) the proximity of the police station or other police to which a report might be sent. These questions, of course, do not arise where the attack is sudden and unpremeditated; or where there are no facilities for having recourse to the authorities; or the recourse being had, there is no succour, or it is delayed. When a party finds a field sown by him being hoed by the other party, he cannot, in the exercise of the right of private defence, assault the other party.[1]

17. Extent of private defence.—The question whether the accused have acted in excess of their right of private defence is not easy to decide. The matter has to be adjudged taking into consideration the background of the case, temper of the parties involved in the conflict, the position of arms, the nature of dispute, relative strength of the contestants and many other factors. It has been repeatedly held that the extent of the private defence cannot be weighed in too fine a set of scales or in golden scales.[2]

18. Nearness of police station.—The bare fact that a police station in not far off from the scene of occurrence is not by itself sufficient to deprive a person of his right of private defence. The question in all cases is whether if the police had been informed the police intervention would have been timely and effective. The effectiveness of police help depends not only on the nearness of the police station but also on the possibility of giving timely information to the police.[3] The right of self-defence is not taken away by not having recourse to state help when there is risk of mischief being committed and the property being removed before the State help could be obtained.[4]

19. Protection of public authorities.—Protection of public authorities must mean such protection as can preserve the *status quo*.[5]

20. Burden of proof.—The burden is on the accused to prove that there was no time to have recourse to the protection of the public authorities.[6]

When an accused relies on an exception, it is for him to show the circumstances under which he was entitled to exercise the right of private

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1. Prem, I. L. R. (1950) All. 167; *see also* Narayan Raut *v.* Emperor, A. I. R. 1948 Pat. 294: I. L. R. 27 Pat. 35 : 4 Cr. L. J. 406.
2. *Per* Sharfuddin Ahmed, J. in Public Prosecutor *v.* G.V. Siva Subrahmanyam, (1966) 2 Andh. W. R. 475 at p. 483.
3. Meher Sardar *v.* Emperor, 19 C. W. N. 46 : Penumetza Thirumalaraju *v.* Emperor, 19 Cr. L. J. 248 at p. 249 (Mad) ; It is difficult to *see* how the right of private defence is lost by not sending word to the police station six miles off. Farali Molla, 14 C. W. N. ccxcix.
4. Jageshar Rai *v.* Emperor, 18 Cr. L. J. 663 at p. 664 (All). In the instant case property was actually being cut and damaged. If the applicants had gone to the police station and returned with police help the damage would have been completed ; Jarba Chamar *v.* Suritam, 2 N. L. R. 177; Fouzdar Rai *v.* Emperor, A. I. R. 1918 Pat. 193; Shamsher Kham, 1896 A. W. N. 170; Sundar Baksh Singh *v.* Emperor, A. I. R. 1918 Pat. 308.
5. State of Orissa *v.* Chakradhar Behera, A. I. R. 1964 Orissa 262 at p. 265: (1964) 2 Cr. L. J. 696.
6. Punjabrao *v.* Emperor, A. I. R. 1945 Nag. 269 at p. 271 : I. L. R. (1945) Nag. 881 : 47 Cr. L. J. 111 : 1945 N. L. J. 349 : 221 I. C. 199.

defence to the extent claimed by him and also to show that the circumstances were not such as to lead one to the inference that he had exceeded the right of private defence.[1]

21. Commencement and extent of the right.—There can be no dispute over the proposition that the third clause of Sec. 99 must be read with the first clause of Sec. 105, I. P. C., which lays down that the right of private defence of property commences when a reasonable apprehension of danger to the property commences. It must be emphasised that the right commences not when the actual danger to the property commences but when there is reasonable apprehension of danger. This is based on sound principle as the apprehension of danger is to be followed by an approach to the public authorities for protection. If the apprehension of danger has actually commenced and if one can have recourse to the public authorities before an actual injury is caused to the property or right, he must do so, or else he will lose his right of private defence. This contingency usually arises when one has got definite information about the other side proceeding towards the land in dispute and the public authorities are within such a reach that one could inform them, before actual damage to the property is done.[2] Paragraph 4 deals with the quantum of harm that may be caused in self-defence. In judging this quantum, it must be remembered, in the words of Holmes, J., that "detached reflection cannot be demanded in the presence of an uplifted knife".[3] It will be seen that the right of private defence of person[4] and property[5] commences as soon as a reasonable apprehension of danger to person or property arises. A person is not therefore bound to wait for the first blow before he strikes his adversary, but that does not justify him in attacking him in anticipation. "If *A* fears upon just grounds that *B* intends to kill him, and is assured that he is provided with the weapons and lies in wait so to do, yet without an actual assault by *B* upon *A* or upon his house to commit that act, *A* may not kill *B* by way of prevention. For the law hath provided a security for them by fight, and recourse to the Civil Magistrate for protection."[6] But if in such a case *B* trespass into *A*'s house to kill him, or raise a blow to smite him, *A*'s right of private defence commences and he is then under no restraint other than here prescribed. But in considering what was the harm necessary to inflict for the purpose of defence, regard must be had to the position and circumstance of the parties, their comparative strength and the force and violence of the attack, and the consequent angry feelings aroused, the danger apprehended, and the difficulty of adjusting the harm caused to the danger threatened.[7] A man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has one assumed dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little farther than to a perfectly cool bystander would seem absolutely necessary. The question in such

Principles for judging the quantum of harm.

cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.[1] Where an assault is made upon a person and he is obliged to act in the exercise of the right of private self-defence, it is not to be expected that he should measure his blows or select a particular part of the body of the assailant or use a particular part of the weapon only. Once the exercise of the right of private self-defence is established, it is not to be weighed, as it were, in golden scales.[2]

Law of private defence not based on law of retaliation.

Obviously when two parties begin to use *lathis* or blunt weapons, one by way of attack and the other by way of defence, it is impossible to count the blows inflicted by the assailants and to expect that an equal number of blows would be given in retaliation. Similarly it would be an unwarranted restriction on the right of private defence to hold the defender liable if the blows dealt by him prove to be somewhat heavier than those from which he endeavoured to save himself. The law of private defence is not based on the theory of retaliation—a blow for a blow or a tooth for a tooth. The acts of an accused person done in good faith for the purpose of resisting unlawful aggression are protected because of necessity that the defender should be able to help himself and repel the attack. The blows dealt on him do not necessarily always indicate what further injuries would have been inflicted if he did not act betimes. It is not only the injuries already inflicted but the injuries which the attackers might inflict if the defender does not save himself that must be taken into consideration.[3] If the total number of injuries on the side of the complainant are somewhat more than those on the side of the accused persons these injuries by themselves do not necessarily prove that the accused were the aggressors and had exceeded their right of self-defence. When *lathis*, *tabar* and other sharp-edged weapons are being used by both the parties in the fight it is very difficult for any side to weigh the strokes that are inflicted by him and to inflict injuries only up to a certain limit.[4]

Where the injuries on the accused party clearly suggested that they were caused by blunt and sharp-cutting instrument the accused and his companions might well have apprehended that at least grievous hurt would be caused to them. If such an apprehension was justified, the accused and his companions would have the right to defend their persons to the extent of causing death of their assailants.[5]

That the person attacked should naturally exaggerate the danger is natural, that he should deal with him on that assumption is,

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1. Alingal Kunhinayan, I. L. R. 28 Mad. 454 ; see also Bhut Nath Dome, 13 C. W. N. 1180 : 3 I. C. (Cal.) 867 ; Pachai Goundan, 26 I. C. (Mad.) 158 ; Radhey, A. I. R. 1923 All. 357 ; Akloo Mia *v.* State, A. I. R. 1949 Assam 7 : 50 Cr. L. J. 557; Allah Ditta *v.* Emperor, A. I. R. 1934 Lah. 696 : 36 Cr. L. J. 305 ; Devisingh Bapusingh *v.* State, A. I. R. 1955 M. B. 34 : 1954 M. B. L. R. (Cr.) 112 : 1954 M. B. L. J. (H. C. R.) 908 : 1955 Cr. L. J. 471.
2. Akloo Mia *v.* State, A. I. R. 1949 Assam 7 at p. 8 : 50 Cr. L. J. 557 ; *see* also Ahmad Din *v.* Emperor, A. I. R. 1927 Lah. 194 : 28 Cr. L. J. 252 : 100 I. C. 124.
3. Rahmat Ali *v.* State, A. I. R. 1953 All. 338 at p. 339 : 54 Cr. L. J. 725 : 1952 A. L. J. 609 ; Ghasi Ram *v.* State, A. I. R. 1952 Bhopal 25 : 53 Cr. L. J. 1366.
4. Bhartu *v.* State, A. I. R. 1954 All. 35 at pp. 37,38 : 1954 Cr. L. J. 54.
5. Akloo Mia *v.* Emperor, A. I. R. 1949 Assam 7 at p. 8 :50 Cr. L. J. 557.

In judging the necessity of harm courts may make allowance for sentence of persons.

therefore, not unreasonable. Law presumes every man to know the law but it does not presume every man to be perfect. In judging of the necessity of harm it makes just allowance for the sentiments of a person placed in a situation of peril and has then no time to think, whose blood is hot, and whose sole object then is to strike one decisive blow so as to ward off the threatened mischief. But the right is, nevertheless, a right of defence, and it must not be converted into one of reprisal. If the person entitled to inflict harm in private defence, inflicts more harm than was necessary, the Court may make an allowance for the fact and punish him only for the excessive harm.[1] Such harm, though not justifiable would probably be punishable as a harm caused on provocation.[2]

Illustrative cases.

So where two owners of land found some trespassers threatening their possession, whereupon they ran home and brought swords with which they slightly wounded two of the trespassers in the land, it was held that the use of swords was in the circumstances unjustifiable, though having regard to the provocation received, and the right of private defence in the prisoners, they were entitled to a lenient sentence.

But a person has no right to kill persons found upon one's land. They may be trespassers, or thieves, or even robbers,[3] but criminal trespass and theft do not justify homicide unless there was resistance and use of violence. As Alderson, B., said: "A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person become excited and gives another a kick, it is an unjustifiable act".[4] So Holroyd, J., said in another case: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger. If a person takes forcible possession of another man's cloths, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into the dwelling of another; but a man is not authorised to fire a pistol on every intrusion or invasion of his house, he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity; but the making of an assault upon a dwelling and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle; and, therefore, in the eye of the law, it is equivalent to an assault; but no words or signs are equivalent to an assault, nor will they authorise an assault in return."[5] So where two persons learn that their land was being ploughed up by eight or ten men and thereupon they rushed out with spears, and they, after a few words of remonstrance, killed two of the trespassers, wounding a third, and it appeared that the latter were unarmed and had offered no resistance, the Court held that the use of unprovoked violence resulting in death was wholly out of all proportion to the injury done or threatened, and that the act of the accused was therefore murder.[6] The decision in this case turned upon the fact that the trespassers were unarmed and offered no resistance.

The case would, however, be different, where the trespasser attacked the owner with a spear, whereupon the owner struck him a blow with a *lathi* which killed him. As Markby, J., remarked: "If the prisoner was

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1. *Cf. per* Jackson, J., in Sohun, 2 W.R. 59; Banku Behari, 20 I. C. (Cal.) 602.
2. *Cf. per* Jackson, J., in Sohun, 2 W. R. 60
3. Ram Prasad, A. I. R. 1919 Pat. 262.
4. Wild's case, 2 Lew, 214; Jhalku Tewari, 21 I. C. (Cal.) 382.
5. Meed's case, 1 Lew. 184.
6. Gourchan Chong, 18 W. R. 19.

justified in using it at all, surely he is not to be expected on such an occasion to measure out with any very great nicety the force of his blow."[1] In another case the zamindar and his *ryots* were on bad terms. The former had employed a number of up-country men to defend his cutcherry threatened by the *ryots*. One day a pony of Hira Singh, one of such men of the zamindars having strayed into the *ryots'* crops, the latter making this a pretext, assembled in large numbers and pursued him, so that he had to beat a retreat towards the cutcherry, where he was surrounded by the *ryots* whereupon he shouted for help, which brought to his assistance eight men who were, however, beaten and driven back. The *ryots* had actually entered the cutcherry when the prisoner rushed into an inner apartment, brought out a loaded gun and fired off both barrels, killing one man, and wounding others. It was held that the prisoner's act was justifiable, as having regard to the attitude of the *ryots* he was justified in believing that they might cause death or grievous hurt to him or his companions.[2] But in this case there was a reasonable apprehension of danger, and on that apprehension arising, the firing of a gun was held to be justifiable, But if in such a case the gun had been fired at, say, from the distance of five and twenty yards before the *ryots* had entered the cutcherry or menaced its peace, the conduct of the prisoner could not have been justified.[3]

Where the deceased, a sturdy, dissolute young man, quarrelled with the accused, his uncle and the latter's son, and after an exchange of abuse snatched up a heavy *jatu* (side-post of a cart), three feet long, and aimed a blow with it at his uncle and possibly another at his uncle's son whereupon the latter seized a second *jatu*, two feet long, and struck his assailant two blows on the head, in consequence of which he died, it was held that there was an excuse for the right of private defence, and that the accused was entitled to be acquitted.[4] So was the accused, a policeman, who, while conveying a prisoner, was mobbed by a number of camel-drivers whose camels were trespassing on the canal banks belonging to Government and he discharged his gun either accidentally, or without taking careful aim, wounding one of his assailants.[5] So while it is a legitimate exercise of the right of private defence to seize a thief, it is not a necessary consequence of that right that he should get beaten to death, unless the thief offers resistance or uses force, in which case even the causing of death is justifiable. But where death was involuntarily caused, as in holding down the thief by the throat in consequence of which he died of suffocation, the Court regarded the death as caused in the legitimate exercise of the right, for which the person causing it would not be held liable.[6] But the case would have been naturally different, if in such a case the prisoner had strangled the thief after he had been secured and was helpless.[7] So where a person found a starved old woman cutting his rice, and thereupon he brutally assaulted her, fracturing her shoulder-blade and wrists and causing two contused wounds on the skull, from the effects of which she immediately died, it was held that the injuries inflicted were far beyond what was justifiable under the circumstances, and that the act of the prisoner was nothing short of murder.[8]

Where the cattle of four boys admittedly trespassed into the accused's field and caused damage, the accused (appellants) had undoubted right to take

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1. Moizuddin, 11 W. R. 41 at p. 42.
2. Ram Lal Singh, 22 W. R. 51.
3. Hussainuddy, 17 W. R. 46.
4. Puran, (1904) Punj. L. R. 49.
5. Mukerji, (1901) P. R. No. 5.
6. Kurim Bux, 2 W. R. 12.
7. Dhanunjai, 14 W. R. 68.
8. Gohool Bouree, 5 W. R. 33.

measures to protect their foldder and their right extended under Sec. 104, I.P.C., to causing injuries to the boys short of death. But this right is subject to the restrictions contained in Sec. 99. The material paragraph of that section (para. 4) enacts that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The harm which the accused caused was the assault on the boys. If it was shown that an occasion for the assault had arisen, the Court would not be justified in nicely balancing the amount of force necessary to repel the trespass and mischief. The Court could not be expected to measure out the attack proportionate to the needs of the occasion and even if they used more force than was strictly necessary, they would be entitled to claim the benefit of the exception. At the same time if the circumstances of the case show that the occasion to use force had not arisen at all, the use of any force was unjustified, and the assault on the boys would lose its justification and the plea of right of private defence could not avail the accused. The boys must have joined with the accused in an exchange of some verbal abuses, but he could not possibly have committed any overt act, which called for the use of any force. The accused had therefore no justification for beating the boys and the plea of self-defence was very properly rejected.[1]

Right of private defence is essentially a question of fact.

It cannot be said with certainty that the moment the deceased is disarmed all apprehension of danger to the accused necessarily ceases. Hence it must be held that the accused cannot claim right of private defence after the accused is disarmed. The question whether the accused had the right of private defence is in every case a question of fact to be decided according to the circumstances of each case and decided cases are not of much help except as indicating generally the principle which should be borne in mind in deciding the question.[2]

Where a heavy and mechanically propelled jeep was used against an alleged obstructor knocking him down and causing him several injuries and the right of private defence was pleaded for this atrocious act, it was held that even if such a right existed, to uphold the plea would set at naught the limitations imposed by Sec. 99.[3]

Where the appellants took their loaded bullock-carts through the wheat and gram field of the deceased though there was no right of way, their act definitely amounted to criminal trespass and mischief and regardless of the amount of loss that was likely to be caused. The deceased had a right to defend his property and to prevent the appellants from causing loss to him.[4]

The High Court was in error in thinking, that the right of private defence had been exceeded. The owner of the land was being assaulted by a number of the prosecution party and deceased was one of them. The case that deceased and his four companions had come there only to intercede has been rejected and must be rejected, the reason being that it is only these five persons who have received injuries in the assault on the prosecution side. It, therefore, stands to reason that the owner was being assaulted by these five persons and it might well have been that deceased was the person who was using the *bhala*.

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1. Kanbi Nagji Kala *v.* State, A. I. R. 1956 Sau. 107 at p. 109 (D. B.): 1956 Cr. L. J. 1439.
   Bharward Vibha Ghoga *v.* State, A. I.R. 1955 Sau. 1 at pp. 3, 4 (D. B.) : 8 Sau. L. R. 123.
   Marudevi Avva *v.* State of Kerala, A. I. R. 1958 Ker. 8 at p. 12 (D. B): I. L. R. (1957) Ker. 751: 1957 Ker. L. T. 720: (1957) M. L. J. (Cr.) 662: 1958 Cr. L. J. 33.
4. Hukum Singh *v.* State, A. I.R. 1959 All. 690 at pp. 691-92 (D. B.): 1959 Cr. L. J. 1258.

The possibility of the deceased being armed with *bhala* cannot be eliminated. The very fact that the appellant had used his *bhala* against the deceased would go to show that he might have been using a more deadly weapon than the others. In any case since the prosecution has not been able to show that the deceased was unarmed when he took part in the assault on the owner it is difficult to say that the appellants had exceeded the right of private defence. In any event the benefit of doubt must be given to the appellant and he must be acquitted.[1]

It is true that the right of private defence cannot be weighed in a golden scale in times of excitement but even so, the facts disclose that the situation was not such as would justify making murderous assault on so many persons, as a result of which three died on the spot and one died in the hospital the same night while fifth had at least grievous hurt. The evidence and circumstances clearly show that the appellants' party wanted to make exhibition of force and P. W. 3 stated in his evidence that one of them was shouting that the whole family of Mansaram would be exterminated. On the evidence therefore it was held that even though the appellants had the right of private defence, they had exceeded it and there could not have been any reasonable apprehension in their minds that such murderous assault was necessary either to save their property or to save themselves.[2]

Excessive force.

Illustrative cases.

The case is, however, different where a person whose property had been frequently stolen, resolves to lie in wait with a companion for the thief. At midnight a thief appeared in the field and thereupon the prisoner struck him a heavy blow with his *lathi* of which the thief died and the question was whether the right of private defence had been exceeded. Norman, J., held that it had not been. "No man", he observed, "finding a plunderer in his field by night in a place, where others may be within call, is to be expected to deal his blows very gently." The prisoner was acquitted.[3] What difference is there between this case and that of the starved old woman cutting rice, it may be asked. But the difference is considerable. In the latter case the thief hit was a man and the blow struck was single, whereas in the other case the starved woman could not possibly have offered any resistance, and there was no reason to suppose that she had other companions. This distinction accounts for the different view taken in a similar case. The prisoner had his grain stolen on previous occasions. He was, therefore, watching his field on a dark night. He saw the deceased cutting his corn, and so chased him. The deceased ran his head against a tree and fell. The prisoner thereupon commenced to hit him recklessly with a fair-sized stick and fractured his skull in two places causing death. It was held that the injury caused was quite unnecessary after the deceased was helpless, but that, inasmuch as it was provoked by the previous thefts from which the prisoner had suffered, he was entitled to some leniency. The accused who was trying to smuggle opium was entrapped by the Excise Inspector assisted by his peon. The inspector ordered the accused to stop and fired two shots to frighten him. The accused thereupon turned round and stabbed the inspector with his sword. He was then arrested and while the peon was disarming him the accused wounded him also with the sword. He was arraigned for wounding the two but the Court acquitted him of causing wound to the inspector on the ground that the shot fired at him might reasonably have caused the apprehension of death or grievous hurt in the accused who was,

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1. Hira Rai v. State of Bihar, A. I. R. 1972 S. C. 244 at p. 246.
2. Sivapada Senapati v. State, A. I. R. 1969 Cal. 28 at p. 31.
3. Mokee, 12 W. R. 15.

however, guilty of wounding the peon who was justified in arresting him.[1] The accused had been to demand his share of the crops from the deceased who aimed a violent blow with his *dang* at his head but it fell on his shoulder, whereupon the accused struck back with his *wahola* which he happened to carry with him. It killed the assailant. He was held protected by this exception.[2]

When two men are fighting together it is extremely hazardous to conjecture as to their relative positions from the nature of the injuries received because the combatants are constantly changing their positions with regard to one another in the course of the struggle.[3] When accused has clearly established his right of private defence, the fact that a shot fired by him entered the back of the leg of the complainant cannot by itself show that the right was exceeded. When firing at the crowd some of whom were advancing and some were retreating a shot may very well hit one of the retreating persons. That would not indicate that person thereatened by the crowd was exceeding the right of private defence. Again, the complainant may have just turned away at the very moment that the shot was fired thus causing the bullet to enter the back of his leg. Prior to that he may have been advancing towards the accused.[4] It would be circumscribing the right of private defence of the body with meticulous and unjustifiable restrictions if it were to be held that, when the person attacked had managed to obtain the weapon from the grasp of the attacker, he was not to be allowed to use that weapon in his defence in order to prevent the attacker from regaining possession of it.[5]

If a person saw his friend being chased with a *dah*, he would certainly have a right of private defence whether or not the blow which he struck was in excess of that right would depend upon the circumstances upon the amount of danger which his friend was in, and the measures which were taken to ensure his friend's safety.[6] In a Punjab case, the deceased, a creditor, abused his debtor who was unarmed. Besides this some relations of the deceased attacked the debtor, whereupon a relation of the debtor struck a blow on the creditor causing his death. It was held that the right of private defence had not been exceeded. Where a man who has been attacked by another uses a weapon such as *lathi*, it is not possible to lay down with any amount of accuracy the extent to which he may rightfully act in defence.[7]

In *Chattar* v. *Emperor*,[8] Young, J., remarked: "Where a man has been attacked by another man and uses a weapon such as a *lathi*, it is impossible to lay down with any sort of accuracy the extent to which the attacked person rightfully acts in his defence. Where in a *marpit* brought about by the illegal act of the dead person himself the accused while resisting the attack of the deceased happens to hit him on the head, rather harder than perhaps he intended to have done and thus kills him, he cannot be said to be exceeding his right of self-defence and should not be convicted."

Similarly, Agha Haidar, J., has observed in *Ahmad Din* v. *Emperor*[9] that "in the excitement and confusion of the moment it is not to be expected

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1. Nga Nan Da, 54 I. C. (U. B.) 577.
2. Mohd. Akbar, 72 I. C. (Lah.) 520; *cf* Pachai Goundan, 26 I. C. (Mad.) 158.
3. Nga Ni U *v.* Emperor, A. I. R. 1935 Rang. 391 at p. 392: 37 Cr. L. J. 186 : 159 I. C. 925.
4. Ashutosh Hait *v.* Indra Hait, A. I. R. 1952 Cal. 217 at p. 218: 1952 Cr. L. J. 579: 3 A. I. Cr. D. 388.
5. *See* footnote no 1, *supra*.
6. Nga Kyaw Win *v.* The King, A. I. R. 1940 Rang. 55 at pp. 56-57: 186 I. C. 719: 41 Cr. L. J. 373.
7. Sunder Singh, 38 Punj. L. R. 209.
8. A. I. R. 1929 All. 897.
9. A. I. R. 1927 Lah. 194 : 100 I.C. 124; 28 Cr. L. J. 252.

that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though the counter-attack should not be out of all proportion to the force employed in the original attack".[1]

Section 59, Criminal Procedure Code, however only entitles a private person to arrest any person who in his view commits a non-bailable and cognizable offence. A person was not entitled to arrest the accused. The accused was entitled in the circumstances to exercise the right of private defence of his person. In such a case the right of private defence was undoubtedly exceeded, but it cannot be said that it was exercised in such a manner as to take the matter out of Exception 2. That means that the offence was not murder but culpable homicide.[2] In a Lahore case, the deceased grappled with the accused and threw him to the ground. The deceased dropped his *dang* and was unarmed while grappling with the accused. The accused then struck the deceased blows with his knife and the latter died due to shock and internal haemorrhage. It was held that the accused in causing death of the deceased exceeded his right of private defence.[3] When there is a free fight between two persons or parties no right of private defence accrues to either of them.[4] Where the deceased called the accused a rustic in an alteration at the accused's shop and while he was returning the accused hit him with a bamboo stick, it was held that the accused exceeded his right of private defence.[5] Where a person along with others went to the accused, obviously not for any innocent intentions and caused injuries to the accused who along with his brother in self-defence attacked and caused him 32 injuries, none of them being on any vital part of the body although the accused was armed with deadly weapons which indicated that he never wanted to deal with him in a manner not warranted by the exigencies of the occasion, it was held that it could not be said that he exceeded his right of private defence.[6] The case is the same where the party of the accused went to the place knowing that they would meet opposition and taking with them a large body of men to defeat that opposition, the party of the prosecution incidentally appear to have done exactly the same thing.[7] In the case of *Ramjilal* v. *Emperor*,[8] the whole party were preventing the release of a woman and there was nothing whatsoever to show that she would have been released if the persons injured had not been attacked. It was obvious that there was a free fight with *lathis*. Two of the appellants Nawal and Ramjilal were injured in the same way as the persons on the other side. It was certainly true that they had between them fewer injuries than the others but the difference was not great. The nature of the injuries was the same, that is, they were the injuries caused in a *lathi* fight, contusions and contused wounds on the head and other parts of the body. It did not appear that the applicants continued to beat the other side after the woman had been released. *Held* that the applicants had not exercised their right of private defence in this matter. They were not guilty of any offence. *Lathis* are deadly weapons. When peaceful citizens are attacked by a body of men armed with such weapons it cannot be said that the right of private defence has been exceeded if those attacked in their turn, use similar weapons in their defence; nor can it be said if in using these weapons one of the aggressors is killed that he would necessarily be exercising the right of private defence. If a man is attacked by

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1. Allah Ditta *v.* Emperor, A. I. R. 1934 Lah. 696 at p. 697.
2. Abdul Aziz *v.* Emperor, A. I. R. 1933 Pat. 508 at p. 511 : 148 I. C. 574.
3. Wazir Muhammad *v.* Emperor, A. I. R. 1933 Lah. 1048 at p. 1049.
4. Permeshri Das *v.* Emperor, A. I. R. 1934 Lah. 332 at p. 334 : 35 Cr. L. J. 1319.
5. Wahengbam Kokngang Singh *v.* The Manipur Administration, A. I. R. 1968 Manipur 55 at p. 57.
6. Mohanlal *v.* State of Haryana, A. I. R. 1968 Punj. 467 at p. 469; Jai Dev *v.* State of Purjab, A. I. R. 1963 S. C. 612.
7. Matte Mandal *v.* Emperor, A.I.R. 1932 Pat. 189 at 191 : 33 Cr. L. J. 509.
8. A. I. R. 1935 All. 913 at p. 914 : 158 I. C. 1049.

another armed with such a weapon he cannot be sure that the intention of the aggressor is not to kill. He, therefore, is entitled in his own defence to take every precaution that he is not killed, even if that entails killing his adversary. These cases ought not to be weighed too nicely.[1]

In *Nakafodi* v. *State*,[2] a case of self-defence was made out in the evidence. But the blow which caused the death was on a vital part of the body when the deceased was armed only with a *lathi*. *Held* that it was a case of exceeding the right of private defence. The accused could have disabled the deceased by giving the blow on the leg or on the hand. The accused was guilty of culpable homicide not amounting to murder as the case fell under Sec. 300, Exception II, I. P. C.

Illustrative cases.

Unjustifiable force.

No man has a right to kill a thief any more than a trespasser. His right extends to the protection of his person and the recovery of his property and no force not necessary for that purpose is justifiable. So where the owner found a thief committing house-breaking by night in his house who upon being detected was endeavouring to escape (but which was not likely), and the accused sent for a *kodalee* with the express object of killing him and on the *kodalee* being brought killed him on the spot, he was convicted but his sentence was mitigated by the Local Government.[3] It will be observed that in this case the killing was on purpose, and done with a weapon not ready to hand or seized by the prisoner, and used in the heat of sudden passion. The thief was killed while lying prostrate on the ground held by the accused who had other assistance available to prevent his escape. All these facts clearly showed that the killing was wholly unnecessary to prevent his escape. The accused was, therefore, technically guilty of murder in cold blood, but inasmuch as his object in killing him was probably to prevent his escape and inasmuch as his act was done in the undoubted belief that the accused had that right, the Court, while convicting the accused, commended these considerations to the mercy of Government who gave effect to them by commuting the sentence passed to one year's rigorous imprisonment.[4] Another case illustrates the wording of the opposite rule. There a thief was caught house-breaking by night with half his body and his head through the wall of a house occupied by none but women, except the prisoner and his young son who was an idiot. The prisoner awoke and seizing a pole-axe which was handy, seized the deceased by the hair, struck him five times on the neck, and in fact, nearly beheaded him. It was held that the accused had exceeded the right of private defence, and that he was, therefore, guilty of culpable homicide not amounting to murder as his case fell within Exception 2, Sec. 300 of the Code; but having regard to the fact that the accused had not deliberately chosen the dangerous weapon, that he was unassisted and that the alarm and excitement produced by his determination to defend his house and his family to the very death, might have, under all the circumstances, led any one to use greater violence than was absolutely necessary for defence, the Court felt justified in passing the light sentence of four months' imprisonment.[5]

But where the correction was not only excessive but cruel, mitigation was considered as out of question. Where, for instance, a parker finding a boy stealing wood in his master's ground, beat and tied him to a horse's tail, and the horse, having taken fright, ran away dragging the boy till his shoulder was

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1. Man Singh *v.* Emperor, A. I. R. 1933 All. 401 at p. 403 : 34 Cr. L. J. 765 : 144 I. C. 583.
2. A. I. R. 1958 Orissa 113 at p. 117: 24 Cut. L. T. 530 : 1958 Cr. L. J. 785.
3. Dueran Geer, 5 W. R. 73.
4. *Ibid.* at p 75 note.
5. Fukeera, 6 W. R. 50; Kunja Bhumia, I. L. R. 39 Cal. 896; Nga Tun Nyein 38 I. C. (L. B.) 316.

broken, of which he died, it was held that the offence was murder, for it was not only an illegal, but a deliberate and dangerous act, and the correction was both excessive and savoured of cruelty.[1] The plea of provocation will not avail where express malice be proved, as where a person declares that he will take his life, in which case death will be attributed to his previous intention and not to the passion that the provocation may have suddenly aroused.[2] In the result he was convicted of culpable homicide and sentenced to one year's rigorous imprisonment.[3] It would seem that the mere fact that a thief is armed is not sufficient to cause a reasonable apprehension of danger, so as to let in the right of private defence. The accused at night found a man in his field stealing melons. He challenged him, but the man made no answer but ran away, whereupon the accused pursued him into a deserted village, and coming up with him first struck him a blow on the cheek with his sword, and when the man suddenly turned round, he struck him another blow, which proved fatal. The accused believed that the deceased was armed with a knife and had turned round to stab him, but it was held that the supposition of the accused that the deceased was armed with a knife was insufficient to give rise to any right of private defence in the absence of any threat or attempt to draw the knife for the purpose of attacking the accused with it. As the deceased had not stolen property in the accused's possession, the right of private defence of recovery of property did not continue until the wounds were inflicted. The accused's act, therefore, amounted to murder.[4]

So where a Magistrate erroneously ordered the attachment of paddy purporting to act under Sec. 145 of the Criminal Procedure Code, and the police officer intimated to the accused, that in taking charge of the crops, they were only carrying out the order of the Magistrate, whereupon the accused pushed and jostled the constables brandishing their sticks, and then confined them for 19 hours in a room without food and drink, it was held that the action of the petitioners was violently aggressive, and not merely self-defensive, and that they were not therefore protected.[5]

22. Limits of the rule.—There can be no right of private defence where there is no violation of a legal right. Where a girl who had been previously betrothed to one *A* was afterwards betrothed to another *B*, whereupon *A* eloped with the girl accompanted by two servants, the party were, however, intercepted by *C*, a party of the girl's father who seized *A*'s horse to prevent his riding away with the girl, whereupon *A* and his servants attacked and struck *C*. It was held that *A* had no right to attack *C*, and that the mere fact that he apprehended a general attack upon his party by *C* did not let in that right.[6] In another case, the proved facts of the case disclosed that the accused was in intrigue with one *A*'s wife, who one night left her husband to visit the accused, who was then sleeping 80 paces distant from *A*'s lodging whereupon *A* understood the purpose of her visit and followed her with a hatchet with which he attacked and wounded the accused, who thereupon stabbed *A* with a knife in the heart, instantly killing him, for which he was prosecuted for murder. In the original Court he denied his intimacy with *A*'s wife, and all knowledge of the transaction, but on the facts being found against him, he contended on appeal, that even if the facts be found to have been as alleged, his act was justifiable homicide in the exercise of the

No right of private defence if no violation of legal rights.

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1. Holloway, Cro. Car. 131 : 1 Hawk. P. C., c. 39, Sec. 42 ; 1 Hale P. C. 453; 1 East P. C., p. 237; *see* Fost., 293.
2. 1 East D. C. P. 224; *see* Sec. 302 Comm.
3. Bag, (1902) P. R. No. 29, distinguishing Mokee, 12 W. R. 15.
4. Gulbadan, (1885) P. R. No. 25.
5. Bhola Mahto, 9 C. W. N. 125 at p. 127; Shurfooddin, 13 W. R. 64.
6. Gurdeit Singh, (1872) P. R. No. 12.

right of private defence, but it was held that the accused had failed to establish any circumstance establishing the necessity of killing *A* which it was upon him to do, and that the plea could not be availed of.[1] So where the complainant's party had seized the accused's cattle after they left their field which they had no right to do, whereupon the accused resisted, killing one of them, it was held that the accused party did not constitute an unlawful assembly, and only the person who had inflicted the mortal wound was liable for it.[2]

100. The right of private defence of the body extends under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely,[3]—

When the right of private defence of the body extends to causing death.

First—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly—An assault with the intention of committing rape;

Fourthly—An assault with the intention of gratifying unnatural lust;

Fifthly—An assault with the intention of kidnapping or abducting;

Sixthly—An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Scope and applicability.
5. Justifiable homicide.
6. Reasonable apprehension of danger.
7. Instances of justifiable homicide.
8. Homicide :—When there is no right of private defence.
9. What is a reasonable danger?
10. Burden of proof.
11. Assessment of evidence.
12. Cases on reasonable apprehension of death or grievous hurt.
13. Rape.
14. Abduction.
15. Wrongful confinement.

1. Analogous law.—This section is generally in accordance with English law under which the offences named in the section have been held to offer sufficiently grave provocation so as to justify homicide.

2. Principle.—Homicide is justifiable only upon the plea of necessity and such necessity only arises in the prevention of forcible and atrocious crimes. This section lays down what is the law in England that a person upon whom a felonious attack is first made is not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the

English law.

1. Hakim, (1884) P. R. No. 41.
2. *See* also Shankar Baksh Singh, A. I. R. 1937 Oudh 54 (Deceased's cattle straying into accused's land—Attempt to rescue—Free fight—Death—Right of private defence exceeded).
3. Voluntary, Sec. 39; Grievous hurt, Sec. 320; Wrongfuly confining, Sec. 340; Kidnapping, Sec. 359; Rape, 375 Unnatural lust, Sec. 377.

felon be killed after he has been properly secured and when the apprehension of danger has ceased, such killing be murder; though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter on account of the high provocation.[1] This is the rule here enacted.

Four restrictions.

Under the last section two things curtail the defender's right, (*i*) facility of recourse to the public authorities and (*ii*) the rule that the harm caused should be preventive and not punitive. These two rules still apply to this section, as do also the other two restrictions specially made in favour of public servants or others acting under their direction. Subject, then, to these four restrictions, a person may even take human life to save human life or liberty or dishonour of the kind which is deemed even as a greater calamity than death.

3. Meaning of words.—"*Voluntary causing of death*", which may moreover be intentional. "*Or of any other harm to the assailant*" : The word "assail ant" would here include also his confederates. If a man is surrounded by two brigands, one of whom deals him a deadly blow then runs away, leaving the other to finish him,could it be said that his right was only against him who had hit him, and run away ? "*If the offence....such an assualt*" : There must be *at least* an assault before the commencement of the right under this section. "*Under circumstances which may cause him to apprehend*", which will depend upon the means of his knowledge, and the manner and nature of his captivity.

4. Scope and applicability.—Under Sec. 100, Indian Penal Code, the right of private defence of body extends to causing of death if there is reasonable apprehension that grievous hurt would be the consequence of the assault.[2] Section 100, I, P. C., provides the circumstances when the right of private defence of the body extends to the voluntary causing of death. This section provides for a right of private defence to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.[3] Section 100 provides *inter alia* that the right of private defence of the body extends under the restrictions mentioned in Sec. 99, to the voluntary causing of death if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

Doctrine of private defence.

In a well-ordered civilised society it is generally assumed that the State would take care of the persons and properties of individual citizens and that normally it is the function of the State to afford protection to such person and their properties. This, however, does not mean that person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must

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1. Dig. Chap. XV, Sec. 2, Art. 21; First Report, Sec. 157.
2. Paramananda Mahakud *v.* State, (1970) 2 Cr. L. J. 931 at p. 936.
3. Sivapada Senapati *v.* State, A.I.R. 1969 Cal. 28 at p. 30.

not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.

Exercise of right of private defence must not be unreasonable vindication.

There can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward of the danger and to save himself or his property, and so he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court-room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force which he uses should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared. So long as the threats last and the right of private defence can be legitimately exercised, it would not be fair to require, as Mayne has observed, that "he should modulate his defence step by step according to the attack, before there is reason to believe the attack is over". The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force. This necessarily postulates that as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence (*vide* Secs. 102 and 205 of the India Penal Code).[1]

All the six clauses of the section deal with offence of assault.

The right of private defence of person under this section arises only when the offence which occasions the exercise of the right is one of the descriptions mentioned in the section. Each of the six clauses in Sec. 100 speaks of an assault which is an offence against the human body under Sec. 352 which occurs in Chapter XVI of the Penal Code dealing with offences affecting the human body. Before the extended right under Sec. 100 can arise there has to be an offence of assault and this assault has to be one of the six types mentioned in the six clauses of the section. So the right of private defence arise against the human body, namely, assault, and if the assault of an aggravated nature as enumerated in Sec. 100, the section provides that the right extends even to the causing of death. In describing the nature of the assault some clauses use words which themselves denote offences such as "grievous hurt", "rape", "kidnapping", "wrongfully confining"; but this does not mean that the intention with which the assault is committed must always be an offence in itself, while in other clauses the words used to describe the intention do not themselves amount to

1. Jai Dev *v.* State of Punjab, A. I. R. 1963 S. C. 612 at p. 617 : 1963 S. C. D. 66

an offence under the Penal Code.[1] Section 100 prescribes the extent of the right of private defence of the body to the voluntary causing of death or any other harm to the assailant if the offence which occasions the exercise of the right is *inter alia* "such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence". It has to be borne in mind that the assault referred to does not mean the assault, if any, already committed, but it is the assault of which an apprehension can reasonably be caused and that assault must be one which would amount to an offence. The right is a defensive one. It is granted to a citizen to be exercised for the purpose or preventing an offence affecting his body being committed. It is not as it is sometimes misconceived a right of retaliation against the completed offence of assault.[2] Where a defendant charged with murder asserts that he killed in self-defence, his state of mind at the time of the killing becomes material, and an important element in determining his justification is his belief in an impending attack by the deceased. The reputation of the deceased for a violent, dangerous or turbulent disposition is thus a circumstance which would cause a belief. Lumpkin, J., in *Monroe v. State*,[3] observed :

> "Reasonable fear, under our Code repels the conclusion of malice; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it make no difference whether my adversary be a reckless and overbearing bully, having a ear lost to all social ties and order and fatally bent on mischief, or is a man of quaker-like mien and deportment, one who never strikes except in self-defence and then evincing the utmost reluctance to shed blood? Who, knowing the character of Xyd the pirate, or of the in famous John A, Murret, would not instantly, upon their approach armed with deadly weapons, act upon the presumption that robbery or murder or both were contemplated? We apprehend that the imminence of the danger, as well as the chances of escape will depend greatly upon the temper and disposition of our foe."

The previous relationship between the deceased and the accused and the deceased's aggressive temperament and disposition shown in his conduct of trespassing into the accused's house in order to assault her while she was retracing her steps must go a great way to cause belief in the accused in an impending danger to life accompanied with little chance of escape.

Law will always make allowance for sentiments of a person in peril who has no time to think.

Mere expression of opinion that the accused has exceeded the right of private defence of body without coming to the definite conclusion as to what extent she had the right, is rather risky. Mere threat, not carried out and later completely abandoned, followed by the retracing of steps by the threatened would not justify any assault from the person threatened, as he must have been convinced that the person threatening did not mean to carry out the empty threat.[4]

The accused can exercise the right to avert the peril to her life by completely disabling or disarming the assailant. So long as the assailant's hands with the stout *lathi* were free to inflict assault on her the apprehension of grievous hurt could not be averted. In unequal fight of the kind the weaker's instinct is

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1. Vishwanath *v.* State of U. P., A. I. R. 1960 S. C. 67 at p. 69: 1960 Cr. L. J. 154 : 1959 A. L. J. 884: (1960) 1 S. C. R. 646 reversing the decision of the Allahabad High Court in State *v.* Badri, 1957 Cr. L. J. 1195 : A. I. R. 1957 All. 714 (D. B. and overruling the decision of the same Court in Ram Saiya *v.* Emperor, A. I. R. 1948 All. 205: I. L. R. (1948), All. 165 : 49 Cr. L. J. 422.
2. Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37 at p. 39: 17 Cut. L. T. 220.
3. 5 Ga 137.
4. Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37 at p. 40 : 17 Cut. L. T. 220.

to loose no opportunity and to leave no stone unturned to avert the peril to life.[1] It is not correct to say that a person apprehending danger to life or grievous hurt should inflict an injury of the same nature to the assailant as was caused to him. Under Sec. 100, Indian Penal Code, the killing of an assailant is justified when the victim of the assault apprehends either death or grievous hurt. The only restriction imposed is that the person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury which he received or which he was threatened with. When the assailant is killed by the victim exercising his right of private defence a conviction of the victim under Sec. 304 of the Penal Code is not justified and he is entitled to an acquittal.[2]

The party of the prosecution assumed the role of aggressors and beat the accused party and further threatened to cause serious and grievous injury. The accused stabbed the deceased purely in self-defence. He was prompted by instinct of self-preservation. *Held* that the case came under either of sub-clauses (1) or (2) of Sec. 100 and the accused was not guilty of offence.

In any event the right of self-defence has been exceeded and the beating with the sticks by the party of the prosecution and the further threat to do so did not warrant the stabbing by the first accused. The law does not require a citizen to behave like a rank coward on any occasion and if a person is attacked with sticks he need not run away, and he would be perfectly justified in the eye of law if he holds his ground and delivers a counter-attack, if the accused party is attacked by a party of men armed with sticks, and having no alternative but defend himself to the best of his ability, the accused retaliates, he clearly acts in private defence, although in doing so he may inflict an injury which may prove fatal.

No hard and fast rule for justification of amount of harm.

No hard and fast rule can be laid down to determine the amount of harm which is legally justifiable or permissible in law under the exercise of the right of private defence. Individual cases will have to be considered on its own peculiar facts. Section 100 does not require as a condition precedent that grievous hurt must be actually caused by the assailant or the right of private defence to come into play. The section only provides that the person claiming the right of private defence must be under a *bona fide* apprehension or fear that death or grievous hurt would otherwise be the consequence of the threatened assault, if he does not defend himself.[3] (*See* also under "What is reasonable danger".)

5. Justifiable homicide.—Homicide in self-defence is justifiable under this section subject only to the restrictions contained in the last section. Consequently, it may be justifiable irrespective of the fact that the party killing was guilty of an assault, or was engaged in an unlawful contest, provided (*i*) that the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm; (*ii*) that he declined further conflict, and quitted and retreated from it so far as was practicable with safety; (*iii*) that he killed the assailant because he had reasonable cause for believing it to be necessary to do so, in order to avoid immediate death,[4] or the other offences here enumerated. A person who apprehends that his life is in danger or his body in risk of grievous hurt, is entitled to defend it by killing his assailant, but in order to justify his act the apprehension must have been reasonable, and the violence used not

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1. Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37 at pp. 41, 42 : 17 Cut L. T. 220.
2. Pattu, *In re*, A. I. R. 1954 Mad. 319 at p. 319: (1953) 1 M. L. J. 69.
3. Lakshmanan *v.* Lakshmanan, A. I. R. 1964 Mad. 418 at pp. 420, 421.
4. Tenth Part, Rep., p. 35.

more than what was necessary for self-defence.[1] Nor should it be used towards person unconnected with the assault, actual or threatened.[2]

Self-defence within well-defined limitations is the natural and inalienable right of every human being. It is the primary law of nature and is founded on necessity and is not superseded by law of society although curtailed thereby. Though abridged, the right cannot be abrogated. The exercise of the right within a circumscribed ambit is recognised from ancient times.

"*Quamvis vim vi repellers omnes leges et omnia jura permittunt, tamen id debet fieri cum moderamine inculpatae tutelae, non ad sumendam vindictam, sed ad propulsandam injuriam.* (Although it is lawful to repel force by force, nevertheless this ought to be done with the moderation of blameless defence, not for taking revenge but for repelling injury.)"

According to the ancient law-givers of India, homicide was permitted if committed when danger to life was feared (**प्राण संशये**) Manu enjoined resort to arms in self-defence (**आत्मनः परित्राणे**) (Manu 8.348-349). But in case the assailant had desisted before striking, he was to be captured, and not killed (**गृहतां न वधः स्मृतः**) (Katyayana in *Smritichandrika*, p. 729). For other instances, references made to the *Hindu Law in its Sourcess* by Ganganatha Jha, page 541 *et seq.*

Law permits taking of the life of another for prevention and not for punishment. It is a right essentially of defence and not of retribution. The right of self-defence is exerciseable in the face of actual or imminent danger. It is available only to those who act honestly and in good faith. In no case, can it be employed as a shield to justify aggression. The accused cannot invoke self-defence as a device or pretence for provoking an attack in order to slay his assailant and then claim exemption on the ground of self-defence.

The necessity justifying exercise of the right must be urgent and the danger of loss of life or great bodily harm, imminent. The right exists if the attack is either actual or threatened. The courts will naturally view the circumstances from the standpoint of the accused and not from that of a cool bystander. In order to justify the taking of life on the ground of appearance of peril, the appearance must be real, though not the peril. The act of killing must be committed because of an honest and well-founded belief in the imminence of danger and not in a spirit of revenge.

Law allows resort to force to repel force *vim vi repellere licet* but this should be done not for taking revenge but for warding off the injury *non ad sumendam vindictum sed ad propulsandam injuriam.* Right of self-defence is not available to a person who resorts to retaliation for past injury but to him who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. The necessity must be present, real or apparent, before the antagonist can justifiably be deprived of his life. The right of self-defence commences when necessity begins, and ends when necessity ceases.

As to the quantum of force that might be employed, that would depend upon the nature and the fierceness of the assault and the ordinary rule is that the force used should be proportioned to the force of the attack or the threatened danger. It must be such as the circumstances reasonably indicate to be necessary for self-defence. Differences of age or physical strength apart, an assault by an unarmed person is not permitted to be repelled by causing fatal injuries with a deadly weapon.

Of course, the courts do not expect a person assaulted to modulate his defence step by step according to the waxing or the waning tempo of the attack.

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1. Kuppa Samier, I. L. R. 28 Mad. 454. 2. Narain Das, I. L. R. 3 Lah. 144.

Once the assault has assumed a dangerous form, courts make all reasonable allowances in favour of a person, who in fear of his life or limb, gives harder blows than appear necessary to a calm spectator watching from safe distance. An accused person when placed in such a predicament, is not expected to maintain sangfroid and remain composed and unperturbed. To use the words of Holmes, J., "detached reflection cannot be demanded in the presence of an uplifted knife".[1]

While the law does not expect from the man whose life is placed in danger to weigh with nice precision the extent and the degree of the force he employs in his defence, the law does insist that person claiming such a right does not resort to force, which is out of all proportion to the injuries received or threatened and far in excess of the requirements of the case. In certain eventualities, it is the duty of the accused even to retreat in order to avoid danger to himself before inflicting fatal injury. This is a necessary corollary that follows from the right of self-defence being based on necessity.

Life of an antagonist may not be taken if it can be avoided by retreating and if retreat is practicable consistently with one's safety. Where there are two courses equally feasible, open to a person, one leading to and the other from the difficulty, he must take the latter in order to rely on the right of self-defence, if he can do so without adding to his peril. But where such a course is not possible because of suddenness or fierceness of the attack, he is not obliged to retire, and in such a case he might stand his ground and inflict counter-blows. The strict common law doctrine of "retreat to the wall" or "retreat to the ditch" was thus expressed in the words of Blackstone[2]—

> "The party assaulted must, therefore, flee as far as he conveniently can either by reason of some wall, ditch, or some other impediment; or as far as the fierceness of the assault will permit him; for it may be so fierce as not to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantaneously. And this is the doctrine of universal justice, as well as of the municipal law."

This doctrine has undergone modification. A person attacked in his own premises or where he has a legal right to be, is not bound to retreat. The exemption from retreating is available to the faultless, but those in fault must retreat if able to do so, there being a safe avenue of escape unless prevented by fierceness of the attack.

Four cardinal conditions for justifying self-defence against manslaughter.

From the above discussion, four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of self-defence: (1) the accused must be free from fault in bringing about the encounter; (2) there must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity; (3) there must be no safe or reasonable mode of escape by retreat; and (4) there must have been a necessity for taking life. Law of private defence as contained in this section is no different.[3]

Not actual continuance of danger but a reasonable apprehension of such danger.

A man, who is assaulted is not bound to modulate his defence step by step according to the attack. Where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary.

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1. Brown *v.* United States, (1921) 256 U.S. 335 at p. 343.
2. *Commentaries*, Bk. 4, p. 185.
3. Balbir Singh *v.* State, A.I.R. 1959 Punj. 332 at pp. 336-37 (D. B.): 61 Punj. L. R. 632 1959 Cr. L. J. 356.

To say that an accused when he was attacked suddenly and fiercely, could, without resorting to his right of self-defence, have sought the assistance of by-standers to save him from the apprehended danger, is, to say the least of it, a counsel of perfection. Thus, where the accused being throttled by the deceased, pierced a knife which happened to be in his pocket into the abdomen of the deceased and the injury proved fatal, his case is covered by Sec. 100 and he cannot be said to have exceeded his right.[1] When it is found that there was a definite attempt on the part of the deceased to kill the accused with a *falsia*, the accused would be perfectly justified in resisting the aggressive attack on him by taking the *falsia* out of the hands of the deceased and inflicting injuries on him to the extent that might be required according to his assessment of the circumstances at the time for the purpose of preventing any further assault on himself by the deceased. If in the course of it he kills the deceased who was the original aggressive party, the present section would completely protect him. While no doubt it is true that the exercise of the right of private defence subsists only so long as an apprehension of the aggressive attack continues, it is also well settled that a person in the position of the accused at the time when he had to face an aggressive murderous attack by the deceased and who had to struggle with him in order to get possession of the *falsia* which was used against him, cannot be expected to exercise any cool judgment in the situation. His responsibility is not to be judged by any mere meticulous standards.[2] In *Pbeli* v. *State*,[3] the accused and the deceased had been exchanging abuses for sometime. It was the deceased who give the first blow to the accused with the *lathi* and the accused hit back on the leg with the sword that he happened to have in his hand. *Held* that the intention of the accused was to disable deceased, who was still armed with the *lathi*. The apprehension that had arisen in the mind of the accused must still have continued for deceased was still in possession of the *lathi*. The blow given by the accused was justified. This was a clear case in which the accused was entitled to the benefit of private defence of his own person. "Where the assault has once assumed a dangerous form, every allowance should be made for one, who with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger but whether there was a reasonable apprehension of such danger."[4]

Examples.

In a case from Burma the deceased *C*, who was going on a cart, met one *A*, whom he asked, "Is that you", and on his replying in the affirmative he commenced to abuse him and kicked him. The latter (*A*) then called out to one *B*, who ran up with a bottle in hand with which he struck *C*. *C* then slashed *A* with his *dah* after which he turned on *B* and slashed at him with it. The injury caused to *A* was slight, but the blow given to *B* cut off three of his fingers. *A* thereupon took

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1. Alingal Kunhinayan *v.* Emperor, I.L.R. 28 Mad. 454: 3 Cr. L. J. 43; *see* also Nisar Hussain *v.* Emperor, A. I. R. 1942 Oudh 147 : 198 I. C. 819 : 43 Cr. L. J. 436 : 1941 O. W. N. 1331: I.L.R. 28 Mad. 454, foll. Kashi Ram *v.* State, A. I. R. 1951 Bhopal 2 : 52 Cr. L. J. 1246; Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37: 17 Cut L. T. 220; Ratan Munda *v.* State, A.I.R. 1951 Orissa 245: 52 Cr. L.J. 685: 16 Cut. L.T. 227; Mst. Shaku *v.* Crown, A.I.R. 1951 Nag. 349: I. L. R. (1951) Nag. 508: 6 D. L. R. (Nag.) 106: 5 A. I. Cr. D. 374: 1951 N. L. J. 252; Madhava Kurup *v.* State, A. I. R. 1953 T.-C. 340 : 1953 Ker. L. T. 31.
2. Ratna Munda *v.* State, A. I. R. 1951 Orissa 245 at p. 247: 52 Cr. L. J. 685 : 16 Cut. L. T. 227; *see* also Dalip Singh *v.* Empero A. I. R. 1923 Lah. 155 : 25 Cr. L. J. 676; Ahmad Din *v.* Emperor, A. I. R. 1947 Lah. 194 : 28 Cr. L. J. 252; Cheda *v.* Emperor, A. I. R. 1932 Oudh 580: 35 Cr. L. J. 55 ; S. Nisar Husain *v.* Emperor, A. I.R. 1942 Oudh 147: 1941 O.W.N. 1331.
3. A.I.R. 1952 Raj. 158 at p. 159: 1952 Cr. L. J. 1252: 1952 R.L.W. 136.
4. Mayne's *Criminal Law of India*, p. 231.

out a knife which he carried and stabbed *C* in a vital part causing his death; the question was how far his act was justifiable. It was held that although *C* had turned upon *B*, *A* had the right to cause his death if he reasonably apprehended at that time that *B*'s life was in peril owing to the assault by *C*; that in the circumstances, *A* might reasonably apprehend that *C*'s conduct indicated an intention on his part to continue using the *dah* either of them regardless of the consequences. Indeed, if *C* had used his *dah* on *B* once more there was the probability of his losing his life, and that under the circumstances *A*'s act in stabbing *C* was protected by this section.[1]

So where a person armed with a heavy weapon rushed at the accused showing every indication of assaulting him, whereupon the latter used his spear as the deceased was in the very act of delivering a blow to him, and which killed him, it was held that though the accused could have run away still he was not bound to do so, and that as he reasonably apprehended grievous hurt, he was entitled to use his spear even to the extent of killing his assailant.[2] The same view was taken in another case in which the deceased, a sturdy and dissolute young man, upon a quarrel with the accused who was his uncle and his son, seized the side-post of a cart and raised it to strike the former, whereupon his son seized another side post two feet long and struck the deceased two blows on the head which killed him; it was held that, as the blow aimed at him by the deceased would certainly have caused grievous hurt and probably death, the accused was within his right in hitting the deceased in the manner he did.[3]

6. Reasonable apprehension of danger.—In these cases, it will be observed, that the weapons used were such as would have certainly caused grievous hurt, if not death, and where it is so, the question is comparatively a simple one, for all that the accused has then to show is that he had no time to have recourse to the authorites and that the harm caused was under the circumstances not excessive. There may, however, be cases in which it may not be easy to establish that the accused had reasonable apprehension of suffering grievous hurt as that term is used to denote hurt "which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits".[4] Now, how is it always possible for a person to say whether the force of a blow will be such as will disable him for twenty days? Indeed, as Mr. Pyne, a Judge of the Sudder Court commenting upon this clause, remarked "scarcely any assault could be committed wherein the assailed may not justify an act of homicide under the eighth definition of the offence".[5] It may, however, be added that though the accused may justify his act, it will be for the Court to see if the violence threatened was under the circumstances sufficient to have caused in the mind of the accused a reasonable apprehension of grievous injury. As Straight, J., told the jury in the case of a sergeant who had shot a native, and then pleaded self-defence "they had to consider two questions, firstly, whether he had a reasonable apprehension that his life or limb was in danger, and secondly, whether the force used was reasonable and such as he believed to be necessary for the purpose of self-defence".[6]

Accused may always justify his violence but the Court has to determine reasonable apprehension of grievous hurt.

Where on a quarrel between two joint owners of a land, *A* and *B*, over a fence erected by *A*, *A*'s brother *C* intervened and pushed *B*, an old man of

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1. Nga Kyaw Dun, (1903) 10 Bur. L. R. 99; Bermu Shetty, 94 I. C. (Mad.) 361.
2. Nga Kyaw Zan, (1903) 10 Bur. L. R. 191; *see* also Chheda *v.* Emperor, A. I. R. 1933 Oudh 380.
3. Puran, (1904) 6 Punj. L. R. No. 49.
4. Section 320 "Eighthly."
5. First Report, Sec. 151.
6. Whittaker, (1882) A. W. N. 172 at p 173 : Sec. 300, Exception 2.

65 years, making him fall to the ground, *A*'s son *D* raised a stick and delivered a blow which fell on *C*'s head instead of his shoulders, as a result of which *C* died, it was held that there being no reasonable cause for apprehension that *A*'s action would either cause *B*'s death or cause grievous hurt to *B*, there was no occasion for exercise of any right of self-defence under this section.[1]

The law does not recognise the possibility of encompassing death by witchcraft or causing any harm by witchcraft. The apprehension of the accused that the woman was a witch and that she was going to encompass his death by witchcraft is unreasonable. He would, therefore, have no right of private defence unless he apprehended physical violence on the spot from the woman in question.[2]

7. Instances of justifiable homicide.—The reports furnish several instances of justifiable homicides. In one case, an armed gang set upon the two accused announcing their intention to kill them and shouted : "Din, Din". The accused bolted, but were pursued into the dark kitchen of their friend where they had hidden themselves. The mob broke into the house and two of them made their way with torches to the kitchen where they attacked the accused. The latter delivered a counter-attack whereupon one of their assailants fled but the other was hacked to death. Their act was held well justified.[3] A person is not bound to abstain from performing a lawful act merely because he is aware that his action would result in a riot. If he is right, woe betide the rioters. The accused were digging a trench. They knew it would provoke a quarrel, which it did. A party attacked the diggers who, being reinforced by their partisans, a free fight ensued in which one of their assailants was killed. One of the accused was himself grievously hurt. They were acquitted.[4] In another case four persons drunk and armed with sticks and *bichuwas* came to the place where the accused were sitting. One of them started the fight by hitting one of the accused. Another person of the party used a knife against the other accused. Thereupon the accused inflicted injuries on the four persons which resulted in the death of three of them. It was held that the circumstances fully justified the accused in entertaining a reasonable apprehension that death or grievous hurt was likely to be caused to him unless he himself dealt with the persons in the exercise of his right of private defence and he was therefore entitled to acquittal.[5]

8. Homicide—When there is no right of private defence.—It must be remembered that the question whether a person had any excuse for incurring the risk of causing such bodily injury as was likely to cause death is, as indeed it must always be, bound up with the right of private defence of body. When the accused after being only threatened by the deceased with a *dhama* left the hut, and, though not even followed by the deceased, returned to the hut out of his own free will and then struck the deceased on the head with a heavy stick and killed him, it was held that, as the accused was able to leave the hut quite unscathed, it was impossible to hold that at the time when he returned to the hut and struck the deceased, the alleged exercise of the right of private defence of the body by the accused was occasioned by any offence committed by the deceased and the accused could not bring himself within this section.[6]

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1. Randhir Singh *v.* State, 1958 Jab. L. J. 257.
2. State *v.* Dhira Bhavji, A. I. R. 1963 Guj. 78 at pp. 78, 79 : (1962) 3 Guj. L. R. 503.
3. Gurlingappa Shidramappa *v.* Emperor, A.I.R. 1921 Bom. 335 at pp. 335, 336; *see* also Mahand *v.* Emperor, A. I. R. 1930 Lah. 93.
4. Bega, (1926) Punj. L. R. 105 : 37 I.C. 391. (The main facts are stated to be given in another connected case which is not reported).
5. Marimuthu *v.* State, (1957) All. W. R. (Sup.) 17 (Mad.).
6. Nga Chit Tin *v.* King, A. I. R. 1939 Rang. 225 at p. 240: 40 Cr. L. J. 725 : 183 I. C. 145.

The facts and circumstances of case reported as *Jagir Singh* v. *State*[1] showed that both the parties went there armed in order to assert their right to disputed land and consequently a free fight took place in which one person on either side was killed. *Held* both the sides, under the circumstances, are liable to conviction and neither party can claim the right to self-defence. Where the deceased ordered his group persons to tie the accused, who was returning, alongwith another person from cinema and take him to police station, and the accused in order to escape from the hold of the deceased and before his group persons caught hold of him, stabbed the deceased, it was held that this case could not be covered by Sec. 100, I. P. C. The Court observed:

> "Though trying up accused 1 might cause some apprehension in the mind of the first accused, it cannot be said in the circumstance of this case that it was done with the intention of kidnapping or abducting the first accused, nor can it be said that it was with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. This is because according to the evidence of P. W. 2 given in the Magistrate's Court, Bhadrappan had only asked to tie accused 1 so as to take him to the police station. So I am satisfied that this case would not be covered by Sec. 100, Indian Penal Code, and it should be held to be a case of the first accused having exceeded his right of private defence."[2]

9. What is a reasonable danger.—The question whether in the circumstances of a given case the accused could have had *reasonable* grounds for apprehending grievous bodily injury is a question of fact to be decided upon the facts of each case. As the illustration appended to Sec. 300, Exception 2, shows, the source of apprehension is not only in the kind of weapon used, but the manner of using it. An ordinary piece of rope may be used to cause death, but it depends upon the manner in which it is used. So in a case where the prisoner who had strangled the deceased with a rope said : "We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down, and kicked him, and then I put a rope round his neck and dragged him into the ditch." Patterson, J., told the jury, "if you believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is, murder, the act is so wilful and deliberate that nothing can justify it."[3] So, again, the relative strength of the combatants is not immaterial. For instance, where a strong man is opposing a weak man, the former may have only a small stick, but the injury it is capable of causing may be very great. Such was the case of a father whose son had been beaten by another boy, and who, thereupon, ran three-quarters of a mile with a small rod,[4] with which he dealt the boy a blow on the head of which he died. It was held to be manslaugther and but for the provocation, it would have been murder.[5]

Where the deceased had raised an axe to strike it on the head of the accused, at that particular point of time the accused may be said to entertain a reasonable apprehension that death would be caused.

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1. (1967) 69 Punj. L. R. 842.
2. Rangaswamy, (1969) 1 M, L. J. 452 at p. 453.
3. Shaw, 6 C. & P. 372.
4. Godbolt's Report 182; other reporters call it a cudgel.
5. Rowley's case, 12 Rep. 87. This case has been much animadverted on. *See* Fost. Cr. L. 294, Cro. Jac. 296; Walsh, 11 Cox. C. C. 336.

The accused was therefore protected by the right of private defence when he seized M. O. 1 and gave the first stroke to the deceased. If the deceased had died with the first stroke the accused would have been fully protected by Sec. 100, Indian Penal Code. But in fact by the first stroke the deceased did not die. He fell down defenceless on the ground, and the moment he so fell down there cannot be any reasonable apprehension in the mind of the accused that the danger to his life still continued. Section 99, 4th para., Indian Penal Code, makes it clear that the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence. From the facts and circumstances of this case, it is therefore apparent that the accused gave the five further strokes of serious nature after the deceased fell down defenceless on the ground. He accordingly exceeded his right of private defence, and Sec. 100, Indian Penal Code, would not enure to his benefit.[1]

10. Burden of proof.—The burden of proving the existence of circumstances bringing the case within the exercise of private defence is on the accused person. This is an inescapable position of the statutory law.

The burden is always on the accused to prove his right of private defence, if his act is sought to be justified on this ground. But Sec. 105 of the Evidence Act does not affect, or detract from, the golden rule of criminal jurisprudence that the prosecution must prove beyond reasonable doubt the guilt of the accused. So, if the evidence in the case shows that it is quite probable that the accused did the alleged act in exercise of his right of private defence, it creates a reasonable doubt in the prosecution case. In other words, the prosecution fails in such a state of evidence to establish the guilt of the accused beyond reasonable doubt; and the accused is entitled to acquittal. In a case where an accused is thus entitled to acquittal, it is not relevant whether he has put forward a plea of private defence or has established any such plea.[2] The burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is cast upon the accused and the Court has *prima facie* to presume against the accused the absence of such circumstances. The failure on the part of the accused to conclusively establish all the circumstances bringing the case under the exceptions does not absolve the prosecution of its responsibility to establish the ingredients of the offence and take away the accused's right to an acquittal on the basis of a reasonable doubt.[3]

The section deals with an exception to the ordinary liability for crime. It must, therefore, be clearly established that the assault sought to be justified was really justifiable under the section so that it is not enough that an attack had been made upon the accused; he must shew by the nature of the attack the weapon used, the manner in which it was used and other circumstances that his case was such that he had reason to apprehend the harm contemplated by the section. The fact that there *was* in reality such a harm would, of course, strengthen his case, but it is not necessary. For all that accused is called upon to show is that he *believed* in its existence, and if the Court is satisfied that he had a reasonable cause for it, he will be held to have established his justification, whatever may have been the real facts. Such was the case of one Levet who had killed *FF* under the following circumstances, *FF* was a female help engaged by Levet's servant, who opened the door of the house at midnight to let her out. Levet heard the noise and suspecting that thieves had

Accused called upon to prove that he believed in existence of harm.

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1. State *v.* Pabitra Guru, A. I. R. 1969 Orissa 287 at p. 288.
2. Narayana Pillai Vasudevan Pillai *v.* State of Kerala, 1968 Cr. L. J. 1362 at p. 1368.
3. Lakshmanan *v.* Lakshmanan, A. I. R. 1964 Mad. 418 at p. 423.

got in, took up a drawn sword and went down in search of them. Hearing Levet's steps, the servant hid *FF* in the buttery, where Levet's wife espied her and, mistaking her to be a thief cried out to her husband; whereupon Levet rushed in that direction, thrusting before him with his sword, and in so doing mortally wounded *FF*. It was held to be a mis-adventure.[1] This finding was justified by Lord Hale on the ground that ignorance of fact excuses the party from all sorts of blame,[2] and this is also the rule elsewhere enacted in the Code.[3] Where a person pleads the right of self-defence, it is not then necessary to establish the fact conclusively ; all that need to be proved is that he had grounds for believing that violence was attempted and that belief was under the circumstances such as any rational man may have entertained.[4] If he proves this, he is entitled to an acquittal though it may be shown that he was wholly mistaken in his belief. In short, his belief must be *bona fide* though it may have been wholly mistaken.

Duty of accused and prosecution.

All that Sec. 105 of the Indian Evidence Act means is that it is the duty of the accused to introduce such evidence as will displace the presumption of absence of circumstances bringing his case within any exception and that will suffice to satisfy the Court that such circumstances may have existed. Notwithstanding Sec. 105, the prosecution must discharge its burden under Sec. 102 of the Indian Evidence Act.[5]

11. Assessment of evidence.—The right of self-defence is a very valuable right. It has a social purpose. Therefore, this right should not be construed narrowly. In view of this rule, in assessing the value to be attached to the evidence, the courts must rely more on human probabilities than on the assertions of the witnesses.[6]

12. Cases on reasonable apprehension of death or grievous hurt.—No hard and fast rule can be laid down to determine the amount of harm which is legally justifiable or permissible in the exercise of the right of private defence. Every case is to be considered on its own facts.[7] Where a person armed with a hatchet has disabled his adversary or the assailant by inflicting one blow, it cannot be urged that he has any reasonable apprehension left or that if he did not repeat, his blow, grievous hurt will be the consequence.[8] Nor can a subsequent blow be justified on the ground that the latter is persisting in abusing the former.[9]

Squeezing of testicles can result in death. Where the deceased was pressing the testicles of the accused and the accused struck the deceased with the knife that he had picked up nearby, it was held that the case was covered by the present section as it could not be said that the accused had no apprehension of that or grievous hurt while his testicles were being pressed by the accused.[10]

In *Nga Chit Tin* v. *The King*,[11] the deceased struck the accused a blow with his *dah* and at the same time challenged him to fight. At the hospital, where he was detained as an in-patient for a week, the accused was found to have an

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1. Levet's case, Cro. Car. 538; 1 Hale P. C. 42.
2. 1 Hale P. C. 42; 1 East P. C. pp. 274 &, 275; 1 Hawk P. C., c. 28, Sec. 27.
3. Sections 76, 79.
4. Casorati, (1879) P. R. No. 36.
5. Balbir Singh *v.* State, A. I. R. 1959 Punj. 332 at p. 339: 61 Punj. L. R. 632: 1959 Cr. L. J. 356.
6. Vidhya Singh *v.* State of Madhya Pradesh, A. I. R. 1971 S. C. 1857 at pp. 1858-59.
7. Abu Zar *v.* Emperor, A. I. R. 1934 Lah. 748 at p. 749: 36 Cr.L. J. 283 (2) : 153 I. C. 113 : 35 Punj. L. R. 783.
8. *Ibid.* Emperor *v.* Lal Bakhsh, A.I.R. 1945 Lah. 43: 46 Punj. L. R. 379: 46 Cr.L.J. 376.
9. Emperor *v.* Lal Baksh, *supra.*
10. Sardari Lal *v.* Emperor, A. I. R. 1947 Lah. 108 at p. 110 : 170 I. C. 25.
11. A. I. R. 1939 Rang. 225 at pp. 231, 232 : 183 I. C. 145.

incised wound on his right arm, three inches long, a quarter of an inch wide, by a quarter of an inch deep. Having inflicted this injury, the deceased was on the point of cutting the accused a second time, and he had his *dah* raised for the purpose, when the accused struck the deceased with the *dah* which he (the accused) was carrying. The deceased was 11 year older than the accused. *Held* that in the particular circumstances of the case the accused had not exceeded the powers given to him by law. Again, when there is a trivial fight with fist and hands there can be no reasonable apprehension of grievous hurt to either of the parties and if one of them uses a knife, he takes an undue advantage and acts in an unusually cruel manner and is not entitled to the benefit under Sec. 100.[1] Section 100 does not lay down that grievous hurt must be actually caused by the assailant before the right of private defence comes into play. All that the section lays down is that the person claiming the right of private defence must be under a *bona fide* apprehension or fear that death or grievous hurt would otherwise be the consequence of the assault on him if he does not defend himself.[2] Thus, when the accused being attacked by persons in a drunken condition armed with *lathis* killed one of them, it cannot be said that the accused exceeded the right of private defence.[3] A women was getting a terrible beating. She rushed out and asked her brother for protection. She was followed by her husband who said he was going to continue the beating. He was a brute and dangerous man. He was a man of powerful physique. The brother of the woman seized a hatchet and hit the deceased on the head and killed him. It was in evidence that immediately after this was done the brother of the woman said that if he had not killed his brother-in-law his brother-in-law would have killed him. It was held that the accused had acted in the right of self-defence not only of his sister but of himself and it would be very difficult to hold that under the circumstances of this particular case he exceeded that right.[4] In another case from the same High Court the deceased's party felt themselves aggrieved at the accused having taken more than their fixed share of water. They came drunk and armed with deadly weapons and attacked the accused and their companions when they were quietly sitting under a mulberry tree in their land and one of the accused received an injury with a sharp-edge weapon. The accused retaliated causing the death of one of the assailants. The whole of the incident lasted for a minute only. It was held that the accused had a reasonable apprehension that grievous hurt with deadly weapons would be caused to them and that they had acted in the exercise of their right of private defence which had not been exceeded.[5]

13. Rape.—Section 100(3) applies only when there is danger of the girl concerned being raped.[6] The right of private defence of the body of a person's wife extends to the voluntary causing of death, if the offence which occasioned the exercise of the right was an assault with the intention of committing rape.[7] If the accused had right to cause the first injury in the abdomen in exercise of right of private defence because of the offence of assault with the

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1. Nihal Singh *v.* Emperor, A. I. R. 1935 Pesh. 155 at p. 157 : 37 Cr. L. J. 87.
2. Gaya Prasad *v.* Emperor, 165 I. C. 264 : 37 Cr. L. J. 1135 at p. 1136.
3. Balwant Singh, 37 Punj. L. R. 561.
4. Karamat Hussain Mulla *v.* Emperor, A. I. R. 1938 Lah, 269 at p. 270 ; 174 I. C. 961.
5. Emperor *v.* Ujagar Singh Hakam Singh, A.I.R. 1938 Lah. 791 at pp. 791, 792: 40 Cr. L. J. 182.
6. Shangara Singh, 42 F. L. R. 80.
7. Mohammad Shafi *v.* Emperor, A I.R. 1934 Lah 620 at p. 621 : 153 I. C. 19 (1) : 36 Cr.L.J. 287; 35 Punj.L.R. 659.

intention to commit rape sought to be committed by the deceased upon the sister-in-law of the accused as covered by clause Thirdly of Sec. 100 of the Indian Penal Code and that right of private defence on her body did extend to the voluntary causing of death or to any other harm to the victim if he was out to commit the offence of assault with the intention to commit rape, the case of the accused clearly falls within the scope of Sec. 100. When he is entitled to cause the first injury in exercise of right of private defence under the circumstances detailed above and that the first injury according to the medical opinion could cause and did cause the death of the deceased, it was held that it could not be held that the accused had committed offence of culpable homicide not amounting to murder within the scope of Sec. 304 (Part I) by causing the second injury when he was running back.[1]

14. Abduction.—The view taken in *Ram Saiya's* case,[2] is that the word "abducting" used in the fifth clause of Sec. 100 of the Penal Code refers to such abducting as is an offence under that Code and not merely to the act of abduction as defined in Sec. 362 thereof. Mere abduction is not an offence, and, therefore, cannot give rise to any right of private defence and the extended right of private defence given by Sec. 100 only arises if the offence which occasions the exercise of the right is of one of the kinds mentioned in Sec. 100. Section 97 gives the right of private defence of person against any offence affecting the human body. Section 99 lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 gives an extended right of private defence of person in cases where the offence which occasions the exercise of the right is of any of the descriptions enumerated therein. The right of private defence of person only arises if there is an offence affecting the human body. Offences affecting the human body are to be found in Chapter XVI from Sec. 299 to Sec. 377 of the Penal Code and include offences in the nature of use of criminal force and assault. Abduction is also in Chapter XVI and is defined in Sec. 362. Abduction takes place whenever a person by force compels or by any deceitful means induces another person to go from any place. But abduction pure and simple is not an offence under the Penal Code. Only abduction with certain intent is punishable as an offence. If the intention is that the person abducted may be murdered or so disposed of as to be put in danger of being murdered, Sec. 364 applies. If the intention is to cause secret and wrongful confinement, Sec. 365 applies. If the abducted person is a woman and the intention is that she may be compelled or is likely to be compelled to marry any person against her will or may be forced or seduced to illicit intercourse or is likely to be so forced or seduced, Sec. 366 applies. If the intention is to cause grievous hurt or so dispose of the person abducted as to put him in danger of being subjected to grievous hurt, or slavery or to the unnatural lust of any person, Sec. 367 applies. If the abducted person is a child under the age of ten and the intention is to take dishonestly any moveable property from its person, Sec. 369 applies. It is said that unless an offence under one of these sections is likely to be committed, the fifth clause of Sec. 100 can have no application. On a plain reading, however, of that clause there does not seem to be any reason for holding that the word "abducting" used there means anything more than what is defined as "abduction" in Sec. 362. It is true that the right of private defence of person arises only if an offence against the human body is committed. Each of the six clauses of Sec. 100 talks of an assault and assault is an offence against the human body (*see* Sec. 352). So before the extended right under Sec. 100 arises there has to

Supreme Court's interpretation.

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1. Nahar Singh v. State, (1969) 71 Punj. L. R. 591 at p. 597.
2. I.L.R. (1948) All. 165 : A. I. R. 1948 All. 205.

be the offence of assault and this assault has to be of one of the six types mentioned in the six clauses of the section. The view in *Ram Saiya's*[1] case seems to overlook that in each of the six clauses enumerated in Sec. 100, there is an offence against the human body, namely, assault. So the right of private defence arises against that offence, and what Sec. 100 lays down is that if the assault is of an aggravated nature, as enumerated in that section, the right of private defence extends even to the causing of death. The fact that when describing the nature of the assault some of the clauses in Sec. 100 use words which are themselves offences, as for example, "grievous hurt", "rape", "kidnapping" "wrongfully confining", does not mean that the intention with which the assault is committed must always be an offence in itself. In some other clauses, the words used to indicatethe intention do not themselves amount to an offence under the Penal Code. For example, first clause say that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence any where in the Penal Code. Therefore, when the word "abducting" is used in Cl. (5), that word by itself need not be an offence in order that that clause may be taken advantage of by or on behalf of a person who is assaulted with intent to abduct. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable.

Further the definition of "abduction" is in two parts, namely: (*i*) abduction where a person is compelled by force to go from any place and (*ii*) abduction where a person is induced by any deceitful means to go from any place. Now the fifth clause of Sec. 100 contemplates only that kind of abduction in which force is used and where the assault is with the intention of abducting, the right of private defence that arises by reason of such assault extends even up to the causing of death. It would be not right to expect from a person who is being abducted by force to pause and consider whe ther the abductor has further intention as provided in one of the sections of the Penal Code quoted above, before he takes steps to defend himself, even to the extent of causing death of the person abducting. The framers of the Code knew that abduction by itself was not an offence unless there was some further intention coupled with it. Even so in the fifth clause of Sec. 100 the word "abducting" has been used without any further qualification to the effect that the abducting must be of the kind mentioned in Sec. 364 onwards. The Supreme Court therefore held that the view taken in *Ram Saiya's* case,[2] is not correct and the fifth clause must be given full effect according to its plain meaning. Therefore, when the appellant's sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.[3]

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1. I.L.R. (1948) All. 165 : A. I.R. 1948 All. 205.
2. *Ibid.*
3. Vishwanath *v.* State of U. P., A. I. R. 1960 S.C. 67 at pp. 68, 69, 70 : 1960 Cr. L. J. 154 : 1959 A. L. J. 884 overruling the decision of the Allahabad High Court in Emperor *v.* Ram Saiya, I. L. R. (1948) All. 165 : 49 Cr. L. J. 422 : A.I.R. 1948 All. 205 and reversing the decision of the same Court in State *v.* Badri, 1957 Cr. L. J. 1195 : A. I. R. 1957 All. 714 (D. B.). This view of the Supreme Court was also taken, without discussion, in the following cases : Jagat Singh *v.* King-Emperor, 25 Cr. L. J. 669; Dalip Singh *v.* Emperor, A. I. R. 1923 Lah. 155; Daroga Lohar *v.* Emperor, 32 Cr. L. J. 84 : A. I. R. 1930 Pat. 347 (2); Mst. Sakhu *v.* The Crown, I. L. R. (1951) Nag. 508 : A. I. R. 1951 Nag. 349; Dayaram Laxman *v.* State, 1953 Cr. L.J. 1185 : A. I. R. 1953 M. B. 182.

In a Nagpur case[1] a husband had assaulted his wife, who was major, with a view to abduct her from her father's house. The wife inflicted injuries with a knife on her husband, which resulted in his death. It was held that she had not exceeded the right of self-defence. It was remarked that Sec. 100 would justify the use of force by a person who was assaulted with a view to abduction even if the force used were to result in death provided it was necessary for that person to use that much force. In this case since the only person in the house was the accused's father who had been put in restraint by the companions of the husband it was only natural for the accused to think that the only way in which she could prevent her abduction was to incapacitate the husband from carrying out his purpose.

Abduction case.

15. Wrongful confinement.—Section 100 must be read with Sec. 101 and the effect of the reading of these two sections 100 and 101 together is not to render an individual entirely helpless in the matter of his unlawful arrest, but to limit the force which he may exercise to hurt, which is something less than voluntarily causing death.[2] In the above-noted case Usman was killed by force used against him by the accused Razu and his companion while resisting the arrest of Razu. *Held* that Sec. 101 can have no application, but Sec. 100, *sixthly*, would apply. But if the accused knew that he was wanted by the police and that he was being taken to the police station for the purpose of being handed over to the police, he has no right of private defence under Sec. 100, *sixthly*.

101. If the offence be not of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant but does extend, under the restrictions mentioned in Sec. 99, to the voluntary causing to the assailant of any harm other than death.

When such right extends to causing any harm other than death.

SYNOPSIS

1. Principle.
2. Scope.
3. Excessive harm.

1. Principle.—The result stated in this section naturally follows from the provisions of the last section. If the harm be of the serious description described in the last section, the right extends to the causing of death, otherwise the harm caused may be any harm short of death. But in causing such harm the restrictions laid down in Sec. 99 still apply. Indeed, they are the restrictions which underlie the whole law of self-defence.

In respect of any offence against the human body other than the offences specified in Cls. (3), (4), (5) and (6) of Sec. 100 the right of private defence of the body extends to the causing to the assailant any harm short of death. Since the word "offence" for purposes of this Chapter (IV) denotes a thing punishable under this Code, or under any special[3] or local law,[4] the right conferred by this section would

Any harm short of death may be justified in self-defence in this section.

1. Mst. Sakhu *v.* The Crown, A. I. R. 1951 Nag. 349 at p. 349 : 5 D.L.R.(Nag.). 106 : 5 A. I. Cr. D. 374 : 1951 A. L. J. 25 : I. L. R. (1951) Nag. 508.
2. Razu *v.* Emperor, A.I.R. 1946 Sind 17 at p. 18 : 222 I.C. 495.
3. Section 41.
4. Section 42.

extend to offences against the human body, if any, under special or local laws.[1] Bit this section was held to justify the intentional firing of a gun by a public servant who had been assaulted while making a lawful arrest, which wounded one of the rescuers.[2] Indeed, any hurt short of death caused in self-defence would be justifiable under this section.

2. Scope.—Under Sec. 101, I. P. C., if the offence which occasions the exercise of the right be not one of those enumerated in Sec. 100, I. P. C., every person has a right to defend his own body and the body of any other person against the offence affecting the human body.[3] Section 101 provides that if the offence be not of any of the descriptions mentioned in Sec. 100, the right of private defence of the body does not extend to the voluntary causing to the assailant of any harm other than death. Under Sec. 101, therefore, a person is entitled to exercise his right of private defence of the body, as against any assault other than the *firstly* and *secondly* of Sec. 100, to the extent of causing grievous hurt. If, after the commission of an assault of a simple or grievous nature, there is in any case, no further apprehension of assault, occasion for the exercise of the right of private defence of the body should not arise. At the same time, the possibility of infliction of further assault likely to cause grievous bodily injury cannot as a rule be ruled out on the mere ground that the injury or the injuries already inflicted are simple. The law, in this aspect, honours the human instinct of self-preservation. In considering whether one is entitled to exercise the right of private defence of his body one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and to form his opinion whether for him or her in those circumstances, it was not fairly wise to apprehend such an injury to the body as would entitle him or her to exercise the right that he or she claims to have done. Where, a defendant charged with murder asserts that he killed in self-defence, his state of mind at the time of the killing becomes material, and an important element in determining his justification or his belief in an impending attack by the deceased.[4]

Law honours human instincts of self-preservation.

3. Excessive harm.—Law views with commiseration the plight of a person who has exceeded his right of private defence. If it has resulted in death his offence is reduced to one of culpable homicide.[5] Where he is one of five or more, the fact that he has exceeded his right does not convert him into a member of an unlawful assembly though he would be individually liable for his excess.[6] The case would, however, be different, if the party had initially exceeded that right or in a case where the exercise of that right was mere pretence.[7] In another case, the accused, a person of education and wealth living in a town where medical attendance could easily be procured, chained up his brother, who was subject to fits of violent insanity with lucid intervals, in an unnecessarily cruel way for over three months and apparently would have continued to so confine him indefinitely if the District Judge had not interfered. He was held justly convicted under Sec. 344 and he could not be exculpated under this section or Sec. 92 because he had not acted with due

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1. *See* second para. of Sec. 40.
2. Mukerji, (1901) P. R. No. 5.
3. Charungu Boipari *v.* State, [(1966) 32 Cut. L. T. 530 at p. 541.
4. Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37 at p. 39 : 17 Cut. L. T. 220.
5. Section 300 Exception 2; *see* also Jaipal Kumbi *v.* Emperor, A. I. R. 1922 Nag. 141; Nga Tun Nyein, 38 I. C. (Bur.) 316.
6. Pennmetsa, 44 I. C. (Mad.) 40.
7. Nareshi Singh, I. L. R. 2 Pat. 595.

care and attention. In other words his act lacked good faith.[1] In one case the deceased descended upon the accused, with a pitchfork in his hand, and commenced to abuse his sister whose son attacked him, whereupon the accused struck the deceased on the head, of which he died. The blow was unpremeditated and held to be the result of sudden provocation. He was held to have chastised the deceased with undue severity and was, therefore, convicted of grievous hurt.[2]

Commencement and continuance of the right of private defence of the body.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence although the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Commencement of the right of private defence.
5. Distinction between defence of person and defence of property.
6. Threats.
7. Continuance of the right.
8. Extent of right.
9. Right to protect the innocent.
10. Cases.

1. Analogous law.—The section defines the commencement and continuance of the right of private defence against personal injuries, as Sec. 105 describes the right in protection of property. The two sections are complementary to one another, and had been unnecessarily placed apart. They are both in harmony with the English law, under which a man may repel force by force in defence of his person, habitation or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a known felony upon either. In these cases, he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if, in a conflict between them,[2] he happens to kill, such killing is justifiable.[3] But it has been held that this rule does not apply to any crime unaccompanied with force, as picking of pockets.[4] It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt; so that if *A* makes an attack upon *B*, it must plainly appear by the circumstances of the case that the life of *B* is in imminent danger; otherwise, his killing the assailant will not be a justifiable self-defence.[5]

Section in harmony with English law.

The word "offence" has been used here as meaning an act punishable under the Code.[6]

2. Principle.—On the principle that prevention is better than cure, this section confers upon a person the right of defending himself against both actual as well as threatened dangers. It only postulates that there shall be a reasonable apprehension of danger to the body arising from an attempt or threat to commit the offence: the right then comes into existence and continues

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1. Shimbhu Narain *v.* Emperor, A. I. R. 1923 All. 546 at p. 547: 21 A. L. J. 391.
2. Sriyan (Mst.), 34 I. C. (Lah.) 990.
3. Fost. 273; Kel. 126, 129: 1 Hale P. C. 445, 481, 484; 1 Hawk. P. C. 28, Secs. 21, 24; Reg. *v.* Bull, 9 C. & P. 22; cited in Russ. Bk. 3, Sec. 3, p. 849.
4. 1 Hale P. C. 498; 4 Black 180: 1 East P. C. c. 5, Sec. 45, p. 273.
5. 1 Hale P. C. 464: 1 Russ. 493 (11th Ed.).
6. Section 40, para 1.

so long as the danger lasts. It will be noticed that the wording of this section is different from that of Sec. 97. It will be presently considered how far this change of language is material (*see* para. No. 4, *post*).

3. Meaning of words.—"*Private defence of the body*", that is, of the body of either the defender or any one else. "*Reasonable apprehension of danger,*" which must be founded on facts. "*Attempt or threat to commit the offence,*" i.e., any offence punishable under the Code.[1] "*Though the offence may not have been committed*" : If committed, the right still exists "if there is a reasonable apprehension of further danager but not otherwise, for the object of the right is protective and not punitive."

4. Commencement of the right of private defence.—This section, along with Sec. 105, lays down a very important rule, the existence of which had to be assumed in the previous discussion. The right of defence whether of person or of property depends upon the arising of a reasonable apprehension of danger to person or property.[2] The apprehension must be a reasonable one, for the right does not exist against any belief which reasonable man would not entertain. It would not, for instance, extend to superstitious fears which a person entertain of another. Thus in one case the accused met the deceased and a third person at a liquor shop, where they all drank together, and as they walked in company through a forest the accused charged the deceased with having caused the death of four of his children by his incantations; the charge the deceased admitted, but threatened to have the accused devoured by a tiger before they were out of the forest. Thereupon the accused got frightened and killed the deceased with several blows of a heavy stick. The accused was an ignorant savage and probably did believe in the efficacy of incantation and in the threat to cause his death by their influence. But the fact that the accused believed in them did not make the apprehension a reasonable one, and the accused could not, therefore, justify his act on that ground.[3] Morever, the section requires that the danger must arise from an attempt or threat to commit the offence which means an act punishable under the Code. Consequently, such a threat could not be avenged, as it would not be an offence under the Code.[4] It is not every idle threat that entitles a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution, and whether the person uttering it had the power to do so.[5] To hold that there can be no right of private defence if the person threatened can avoid injury from his assailant, would amount to placing a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right is permitted depends not on the actual danger but on whether there was reasonable apprehension of such danger.[6] Nor does the law require a person labouring under a reasonable apprehension of death or grievous hurt to his companion to postpone his right of defending the body of his companion till it is seen that the latter, unaided, fails to eradicate the source of danger.[7]

Reasonable, apprehension does not extend to superstitious fears.

5. Distinction between defence of person and defence of property.—From the difference between the language used in Secs. 100 and 103 on the

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1. Section 40, para. 1.
2. Hussainuddy, 17 W. R. 46 : (1907) P. W. R. No. 10 ; Kunja Bhunia, I. L. R. 39 Cal. 896.
3. Gobardhun Bhuyan, 4 B. L. R. 110.
4. Section 40, para. 1.
5. *See* Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37 : 17 Cut. L. T. 220.
6. Alingal Kunhinayan, I. L. R. 23 Mad. 454 ; Kuppu Naicken, 1935 M. W. N. 952.
7. Nga Than *v.* Emperor, A. I. R. 1933 Rang. 273 at p. 275: 34 Cr. L. J. 1248.

one hand and Secs. 102 and 105 on the other hand, it would appear that the law on the right of private defence draws a distinction between defence of person and the defence of the property. Although in both the cases the right commences when there is a reasonable apprehension of harm, the circumstances under which there can be said to be a reasonable apprehension differ, a mere threat being sufficient in case of an attack on the person, whereas in the case of an attack on property there must be something more than a mere threat and it must be a threat which is so imminent as to amount to an attempt to commit the offence. Thus, in one case a party of men including the deceased, armed with deadly weapons, advanced towards the house of the accused in a threatening manner shouting out threats of setting fire to the house. But they had neither torches nor any inflammable material nor was any attempt made so set fire to the house. The accused who was standing in front of his house shot and fatally wounded the deceased. It was held that the threat to his property was not so imminent as to entitle the accused to shoot in order to repel it, but the party of the deceased being armed with deadly weapons and advancing in a threatening manner must be held to have given rise in the mind of the accused to a reasonable apprehension that he was about to sustain grievous injury at their hands; it was therefore decided that in firing his gun so as to cause fatal injuries to the deceased he did not exeeed the right of his body which he enjoyed according to law.[1]

A mere threat may be sufficient in private defence of person but some thing required in case of property.

6. Threats.—There are many threats which are only used as a form of abuse, but which are never intended to be taken seriously. There are threats which the person uttering them has not the capacity to put into immediate execution. For it is only against a danger, present and imminent, that the right avails. A threat that *A* shall murder *B* whenever he gets a chance, does not entitle *B* to kill *A* on the spot for the right of private defence is essentially a protective and not a preventive right : "A bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other by way of precaution, there being no actual danger at the time."[2] The threat of an offence here spoken of must then be understood to mean a threat of present and not prospective danger. It may be that the threat uttered is in itself an offence.[3] Where it is so, the question still remains whether it is a threat to the body and causes reasonable apprehension of it. Such apprehension could scarcely arise from the mere threat unaccompanied by any act of preparation. And where the preparation permits a person to have recourse to the authorities, he must apply to them for protection. If, however, he obtains no protection, he is entitled to face the danger, and he has then his right, which he may exercise subject to the restrictions here laid down. It cannot then be said that he could have avoided the danger by running away. Indeed, if a person knows that another is on a road lying in wait for him, he is not bound to avoid it, but may proceed on his way having made preparation to resist the attack with all necessary force with which he may resist until he has secured himself from all danger, and in doing so he may pursue his adversary, and even kill him, if necessary.[4] So in a case Ford and his party were in possession of a room at a tavern. Several persons persisted in having it, and turning

Threat of an offence to be of present and not prospective danger.

1. Mohd. Rafi *v.* Emperor, A. I. R. 1947 Lah. 375 at p. 377.
2. 1 East P. C. 271 at p. 272.
3. Section 503; Gunga Chunder *v.* Gour Chunder, I.L.R. 15 Cal. 671 at p. 673.
4. 1 East P. C. 271.

Ford out, but he refused to leave, whereupon they drew their swords upon Ford and his company and Ford drew his sword and killed one of them. It was held to be justfiiable homicide.[1]

In another case, Mawbridge and Cope had some words whereupon Mawbridge threw a bottle at the head of Cope, and immediately drew his sword. Cope returned a bottle at the head of Mawbridge, whereupon the other stabbed Cope, and the question was whether Mawbridge was justified, but it was held that he was not, and that his act amounted to murder, because Cope's act in hurling a bottle at Mawbridge was fully justified, as Mawbridge first threw the bottle at Cope and drew his sword, the latter had reason to believe that Mawbridge meant great mischief. Cope's act was, therefore, done in self-defence. And Mawbridge was, consequently, guilty of murder, for he had then no justification for stabbing him.[2]

Not easy to see dividing line between criminality and non-criminality.

It is not always easy to see the dividing line between criminality and non-criminality in such cases. A person may truly believe that his life is in danger; he may consider his belief amply justified, but, in fact, it may not be so. Indeed, when once blood is hot, persons begin to take an exaggerated view of the injury threatened and received, and law has consequently made some allowance for an injury caused in the exercise of the right of self-defence without sufficient grounds. Such cases would be dealt with as arising on a grave and sudden provocation.[3] So if an offender against whom the right avails, is killed after he has been properly secured or after the apprehension of danger is over, such killing would be murder though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation.[4]

7. Continuance of the right.—Under Sec. 102, I. P. C., the right of private defence of the body continues so long as such apprehension of danger to the body continues.[5] This raises the question as to how far the right of prevate defence continues. According to the section the right continues "so long as such apprehension of danger to the body continues". The expression "such apprehension" means, of course, the reasonable apprehension arising from an attempt of threat to commit the offence. Its continuance must then depend upon the existence of facts which had given rise to the apprehension. If, for instance, the defender fears a renewed attack, his right continues. So where two house-breakers had made an aperture in the accused's *tatti* wall, and on seeing him come out with a stick one of the men escaped, but the other advanced to attack him, where upon the latter struck at him in the dark killing him, it was held that the accused had acted within his right.[6] Again, where a person was mobbed, and the mob entered the *kutchery* in which the accused had taken shelter, a person who rushed in and brought out a gun which he fired was held to be justified.[7] But the right does not inure after the affray is over, and after the assailants are running away. If they are pursued it is revenge and not defence.[8] Where the deceased who began the attack was soon disarmed and had started moving away, the accused armed with weapons (including a *gandasi* removed from the possession of the deceased) could not claim a right of private defence of body.[9]

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1. Ford, Kel, 82 : 1 East P. C. 243.
2. Mawbridge, Kel. 121 ; Fost, 296 ; *see* 1 East P. C. 276, quoted in 1 Penal Law (4th Ed.), Sec. 970, p. 646.
3. Section 300, (Exception 2), pp. 334 and 335.
4. 1 East P. C. 293; 4 Black, 185; 1 Hale P. C. 485.
5. Cherungu Baipari *v.* State (1966) 32 Cut. L. T. 530 at p. 531.
6. Pelkoo Nushyo, 2 W. R. 48.
7. Ram Lal Singh, 22 W. R. 51.
8. 4 Black, 293 ; *see* Nga Chit Tin *v.* King, A. I. R. 1939 Rang. 225 : 40 Cr. L. J. 725 : 183 I. C. 145.
9. Ranjit Singh *v.* State, A. I. R. 1957 Punj. 306 at p. 307 : 59 Punj. L. R. 61 : 1957 All. W. R. (Sup.) 30 : 1957 Cr. L. J. 1458.

Their Lordships of the Supreme Court have laid in *Jai Dev* v. *State of Punjab*,[1] that where the aggressors had already started running away and there was no danger either to the property or to the bodies of the accused-appellants, they (accused-appellants) were guilty of murder and could not invoke the right of private defence; it was for the party pleading self-defence to prove the cicumstances giving rise to the exercise of the right of self-defence, and this right could not be said to be proved as soon as the conclusion is reached that at the relevant time there was no threat either to the persons of appellants or property of their companions.

When the aggressor had already started running away whether right of private defence is available to the accused.

In Orissa case where the direct testimony of the eye-witnesses P.W.s 6, 10 and 11 was in substance this : After some time the deceased regained his senses and was running away from the spot for his life. Then what happened is described thus by the learned Sessions Judge on the basis of the evidence (omitting immaterial portions).

"....On seeing this accused Nicholas chased armed with his axe and dealt a blow with the sharp side of it on the head of the deceased. The deceased fell down at a short distance from the disputed land and expired. P.W's 10 and 11 have deposed that the second assault on the deceased took place at a distance of 25 yards from the disputed land. P.W. 6 has assessed the distance at 50 yards from the disputed land. P. W. 5 has deposed that the dead body was found lying at a distance of 25 feet from the disputed land. P.W. 13, the Investigating Officer, also found the dead body lying at a distance from the disputed land which he showed in his spot map Ex. 21. Thus it is clear that the second place of assault was outside the disputed land. P. W.s 6, 10 and 11, the eye-witnesses, have deposed that the assaults took place at two different places. The second place of assault indicates clearly that the deceased was in fact running away for his life as the eye-witnesses have deposed, and accused Nicholas chased him and dealt the fatal blow with his axe....There is absolutely no reason why the ploughmen, P. W.s 6, 10 and 11 should not be believed."

What is the effect of the accused-appellant Nicholas chasing the deceased while running away from the spot for his life ? Section 102 of Indian Penal Code is clear on the point. It was held that the land in dispute was in the possession of the accused. The deceased with the ploughmen brought by him trespassed on the land. Therefore at that stage the accused-appellant had a right of private defence of property : he had also a right of private defence of person when he was attacked. At that point of time the accused,-appellant had a right of private defence and he could have caused death or any other harm to the assailant, if the aggressor's assault was such as might reasonably cause the apprehension that death would otherwise be the consequence of such assault. But the position changed after the deceased regained his senses and was running away from the spot for his life. At that stage the accused-appellant could have no reasonable apprehension of danger to his body. When the deceased was running away, the accused-appellant had no justification to pursue the deceased and give him a further stroke in the manner he did which caused the death of the deceased. In view of the fact that the deceased had already started running away and there was no danger either to the property or to the body of the accused-appellant, the right of private defence as alleged was not available to the accused-appellant in the circumstances of the case.[2]

Effect of accused chasing the deceased while running away from spot for life.

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1 A. I. R. 1963 S. C. 612 ; 1963 S. C. D. 2. Nicholas Khadia v. State, 1965 Cr 66 ; 1963 All. Cr. R 170. L. T. 1014 at pp. 1015, 1017 u

8. Extent of right.—In deciding whether the accused can be helb to have exceeded the right of private defence which he undoubtedly had, regard must be had to the comparative physical strength of the accused and the deceased respectively and also to the antecedents of the deceased and his conduct on the particular occasion. When the accused, a weak man, is attacked by a strong man it is difficult to judge the extent of the rihgt of private defence by any hard and fast rule and the accused connot be expected to regulate the extent of force to be used by him by any precise standards.[1]

The right os private defence commences as soon as a reasonable apprchension of danger to the body ari!es from an attempt or threat to commit the offece although the offence might not have been committed, and it continues as long as such apprehension of danger to the bod continues. So long as the *tangia* was in the hands of Lingaraj and the latter attempted to kill him, Mahajan had every justification to apprehend danger to his body and consequently he would have been justified to inflict such injury on Lingaraj as he would have considered necessary to save himself. But once the *tangia* was snatched away by Mahajan from Lingaraj, there could not have been any further apprehension in the mind of Mahajan. In fact, Mahajan had not stated what further injury he apprehended from Lingaraj. If there was evidence to show that after the *tangia* was seized from Lingaraj the latter was attempting to catch hold of some other weapon, that could have been a sufficient justification for Mahajan to exercise his right of private defence. But that is not the case here. Whether a person claiming to exercise right of private defence had any reasonable apprehension of danger or not depends on the state of his mind at that time and it is for him to say what danger he apprehended. Outsiders cannot divine what was passing in his mind. When Mahajan himself had not chosen to speak out what danger he had at that moment expected from Lingaraj who was completely disarmed by him, and when he did not say that at the moment there was any attempt on the part of Lingaraj either to snatch back the *tangia* from him or to secure any weapon from elsewhere, it is manifest that Mahajan has failed to establish that the right of private defence was available to him.[2]

9. Right to protect the innocent.—The right of private defence cannot be availed of by a person to justify his crime. He cannot use force in prosecution of an illegal act. Where, therefore, a man had wrongully confined some men in a house and killed one of those who attacked it and endeavoured to set it on fire, he was held to be guilty of manslaughter at least.[3]

10. Cases.—In Lahore case, the deceased was a person of strong physique, dangerous character and brutal nature who was reputed to have killed a man previously. On the 12th June he was heavily drunk and had some quarrel with the accused but was taken back to his house. Later he returned armed with a stick and entered the shop of accused who was described to be comparatively a weakling, threw him on the ground, pressed his neck and bit on his hand and his chest. When, however, the accused was extricated he took up a hatchet which was lying in the shop and struck three blows on the head of the deceased with the result that he died after three days. It was held that though no grievous hurt was actually caused to the accused the circumstances were sufficient to raise a strong apprehension in his mind that he was under a reasonable apprehension of receiving such injury at the hand of his assailant

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1. Kala Singh *v.* Emperor, A. I. R. 1933 Lah. 167 at pp. 167, 168: 34 Cr. L. J. 1175 (2) : 34 Punj. L. R. 259.
2. Gopinath Das *v.* Alekh Sahu, A. I. R. 1970 Orissa 50 at pp. 52-53.
3. 1 Hawk. P. C. 28, Sec 22; 1 Hale P C. 405 at pp. 440, 441.

unless he succeeded in disabling him. The whole conduct of the deceased was aggressive from the beginning. The right of private defence had not been exceeded.[1]

When two parties are equally determined to fight on the pretence of securing their respective possession over a field there can be no question of a right of private defence, nor can there be any room for the plea of self-defence when either party invites the other to the contest.[2]

It is not possible to say that when a person is attacked while doing a lawful act he is not entitled to stand his ground and defend himself but must run away.[3]

In the above-noted case the applicants armed with *lathis* proceeded to Akohra to appraise the crops soon after their opponents appeared armed and began to cross the river. The applicants did not wait until they were attacked but ran off to meet the other side and attacked them. When the *lathi* fight took place several persons on each side were injured, some of the injuries being serious and amounting to grievous hurt. *Held* that the right of self-defence had commenced when the applicants went out to fight their opponents and they committed no offence as they were not shown to have inflicted more harm than it was necessary to inflict for the purpose of defending themselves.

103. The right of private defence of property extends under the restrictions mentioned in Sec. 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence, of any of the descriptions hereinafter enumerated, namely,—

When the right of private defence of property extends to causng death.

First—Robbery.

Secondly—House-breaking by night.

Thirdly—Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property.

Fourthly—Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right af private defence is not exercised.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Scope.
4. Meaning of words.
5. Death in protection of property.
6. No right of private defence against a trespasser.
7. Theft.
8. House-trespass.

1. Analogous law.—This section is closely analogous to Sec. 100. Indeed, the two sections lay down the same rule, namely, the circumstances in

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1. Kala Singh *v.* Emperor, A. I. R. 1933 Lah. 167 at pp. 167, 168: 34 Punj. L. R. 259.
2. Bhairo Singh *v.* Emperor, A. I. R. 1935 Nag. 141 at p. 144: 36 Cr. L. J. 861: 156 I. C. 120 : 31 Nag. L. R. 380.
3. Hafiz Ali *v.* Emperor, 6 Cr. L. J. 271 at p. 274 : 10 O. C. 136.
4. Theft, Sec. 378; Robbery, Sec. 390; Mischief, Sec. 425; House-trespass, Sec. 442; House-breaking, Sec. 445

which even the killing of a person is justifiable. Section 100 deals with justifiable homicide in defence of body, while this section deals with justifiable homicide in defence of property. The commentary under this section must, therefore, be read as supplementary to that given under Sec. 100.

Rule under this section in harmony with English law.

The rule here laid down is in accordance with the English law, in which distinction is observed between such offences as are attended with force, or any extraordinary degree of atrocity which in their nature must be taken of such urgent necessity as will not allow of any delay, and others of a different sort if no resistance be made by the offender.[1] Accordingly it has been held that no one has a right to kill a person found picking his pocket.[2] "But if one pick my pocket and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons."[3]

2. Principle.—Under Sec. 103 of the Indian Penal Code, the right of private defence of property extends, under the restrictions mentioned in Sec. 99, to the voluntary causing of death in case of theft or mischief, when such theft or mischief is committed in such circumstances as may reasonably cause an apprehension that death or grievous hurt will be the consequences if such right of private defence is not exercised.[4] This section recognizes the right of a person to kill a person committing offences attended with force or surprise. Where there were absolutely no circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence to the accused, if the right of private defence is not exercised, it was held that Sec. 103, the clause, had no application. The right of private defence of property could not, therefore, extend to the causing of death.[5]

3. Scope.—Section 97, Penal Code, declares that every person has a right to defend the property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. Section 103 justifies homicide in case of (1) robbery, (2) house-breaking by night, (3) arson, and (4) theft, mischief or house-trespass causing apprehension of death or grievous hurt. This right is, however, subject to the two limitations contained in Sec. 99, namely, that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities and that the right of private defence in no case extends to the infliction of more harm than it is necessary to inflict for the purpose of defence.[6]

Observations of the Supreme Court.

Under Sec. 103 of the Indian Penal Code, the right of private defence of property extends, under the restrictions mentioned in Sec. 99 thereof, to the voluntary causing of death, if the offence the committing of which or attempting to commit which occasions the exercise of the right falls in one of the categories mentioned therein. That is to say, if it was not one of the offences enumerated therein, the person had no right of private defence extending to the voluntary causing of death.[7] Subba Rao, J., in the above-noted case observed : "In most of the cases, the discussion of the evidence in compartments—one relating to the offence and the other to

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1. East P. C. 273 : Fost, 273 : 1 Hale P. C. 445 at pp. 481-84 : 1 Hawk P. C. 22, Secs. 21, 24 ; Bull, 9 C. N. P. 22.
2. 1 Hale P. C. 4 : Black, 180.
3. 1 East P. C. 5, Sec. 45, p. 272.
4. Ramanand Singh *v.* State of Bihar, A. I. R. 1968 Pat. 258 at p. 264.
5. Jaria Naik *v.* State, (1969) 35 Cut. L. T. 322 at p. 325.
6. Dina Nath *v.* Emperor, A. I. R. 1948 Lah. 117 at p. 119 : 49 Cr. L. J. 300.
7. Gurdatta Mal *v.* State of U. P., A. I. R. 1965 S. C. 257 at p. 261.

the right of private defence—may not be possible, for almost always the evidence relating to one part will have impact on the other part, and the Court in considering whether the accused are liable constructively for murder will have to consider also the evidence of the defence that their common intention was not to commit murder but only to protect their right and to cause hurt, if necessary." Proceeding further his Lordship said: "Section 103 of the Indian Penal Code is subject to Sec. 99 thereof. Under Sec. 99 there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, and the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."[1] Thus where the deceased under the protection of police, were peacefully cutting the crops and where none of the deceased were in possesion of any dangerous weapons except sickles, which were used for cutting the crops, it could not be said that there was any serious apprehension to the life of the accused which would entitle to exercise their right of private defence to the extent of causing death of the deceased. Discussing this aspect of the case in the judgment, Subba Rao., J., said: "The intention of the deceased was peaceful and they were cutting the crops under the protection of the police and none of the deceased was in possession of any dangerous weapons. The sickles were used only by the labourers to cut the crops. In the circumstances disclosed in the evidence we cannot hold that there was any reasonable apprehension on the part of the appellants that they would be killed or hurt by the deceased. The High Court was certainly right in holding that the facts of the case did not attract the provisions of Sec. 103 of the Indian Penal Code." His Lordship then proceeded on: "Can it be said that in the present case the accused had no time to have recourse to the protection of public authorities and they had not caused more harm than was necessary to inflict for the purpose of private defence? The accused knew beforehand that the deceased had gone to the field to cut the crop. The police station is about two miles from the plot. They could have certainly gone to the police station to inform the proper authority of the intentions of the deceased and asked for police protection. They did not do so. When they came to the field they found two police constables. They should have told them of the real situation, asked them to see that the deceased did not carry away the crop and should have sent one of their party to the Sub-Inspector and made the necessary report. This reasonable attitude on the part of appellants would have prevented the unfortunate events that had happened. Instead, they tried to deploy the two constables on a false pretext and succeeded in doing so in respect of one. Secondly, was it necessary for the accused, in the circumstances in which they were placed, to use their guns immediately on coming to the field to shoot to kill three of the complainant's party? The deceased had no arms, whereas the appellants were fully armed with deadly weapons. The deceased were cutting the crop under the protection of the police, indicating thereby their peaceful intentions. Shooting at close range without warning would certainly be causing more harm than was necessary, in the circumstances of the case, to inflict for the purpose of private defence. In this view of the case also the appellants could not rely upon their right of private defence."[2] A person whose duty it is to guard a public building is in the same position as a person employed to guard a private building; that is to say, it is his duty to protect the property of his employer, and he may take such steps for this purpose as the law permits. Section 97, Penal Code, declares that every person has a right, subject to certain restrictions mentioned in Sec. 99, to defend the property of himself or any other person against any act which is an offence falling within the definition

Right arises not only when specified offence is committed but also when they are attempted to be committed.

1. Gurdatta Mal *v.* State, A. I. R. 1965 S. C. 257 at pp. 261, 268
2. *Ibid.* at p. 268.

of theft, robbery, etc. Section 105 declares that the right of private defence of property commences when a reasonable apprehension of a danger to the property commences, and Sec. 103 says that the right of private defence of property extends, under the restrictions mentioned in Sec. 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions therein enumerated. Among the offences therein enumerated are theft, mischief and house-trespass. A person employed to guard the property of his employer, therefore, is protected by these provisions of the law, if he causes death in safeguarding his employer's property, when there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in Sec. 103, or to attempt to commit one of those offences. The fact that the property to be guarded is public property does not extend the protection given to a guard.[1] As already stated the right of self-defence under this section arises not only when the offences enumerated in the section are committed but also when they are attempted to be committed.[2]

It was held in *Ramras Mahton* v. *The King*, that the fourth clause of Sec. 103[3] I. P. C., dealt specifically with cases where the act which caused the exercise of the right of private defence amounted to theft, mischief or house-trespass and this clause really mant that when the act which amounted to theft, mischief or house-trespass was such as *per se* to cause a reasonable apprehension that death or grievous hurt would be the result, then the causing of death in order to prevent the commission of such act was justified but it did not apply when the apprehension of death arose by reason of intervention of the person exercising the right of private defence.[4]

4. Meaning of words.—"*Under the restrictions mentioned in Sec.* 99": Obviously the only restrictions ordinarily applicable are those laid down in Cls. (3) and (4) of this section. "*If the offence which occasions the exercise of the right*": These words are inapt. They only mean if the offences committed or attempted are those described below, and if the circumstances which give rise to the right exist. Such circumstances are described in Sec. 105.

5. Death in protection of property.—The circumstances in which a person may lawfully kill another are described in Sec. 100 and this section. The combined effect of the two sections is to authorise the killing of a person in the following cases:

Killing authorised in five cases by combined effect of Secs. 100 and 103.

If the offender threatens—

(*a*) The causing of death or grievous hurt,
(*b*) Rape and unnatural offence,
(*c*) Kidnapping, abduction and wrongful confinement,
(*d*) House-breaking by night or robbery, and
(*e*) Arson.

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1. Emperor *v.* Jamuna Singh, A. I. R. 1944 Pat. 150 at p. 152: I. L. R. 23 Pat. 908: 46 Cr. L. J. 508.
2. Ali Mea *v.* King-Emperor, A. I. R. 1926 Cal. 1012 at p. 1013: 43 C. L. J. 532. Under Sec. 103, Indian Penal Code, the right of private defence of property to the extent of causing death arises not only when the house is broken into but when an attempt is made to break into the house. It is not the intention of the law that the right to defend property is available only when the thief has already effected entry, for property may be protected by attacking the thief inside the house as much as by preventing his entry into it; *see* also Dina Nath *v.* Emperor, 49 Cr. L. J. 300.
3. I. L. R. 26 Pat. 550: A. I. R. 1949 Pat. 61.
4. Mithu Pandey *v.* State of Bihar, A.I. R. 1966 Pat. 464 at p. 469.

The right commences with the reasonable apprehension of danger to person[1] or property.[2] In either case it extends to the causing of death in the five foregoing cases.[3] It ends with the cessation of apprehension of danger,[4] or the recovery of the property; or the obtaining of assistance of the public authorities or the escape of the offender. Now, as regards the right here conferred, two points are essential: (*i*) The right does not commence till there is a reasonable apprehension,[5] and (*ii*) that reasonable apprehension must be of the commission of the crimes described in the four clauses. In order then to justify homicide under this section, it is not enough to show that the person slain was a trespasser, or that he had even gone into one's hen roost and some dead fowls and a crow were found near him, for that will not amount to house-breaking or robbery or an attempt to commit the same.[6] But it will be, of course, different if he had already made an aperture in the wall, and was about to get in through, when he was assaulted.[7] A mere house-breaking by day time would not justify the killing of the house-breaker and such is also the law of England,[8] but if the house-breaking is such as imports an apparent robbery, or an intention or attempt at robbery, then the case would be different, and in this respect also the section closely follows the English rule.[9] So where a person was in actual peaceable possession of land upon which he had sown a crop, the act of the accused who came in force to cut the crop was robbery, and the party in posession were entitled to resist it even to the extent of killing the aggressors.[10] But the extent of harm to be caused in defending one's property depends upon the circumstances of each case and must always be proportionate to the quantum of force used by the attacker which it is necessary to repel.[11] And as dacoity is only an aggravated form of robbery,[12] it follows that the same right exists against dacoits as is here declared against robbers. A pick-pocket, as such, is not a robber, and therefore there is no right to kill him. Incendiaries are similarly exposed to the same risk, if they commit mischief which is intended to destroy any building, tent or vessel used for residence or custody of property. The last clause deals with the milder forms of the three offences dealt with in the three preceding clauses, but these assume the same aggravated form by the presence of apprehension of death or grievous hurt. This clause would be utilized if there be any technical objection to a case falling into any of the three earlier clauses.

Section closely follows English rule.

There was reasonable apprehension that the person who was using the *bhala* against him may cause either death or grievous hurt to the owner. If at that juncture, the appellant used his *bhala* against Biharirai reasonably apprehending grievous hurt to or death of his companion he would be entitled to be acquitted.[13]

6. No right of private defence against a trespasser.—A person entitled to the land but not in possession of it has no right to dispossess even

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1. Section 102.
2. Section 105.
3. Sections 100, 103.
4. Section 102.
5. Section 105.
6. Scully, 1 C. &. P. 319.
7. Poloke Nushoyo, 2 W. R. 43; *see* also Ali Mia *v.* Emperor, A. I. R. 1926 Cal 1012; Ram Khelawan, 1951 A. L. J. 464: 1951 A. W. R. (H. C.) 47; Ajab Narain Singh *v.* Emperor, A. I. R. 1939 Pat. 575: 40 Cr. L. J. 611; Ram Prasad Mahton *v.* Emperor, 20 Cr. L. J. 375: A. I. R. 1919 Pat. 534.
8. 1 East P. C. 5, Sec. 44, p. 273; 4 Black, 180.
9. 1 Hale P. C. 488.
10. Gooroo Chur Chung, 14 W. R. 69 ; following Sachee, 7 W. R. 114.
11. Ram Khelawan Singh I. L. R. 36 Cut. 827; *see* also Ajab Narain Singh *v.* Emperor, A. I. R. 1939 Pat. 575: 40 Cr. L. J. 611: 191 I. C. 811 : 21 Pat. L. T. 86 : 1939 Pat. W.N. 671; Ram Prasad Mahton *v.* Emperor, A. I. R. 1919 Pat. 262 : 20 Cr. L. J. 375: 56 I. C. 983 : 5 Pat. L. J. 289.
12. Section 391.
13. Hira Rai *v.* State of Bihar, A. I. R. 1972 S. C. 244 at p. 246.

a trespasser by force, if the trespasser is in settled possession of the land. In such a case unless he is evicted in due course of law, he (the trespasser) is entitled to defend his possession even against the rightful owner.[1] Even assuming that Onkarsingh and his brothers had a defective title or no title at all, yet, since they had been in possession for some time, they had the right to defend their possession even against the rightful owner, and the accused party had no right to use criminal force with the common object of taking back the possession or ousting Onkarsingh and his men. The accused thus had no right of private defence. It was open to them to take recourse to due process of law.[2]

7. Theft.—Right of private defence as laid down by Sec. 103 in case of theft extends to voluntarily causing death provided there are such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. Where there are no such circumstances which may have caused apprehension that death or grievous hurt would be caused to the accused, the right of private defence of property, if any, would come under Sec. 104 which does not extend to the voluntarily causing of death but extends subject to restrictions under Sec. 99 to the voluntarily causing to the wrong-doer of any harm other than death. One of the restrictions contained in Sec. 99 is that the right of private defence should in no case extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In causing death, the right being exceeded courts have to see whether the case comes under Exception 2 to Sec. 300, Penal Code, which requires that it must be proved that the death was caused (1) in good faith in the exercise of the right of private defence of person or property, (2) it was caused without premeditation, and (3) without any intention of doing more harm than was necessary for the purpose of such defence. Unless the case can be brought under the provisions of this exception the accused would be guilty of murder provided of course that the usual conditions required by Sec. 300 are complied with.[3] When the act which amounts to theft, mischief or house-trespass is such as *per se* sufficient to cause a reasonable apprehension that death or grievous hurt will be the result, then the causing of death in order to prevent the commission of such act is justified.[4] It does not apply when the apprehension of death arises by reason of the intervention of the person exercising the right of private defence.[5] Though the right of private defence against theft continues till the offender has effected his retreat with the property or till the property has been recovered, where the thief has been felled down by a blow with an axe and is lying prostrate with the stolen property thrown on the ground, it cannot be said that the right of private defence extends to inflicting further blows on the thief of which he dies subsequently. In such circumstances, the case of the accused neither falls under Sec. 103 nor under Exception 2 to Sec. 300 reducing the offence to one of culpable homicide not amounting to murder.[6]

Fatal blow to cause death to thief if justifiable.

8. House-trespass.—The extended right to cause even death is conferred in the case of house-trespass only when it is committed in circumstances which may reasonably cause an apprehension that death or grievous hurt will

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1. *See* Munshiram *v.* Delhi Administration, A. I. R. 1968 S. C. 702 at p. 705.
2. State of M. P. *v.* Saligram, 1971 Jab. L. J. 292 at pp. 297-98.
3. Ladha Gova *v.* State, A. I. R. 1951 Sau. 1 at pp. 2, 3 : 6 D. L. R. (Sau.) 14 : 5 A. I. Cr. D. 117 : 3 Sau. L. R. 148; Ramras Mahton *v.* Emperor, A. I. R. 1949 Pat. 61 : 49 Cr. L. J. 449: I. L. R. 26 Pat. 550.
4. Padmeswar Phukan *v.* State, 1971 Cr. L. J. 1595 at p. 1596.
5. Ram Prasad Mahton, 20 Cr. L. J. 375.
6. Ladha Gova *v.* State, A. I. R. 1951 Sau. 1 at pp. 3, 5: 6 D. L. R. (Sau.) 14: 3 Sau. I. R. 184.

result if such right of private defence is not exercised. Accordingly, where the accused went to the rescue of a woman whose husband forcibly dragged her from her father's house against her will and in the attempt caused the death of the husband, there was no such apprehension as stated in Cl. (4) of this section and the accused could not claim the right of private defence under the said clause.[1]

When the right of private defence of property extends to causing death.

104. If the offence, the committing of which, or the attempting to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Sec. 99, to the voluntary causing to the wrong-doer of any harm other than death.

SYNOPSIS

1. Analogous law.
2. Meaning of words.
3. Scope.
4. When homicide in unjustifiable.

The commentary under Sec. 101 may be read, *mutatis mutandis*, as a commentary on this section.

1. Analogous law.—This section is related to the last, as Sec. 101 is to Sec. 100. It is enacted to legalize the infliction of any harm short of death in all cases in which the offences of theft, mischief or criminal trespass are not aggravated in the manner described in the clause "*fourthly*" of the last section, viz. by being attended with an attempt to cause death or grievous hurt.

2. Meaning of words.—"*Harm other than death*" Harm implies use of the force, not mere abuse punishable under Sec. 504, which cannot be justified under this section.[2]

3. Scope.—Under this section when the offence furnishng an occasioni for the exercise of the right of self-defence is theft, mischief or criminal trespass but not of the type enumerated in Sec. 108, the right extends only to causing of any harm other than death. A person had every right to defend his property and to stop the accused from uprooting the reeds etc. which he had planted in his field. In defending his property he can under Sec. 104, I. P. C., cause any harm short of death. He is therefore justified in attacking the accused person uprooting the plants with his *gurzu* and the fact that he did so does not help the accused at all. Surely if a man is uprooting another man's trees he would not be going to the police station for help because by the time he comes back all the trees would be gone. In normal conditions he would be well advised to protect his property by using all force necessary to stop the uprooting of the plants.[3] The section does not apply to a case where death has been caused in exercise of the supposed right of self-defence.[4] This section has to be read subject to the provisions of the succeeding section, that is Sec. 105.[5]

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1. State *v.* Badri, A.I.R. 1957 All. 714 at p. 716: 1957 Cr. L. J. 1195.
2. *See* Rakhal Das Roy *v.* Kailash Banu, 5 I. C. (Cal.) 721: 11 Cr. L. J. 213: 11 C. L. J. 113. Section 104 can have no application by way of defence to charge brought against the accused in case of using abusive language.
3. Gulla Din Sharaf Din *v.* Emperor, A. I. R. 1940 Pesh. 6 at p. 8: 41 Cr. L. J. 561; Gamman, 48 Cr. L. J. 590: 230 I. C. 277; Narain Dass, I. L. R. 3 Lah. 144; Ladha Gova *v.* State, A. I. R. 1951 Sau. 1: 6 D. L. R. (Sau.) 14: 5 A. I.Cr. D. 117: 3 Sau. L. R. 184.
4. Ramras Mahton *v.* Emperor, A.I.R. 1949 Pat. 61 at p. 62: I. L. R. 26 Pat. 550: 49 Cr.L.J. 649; Hasham *v.* Emperor, A.I.R. 1936 Lah. 28 : 37 Cr. L. J. 1428 · 61 I. C. 344.
5. Ramaswami, 1949 M. W. N 545.

In the case reported in *Kunwar Sen* v. *Vir Sen*,[1] the facts of the case as mentioned therein were as under:

"The prosecution story lies in a narrow compass. On 13.11.68 at about 6 p. m. complainant Kunwar Sen was passing on a *rasta* (pathway) which ran through the fields of the accused. When he was in the midst of the field the accused suddenly appeared armed with *lathis* and *kulhari* and questioned him as to why he was passing through their field. The complainant entreated to be excused and promised not to pass on that passage again. He also requested them to allow him to go out of the field. The accused, however, did not listen to his entreaties and attacked him with their respective weapons. On the alarm raised by the victim a number of villagers reached the scene and witnessed the occurrence. Complainant Kunwar Sen had received nine injuries one of which had resulted in fracturing his ulna bone of the right fore-arm. He was immediately taken to the hospital at Sirsaganj and on the next morning he lodged a report at the police station giving the essentials of the prosecution story."

The learned Magistrate without giving any finding on facts came to the conclusion that even if the prosecution story is held established "the accused in the present case had every right to prevent the complainant from continuing the criminal trespass, regardless of he amount of damage that was likely to be caused...and the saying of the complainant that he requested the accused to be excused and promised not to pass again, and again requested for allowing him to pass on that day does not give him any right for insisting that he must continue the criminal trespass. Thus if the accused used force to prevent him from continuing the trespass, they used it in the exercise of the right of private defence of property and they are entitled to benefit of Sec. 104, Indian Penal Code." Accordingly he acquitted the respondents.

The High Court allowing the revision against this decision of the Magistrate held on pages 76-77, as under :

> "There can be no doubt that the Trial Magistrate has taken a wholly erroneous view of the law and has misunderstood the import of the decision of this Court in the case of *Hukum Singh* v. *State*.[2] In that case the appellants after loading their bullock carts with sugarcane took them across a large number of fields including the field of the deceased although there was no *rasta* for the bullock carts through the fields in which there were standing crops and when the deceased objected they had severely assaulted him. Here the case is reverse in so far as the complainant stopped passing through the field and entreated the accused to excuse him but he was belaboured by them. Moreover, there can be no comparison between an individual passing through a field covered with crops and loaded bullock carts going over the same as the quantum of damage to the crops, if any, in the former case will be negligible to merit any serious consideration in such circumstance.
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> "It must be noticed that the accused had totally denied to have beaten the complainant and the evidence led on their behalf suggested that the complainant had received those injuries by a fall in a dark well. When the complainant entreated the accused to excuse him for having passed through their field and to allow him to go out of it and when there is nothing on the record to indicate that when the accused did not agree to his entreaties the complainant made any attempt to proceed further in the field; the question of the accused-respondents being justified 'in preventing him to continue the trespass', does not arise and

1. 1969 Cr. L. J. 76 at pp. 76-77.
2. A. I. R. 1959 All. 690.

they were not justified in beating him. There is neither any evidence on the record nor the circumstances of the case indicate that the complainant had caused any damage to the crops of the accused. The evidence on the record on the other hand shows that he was passing on a *rasta* which ran through the accused's field. It is true that the field was covered by the crops. That does not, however, preclude the possibility of the existence of a village pathway running through the field. Had there been no *rasta* there was no point in the complainant to try to walk over the crops as on the one hand it would have prevented his movement and on the other would not have resulted in any appreciable damage to the accused crops. When the complainant begged the accused to be excused for having passed over the *rasta* running through their field and to allow him to go out of it the criminal trespass, if any, had ceased to exist and the accused had no justification in severely beating him.

"In this view of the matter the order of acquittal recorded by the learned Magistrate by giving the benefit of Sec. 104, Indian Penal Code, to the accused-respondents does not appear to be correct and must be set aside."

4. When homicide is unjustifiable.—The last section lays down the cases in which even homicide is justifiable. This section lays down that in other cases it is not. So where the accused were on their master's land when the deceased came up with a number of men to fish in a disputed tank by force of arms, and the accused were prepared for the fight, and the two parties fought and one of the aggressors was killed, it was held that, as the act of the accused was not protected by the last section, it fell within the scope of this section, which did not justify the killing of a trespasser. But at the same time, though the accused had exceeded their right of private defence, still some consideration must be shown to them in the sentence, and their sentences were accordingly reduced to rigorous imprisonment from seven to three years.[1] This was a case of death. But

Section justifies causing of harm but short of death and subject to restrictions under Sec. 99.

short of death the section justifies the causing of any harm, subject, however, to the restriction laid down in Sec. 99 that the harm should not be more than is necessary for the purpose of defence.[2] And neither section takes note of the motive which prompted the harm, unless the harm caused was in itself so excessive as to be indicative of revenge. In judging of the reasonableness of harm caused, it must be noted that though the harm caused by each individual may not be excessive or sufficient in itself to cause death, still if the cumulative effect of the injuries caused by several resulted in death, they will all be accountable for it. As Campbell, J., observed in a case: "If several parties band together, and so act in defence of property that the unlawful causing of death is a natural and probable result, and death is, in fact, so caused, it would be very dangerous to hold otherwise than that they are all responsible and guilty of culpable homicide of a low degree though it be."[3] But where a number of persons acting in concert are shown to have defended their property by use of force and they are acquitted of homicide, they could not be found guilty of rioting.[4] It is not the lawful exercise of the right of private defence to confine trespassers for the night till the arrival of the police on the following day,[5] unless the trespassers were guilty of a non-bailable and cognizable offence.[6] But a person in possession of his property is entitled to

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1. Goburdhun, 14 W.R. 74; *see* also Hasham *v.* Emperor, A. I. R. 1936 Lah. 28: 37 Cr. L. J. 1428.
2. Section 99, para. 4.
3. Mitto Singh, 3 W. R. 41 at p. 42.
4. *Ibid.*
5. Shurfoddin, 13 W. R. 64.
6. Section 59, Cr. P. C.

use force to eject a trespasser, and the trespasser cannot complain that he was acting under orders, if his act was, in fact, a trespass. So where a police constable authorized to watch the movements of suspected characters entered into the house of a person at midnight and knocked at his door to see if he was there, he was held to be guilty of trespass, as he had no authority to enter into the houses of even suspected characters, and the accused who resented the constable's act by abusing and pushing him and lifting his stick to strike him was held to be protected under this section.[1] Where the deceased had succeeded in obtaining peaceful possession of the property, and the accused had obtained unlawful possession only for a couple of hours or so, it was held that the possesion of the accused was nothing better than mere trespass and could not give them any right of private defence. The deceased had, on the other hand, a right to maintain his possession and eject the accused and hence the right of self-defence of property vested in the deceased and not in the accused. If the accused were beaten, it must have been because they refused to vacate the land. According to the provisions of Sec. 104, Indian Penal Code, the deceased had a right to inflict any necessary injury, short of death, in the exercise of their right of private defence of property and in the circumstances of the case it cannot be said that the deceased exceeded his right of private defence.[2]

Where a trespass is committed on land for purposes of stealing crop the right of private defence of property begins and it is not necessary to have recourse to public authorities to seek redress. In such a case the accused cannot be expected to judge his act by the cool standard of a passerby. Reference may, in this connection be made to the decision in *Har Chand* v. *Emperor*,[3] and *Abdul Hadi* v. *Emperor*.[4] The former case points out that the law does not require that when a person is being wrongfully deprived of property of which he is in possession he should leave the thief alone and run to a *thana* at a distance to seek redress from the police. No doubt that case states that the position would be different if intimation is received in advance of the intentions of the opposite party. The latter case enunciates the same rule as the former. It is said there that it is not the intention of Secs. 97 and 99, Penal Code, to compel a person having the right of private defence of property to acquiesce in criminal trespass and not to exercise his right of private defence at all. It is further said that such a person need not, instead of protecting his property, run to the police and leave the aggressors to do what the law entitled him to protect himself against by exercising his right of private defence. Paragraph 1 of Sec. 105, Penal Code, provides that the right of private defence of property commences when a reasonable apprehension of danger to the property commences. It follows that if the act of trespass and theft in a case had already begun when accused and his companions went to the property there was more than apprehension of danger to property and the right of private defence had come into existence. When the right had commenced it is not expected that a person entitled to exercise it should have recourse to the protection of public authorities. Paragraph 2 of Sec. 105 shows that the right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered. Paragraph 4 says that the right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief. If in protecting the crop death is caused, but there was no intention to cause death or such bodily injury as was likely to cause death, the offence would fall only under the latter part of Sec. 304.[5]

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1. Doraswami, I. L. R. 27 Mad. 52.
2. Indar Singh *v.* Emperor, A. I. R. 1938 Lah. 60 at p. 62: 39 Cr. L. J. 288.
3. A. I. R. 1930 Lah. 314 (2).
4. A. I. R. 1934 All. 829 (2).
5. Madhava Kurrup *v.* State, A. I. R. 1953 T.-C. 340 at pp. 352-43 : 1953 Ker. L. T. 31.

In an Oudh case, there was no evidence of any enmity between the accused and the deceased who had gone to the accused's field at night and the accused suspecting that he had come to commit theft of the *dhan*, dealt him some *lathi* blows as a result of which he died on the spot and the medical examination showed that most of the injuries were on the vital parts of the body. It was held that considering the fact that most of the injuries were on vital parts of the body, namely the head and the face, the accused must be imputed constructive notice of the fact that the injuries inflicted by him were likely to cause death, and conceding that the accused had a right of private defence under Sec. 104, it follows that in causing the injuries above referred to which resulted in death of the deceased, the accused had exceeded that right and was then liable to be convicted under Sec. 304, Indian Penal Code.[1]

Confederates, aiders, abettors are included amongst wrong-doers.

The section says that harm may be caused to the wrong-doer, but this term would include his confederates, aiders and abettors who were present at the time of his commission of the offence, though it would not include an accomplice who was not present. If, for example, a zamindar sends out his servants to take forcible possession of property belonging to or in the possession of another the latter would not be justified in assaulting the zamindar who did not accompany his men, though he was the principal wrong-doer.

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Commencement and continuance of the right of private defence of property.

The right of private defence of property against theft continues till the offender has effected his retreat with property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Right of defence of property.
4. Recourse to public authorities.
5. When the right ends.
6. No right of private defence against a person running away.
7. Robbery.
8. Criminal trespass and mischief.
9. House-breaking.
10. Misappropriation and receiving stolen property.

1. Bachhu Lal *v.* Emperor, A. I. R. 1935 Oudh 442 at p. 442 : 36 Cr. L. J. 1209.

1. Analogous law.—This section was Cl. (81) of the draft in which the Law Commissioners objected to the phrase "till the offender has effected his retreat with the property". In a later opinion on this clause it was pointed out that if the clause remained, the right of private defence against robbery would cease after the robber had left the house, which could not be the intention of the framers of the Bill. But notwithstanding this criticism, this section was enacted as orginally drafted.[1]

2. Principle.—This section lays down as to when the right of private defence of property commences. As such, the section is analogous to, and closely follows the wording of Sec. 102 in which a similar rule for the commencement of the right for the defence of person is enacted. The commencing periods for the two rights naturally differ with the object they are intended to serve. But in one respect they both agree, for the right to personal protection as well as the protection of property commences with the reasonable apprehension of danger to person or property. But as against theft the section declares the right to continue (*a*) till the offender has effected his retreat with the property ; or (*b*) the assistance of the public authorities is obtained; or (*c*) the property has been recovered. The section does not say what becomes of the right if any one of the contingencies is satisfied, but the property remains unrecovered. But regard being had to the fact that the primary object of the right is to enable the owner to recover his property, the right would appear to exist till the purpose for which the right exists has been attained. In other words, the three clauses determine the owner's right of recapture which it is for the owner to resort to at his discretion.

This section is analogous to Sec. 102 in many respects.

3. Right of defence of property.—The right of private defence of property commences with the reasonable apprehension of danger to such property. The meaning of this phrase has been set out else-where, and its meaning must be understood in the same sense here. So far the section is perfectly intelligible. But then it goes on to limit that right by fixing a period for its determination. As against theft it enacts that the right continues (*a*) till the offender has effected his retreat with the property, or (*b*) the assistance of the public authorities is obtained, or (*c*) the property has been recovered.

It is not the law that the rightful owner in peaceful possession of a piece of property must run away if there is an actual invasion of his right and an attempt on his person. There are cases in which the person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code, and when there is no time to get police help. It is lawful for a person who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such person if the opposite party is armed, to take suitable weapons for his defence.[2] The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions, the exercise of his right of private defence.[3]

Right of private defence not a right of retaliation nor the exercise of it dependent on actual harm done.

This clause had been animadverted upon by the Law Commissioners (*see* para. No. 1 above), but nevertheless, it remains unaltered. Now in order to

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1. First Report, Secs. 155, 158, Reprint, p. 230.
2. Summa Behara *v.* Emperor, A. I. R. 1945 Pat. 283 at p. 285: 46 Cr. L. J. 672: 1945 Pat. W. N. 278: 220 I. C. 141: 26 Pat. L. T. 46.
3. Barisa Mudi *v.* State, A.I.R. 1959 Pat. 25 at p. 28: 1957 B. L. J. R. 756: 1959 Cr. L. J. 71 ; Khetri Bewa *v.* State, A. I. R. 1952 Orissa 37: 17 Cut. L. T. 220.

understand the clause it must be remenbered that the right of private defence of property here contemplated is the *defence* of property,[1] by use of force.[2]

Sole object of the defence of property is the recovery of property or till the retreat of the thief.

This section then lays down up to what time it is lawful for a person to use force in defence of his property, that is, to prevent its seizure and removal. The recovery of his property is the sole object of this right, and therefore, the clause lays down that the use of force should cease as soon as that object has been attained, namely, the property stolen has been recovered. If however the property cannot be recovered, then the clause allows the owner to follow the thief till "he has effected his retreat with the property" which could only mean till the pursuit is given up. But the pursuit need not be hot on his heels, for the owner may fall behind and yet intend to continue the chase. And suppose *A* runs away with *B*'s watch, and *B* pursues him, but *A* getting the better of *B* cannot be caught and *B* gives up the pursuit. He sees *A* the next day wearing his watch; is his right of private defence gone? In one sense *A* had effected his retreat with the watch. But *B* has not recovered the property, and so long as *B*'s property has not been recovered, his right of private defence is assured to him by another clause. If, therefore, the two clauses are in conflict, is the felon to have the benefit of it? Such a view would be opposed to all reasonable interpretation of criminal law, and it would lead to awkward consequences. In such a case, the correct view would then seem to be that if *B* sees *A* with his stolen watch the next day, *B* has his right of private defence subject, of course, to the restrictions mentioned in Sec. 99; that is to say, if *B* sees a police man in sight, he must seek his protection; if he does not, he may use force on *A* and recover his watch.[3] It is said that in such a case, *B*'s right revives,[4] but there is no question of revival, theft is a continuing wrong and a thief is a thief whenever he may have committed the theft. And if, therefore, *B* sees *A* six months after the theft in possession of his watch, *B* has the same right against him as if *A* had only a moment before stolen it.[5] This view did not find favour with the Lahore High Court. In *Mir Dad* v. *Crown*,[6] it was held that in the case of theft the right of private defence of property is put an end to by the successful private retreat of the theft. It was also held in that case that while the thief is running away with the property, he cannot be said to have retreated. It is only when he reaches his final destination that he can be said to have retreated. It is only until the offender has so completed his retreat, the right of self-defence continues until the property is recovered, i. e. during the retreat of the offender or until the assistance of the public authorities is obtained. This view was reiterated by the same Court in *Rakhia* v. *Emperor*,[7] where it was laid down that if the thief runs away after throwing the stolen property on the ground the right of private defence ceases, and the owner is not justified in continuing the chase and assaulting him. In *Mir Dad* v. *Emperor*,[8] a Division Bench of the Lahore High Court explained what Sec. 105, implied and it was observed by Fforde, J., that if the thief had effected his retreat with the property or if the property had been recovered, the owner of that property had no right to proceed with violence against the thief. The same view was taken by the Rangoon High Court in *Nga Pu Ke* v. *Emperor*.[9]

Conflicting judicial opinions of different High Courts.

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1. Section 97.
2. Section 104.
3. Jarha *v.* Surit Ram, 3 N. L. R. 177 at pp. 180, 181.
4. *Ibid.*, p. 180, citing Mayne's *Criminal Law*, 237.
5. Jarha *v.* Surit Ram, 3 N. L. R. 177 at pp. 180, 181; *contra* Mir Dad, I. L. R. 7 Lah 21; Karam Ali, A. I. R. 1927 Lah. 355.
6. A.I.R. 1926 Lah. 74 at p. 75: I. L. R. 7 Lah. 21: 96 I.C. 385: 27 Punj. L. R. 280.
7. A. I. R. 1934 Lah. 595 at p. 596 : 96 Cr. L. J. 292 : 35 Punj. L. R. 664.
8. A. I. R. 1926 Lah. 74.
9. A.I.R. 1933 Rang. 340: 35 Cr. L.J. 267.

In another case,[1] the Nagpur High Court itself dissented from its earlier view and fell into line that of the Lahore High Court. The owner has no right to invade the privacy of another man's house in order to recover his property that a thief may have concealed therein. Such an entry, as of right, would be trespass. But if the house belongs to the thief, then the owner may lawfully enter it in pursuit of thief for a thief's house is not his castle . The Allahabad High Court has expressed its agreement with the majority view. Accordingly, it has held that when the offence has been committed and the property removed, a recapture after an interval of time by the owner or other person on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which Sec. 105 of the Indian Penal Code contemplates seems to be a recovery either immediate or made before the offender has reached his final retreat.[2]

From the persual of Sec. 105, I. P. C., it is clear that the duration of the right of private defence of property against theft continues (1) till the offender has effected his retreat with property, or (2) the assistance of the public authorities is obtained, or (3) the property has been recovered. The primary object of this provision of the law appears to be that the owner of the stolen property may not be deprived of it when the same may be recovered by the owner by using force against the thief but this right of using force is subject to the aforementioned three conditions.[3]

In *Jarha* v. *Surit Ram*,[4] it has been held that if *A* runs away with *B*'s watch *B* may chase him until he effects his retreat, but the right of self-defence does not end with his escape. If *B* sees *A* the next day, the next month or the next year, wearing the stolen watch, *B* may forthwith seize *A* and recover his watch, using for the purpose as much force as the case allows, and if a policeman be found at hand, *B*'s proper course would be to hand over *A* to him and let him recover his watch. But *B* is not bound to put off the capture of *A* until he can find assistance of the public authorities.

Again, suppose on a day after the theft *B* sees his watch lying on a table in a house or a garden, and if he can get the assistance of the police, without losing sight of it, no doubt he would be bound to do so, but he would be under no legal obligation to risk a further loss or removal of the stolen property for the purpose of having recourse to the public authorities, and if the circumstances are such that immediate seizure seems to offer the only reasonable prospect of recovery, *B* is entitled to enter the house or garden and recover the watch.

The proposition laid down to *Jarha's* case[5] has not been followed in later cases. In *Mir Dad* v. *Crown*,[6] two learned Judges in their separate judgments expressed the view that the right of private defence of property subsists as long as the offender has not effected his retreat with the property, and as soon as the offender has completed his retreat the right ceases. Le Rossignol, J., also observed that if serious disorders are to be avoided the right of private defence must be strictly confined within the limits fixed by the statute. Learned Fforde,

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1. Punjab Rao *v.* Emperor, A. I. R. 1945 Nag. 269 at p. 270: I. L. R. (1945) Nag. 881 : 47 Cr. L. J. 111 : 1945 N. L. J. 349 : 221 I. C. 199. The right of private defence of property against theft comes to an end if the offender has effected his retreat with the property or the assistance of the public authorities has been obtained or the property has been recovered.
2. State *v.* Sidhnath Rai, A. I. R. 1959 All. 233 at p. 235: 1958 All. L. J. 511.
3. Amar Singh *v.* State of Rajasthan, A. I. R. 1968 Raj. 11 at p. 12.
4. (1907) 3 Nag. L. R. 177.
5. *Ibid.*
6. A. I. R. 1926. Lah. 74.

J., while dealing with the illustration which was dealt in *Jarha's* case,[1] made the following observations:

> "If the thief has effected his retreat with the property or if the assistance of the public authorities has been obtained, or if the property has been recovered, the owner of that property has no right to proceed with violence against the thief. To take the illustration given in the authority referred to (1907) 3 Nag. L.R. 117 if *A* runs away with *B*'s watch, *B* may chase him and seize his watch from him, using for that purpose such violence short of inflicting death as may be necessary for the purpose of recovering of the property stolen. But if *B* fails to capture *A* and recover his watch, his right to recover the article by violence has ceased. Similarly, if instead of pursuing *A*, *B* invokes the aid of a policeman for that purpose and the policeman captures *A*, *B* cannot intervene with violence for the purpose of recovering his article; and again, if *B* by any means, whatsoever, recovers his watch he cannot then proceed to use violence to the thief."

It has been specifically observed in the above passage that if *B* fails to capture *A* and recover his watch his right to recover the article by violence has ceased. From this it is clear that the learned Judge means to say that if the offender has effected his retreat the right to use violence by the owner ceases. This view has been followed again by the Lahore High Court in *Rakhia* v. *Emperor*[2] wherein it has been observed that if the thief runs away after leaving the property, the right of private defence comes to an end and the owner would not be justified in pursuing him and assaulting him. The Allahabad High Court has also adopted the same view in *State* v. *Sidhnath Rai*.[3]

4. Recourse to public authorities.—The question whether or not there was time for the injured party to have recourse to the protection of the public authorities is always one of fact depending upon evidence in each case.[4]

5. When the right ends.—The clause makes the right subject to the limitation, that if the assistance of the public authorities has been obtained, the right of self-help ceases. In this connection the wording of this clause is materially different from the corresponding clause of Sec. 99. According to that clause, there is no right if there is time to have *recourse* to the protection of the public authorities. But under this clause, the right exists and may be asserted till the *assistance* of the public authorities is *obtained*. As this section is a special section dealing with a right directed against a special class of malefactors, it may even be contended that the owner is not bound to have recourse to the protection of the public authorities, and that he has the larger right against the thief till the public authorities choose to assist him. But this construction, though plausible, is not a preferable one. For the right of private defence is a right of necessity, and it cannot, therefore, be asserted whenever it is possible to have recourse to the public authorities whose duty it is to suppress and apprehend crime. Moreover, though this section is not subject to Sec. 99, still it is necessarily subject to Sec. 104, which in its turn is subject to Sec. 99. Consequently, it is a matter of legal obligation to have recourse to the public authorities for protection as there required.

Right of private defence is right of necessity.

6. No right of private defence against a person running away.—By no stretch of argument can it be said that any accused has any right of private

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1. (1907) 3 Nag. L. R. 177.
2. A. I. R. 1934 Lah. 595.
3. A. I. R. 1959 All. 233.
4. Kirpa Ram *v.* Emperor, 48 Cr. L. J. 503: at p. 507: 230 I. C. 105.

defence against a person who is running away from the scene of the occurrence (Sec. 105, Indian Penal Code). The assault on him will be wholly unjustified.[1]

7. Robbery.—Robbery is theft accompanied by violence.[2] The right against robbery is, therefore, essentially a right against the use of violence. The right against theft is then a right to prevent the removal of property. If violence ceases, so does also the right against its use unless its fear continues in which case the right remains so long as the fear lasts. But the fear must be of *instant* hurt or restraint. The fact that the person apprehends a renewed attack in insufficient to let in the right. It must be the fear of present and imminent violence.

8. Criminal trespass and mischief.—In the case of criminal trespass and mischief the right remains only so long as the offence is being committed. If a trespasser has left the land, the owner cannot pursue him for the purpose of chastisement. If he does so, he cannot plead the protection for the exception. This rule only applies to criminal trespass and mischief as such, and unattended by violence. When they are so attended, the right would be enlarged as it may then be a night robbery, or it may fall under the fourth head of Sec. 103. But where it is not so, an assembly lawful in its inception may become unlawful as soon as the trespass or mischief it was intended to remove is over.[3] So where one Goluk Chunder in excavating a *khal* encroached on one Issur Chunder's land, and committed mischief by cutting the land and throwing earth on it, which was resisted by Issur's men whereupon the mischief ceased, but the men continued to remain assembled probably to prevent even the cutting of the *khal*, it was held that the assembly had no right of private defence after the mischief had ceased and when there was no likelihood of its removal.[4] It need scarcely be added that the right is not only limited as regards duration but also as regards the property in respect of which the right exists. For instance, if the owner detects two of his buffaloes in a herd, he has no right to drive away the herd.[5]

Rule only applies to criminal trespass and mischief as such and unattended violence.

The fact of the case reported as *Sardara* v. *Emperor*,[6] found by the Bench were that the accused's party had been in possession of the greater part of a field for some considerable time, that they had actually planted part of it with tobacco and that in the other portions of it they had erected ordinary agricultural buildings such as mangers and cattle-sheds. On the day of occurrence, the complainant's party took into their head to assert a right in that field and started to plough it. The party of the accused knowing that ploughing was going on and that their possession was challenged, left their houses with arms in order to stop what they considered to be, and which undoubtedly was a trespass. When they reached the field, there was a fight in which a number of men on each side were injured, and one of the complainant's party was killed. The accused's party were challenged, prosecuted and convicted. Accepting their appeal and setting aside their conviction, this is what the learned Judges observed :

> "Both sides in our opinion were prepared to battle and both sides were equally responsible for fighting. On the facts which we believe them to be true, the party of the accused certainly had a right to turn the complainants out of the land which had been in their possession for such

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1. State of M. P. *v.* Saligram, 1971 Jab. L. J. 292 at p. 301.
2. Section 300.
3. Venkata Reddi, 1937 M. W. N. 176.
4. Rajkisto Doss, 12 W. R. 43.
5. Karam Ali, A. I. R. 1927 Lah. 355 at p. 356.
6. 169 I.C. 826 : 38 Punj.L.R. 131 : 38 Cr. L. J. 807: 10 R. L. 41 ; *see* also Kirpalam *v.* Emperor, 48 Cr. L. J. 503.

a long time. In the course of the exercise of their right they have unfortunately killed Shera, receiving themselves serious injuries. Under the circumstances, we do not think that we can put any criminal liability upon the party of the accused at all. It was the complainants who were the provoking party and who were in the wrong. They were in force and armed. It, therefore, needed force and arms to turn them out. In these matters, it is impossible to judge exactly the right amount of force to be used."

In *Indar Singh* v. *Emperor*,[1] the accused as well as the complainants were joint owners of the land, but the possession of the land had all along been with the complainants. The accused went to the land and started irrigating a portion of it, which they claimed to have been allotted to them by a *panchayat*. The complainants coming to know of this also went to the land and protested against the conduct of the accused. This led to a fight in the course of which one of the party of the complainants was killed. One of the accused was convicted under Sec. 302, and the other under Secs. 324 and 323, I. P. C. They both appealed to this Court. It was urged on their behalf that since they were attacked while they were in peaceful possession of the land they had a right of self-defence. The plea was rejected by the Bench which heard the appeal in the following words:

"The learned counsel for the appellants contended that as the appellants were entitled to the joint possession of the land in any case and had succeeded in obtaining peaceful possession, they had a right of private defence but this contention cannot be upheld in the circumstances of the case. The appellants had been in possession only for a couple of hours or so and the possession had never been acquiesced in by Arjan Singh and others. The possession was, therefore, nothing better than mere trespass and could not give them any right of private defence. Arjan Singh and his companions had, on the other hand, a right to maintain their possession and to eject the appellants. If the appellants were beaten, it must have been because they refused to vacate the land. According to the provisions of Sec. 104, I. P. C., Arjan Singh and others had a right to inflict any necessary injury, short of death, in the exercise of their right of private defence of property. .. .. The appellants on the other hand committed a double wrong, firstly, by trying to take unlawful possession of the land and secondly by resisting Arjan Singh and others when they tried to eject them from the land."

In *Abdul Hadi* v. *Emperor*,[2] there was a dispute about a piece of vacant land between the complainant and the accused. The complainant sent a number of men to dig a mound in the land with the object of excavating a portion of it so as to make it fit for some purposes in manufacturing sugar. The accused arrived and beat those men. They were all prosecuted, and on conviction were sentenced under Secs. 147, 327, I.P.C. It was held that the accused had committed no offence since they had every right to prevent the digging of part of the land which amounted to criminal trespass and mischief. It was urged by the Assistant Government Advocate in support of the accused's conviction that Sec. 97 was subject to the restrictions contained in Sec. 99, I.P.C., and the accused had ample time to seek the assistance of the police before beating the complainants' men who were digging part of the land in dispute.

1. A. I. R. 1938 Lah. 60 : 173 I. C. 269 : 39 Cr. L. J. 288: 10 R. L. 421; *see* also Kirpa Ram *v.* Emperor, 48 Cr. L. J. 503.

2. A. I. R. 1934 All. 829 (2) : 148 I. C. 649: 35 Cr. L. J. 730 : 1934 A. L. J. 689 : (1934) Cr. Cas. 1012 (2): 6 R. A. 755 ; *see* also Kirpa Ram *v.* Emperor, 48 Cr.L.J. 503.

The learned Judge spurned the contention and observed that the argument led to the result that a person having a right to defend his property against mischief or criminal trespass must, instead of protecting his property, run to the police and leave the aggressors to do what the law entitled him to protect himself against by exercising his right of private defence. He further observed:

> "It could not have been the intention of the framers of Secs. 97 and 99, to compel a person having the right of private defence of property to acquiesce in criminal trespass or mischief, and not exercise his right of private defence at all. In most cases if recourse is had to public authorities the mischief complained of will have been committed before the public authorities come to his rescue. Section 105, I. P. C., provides that the right of private defence of property commences when a reasonable apprehension of danger to the property commences. It follows that if the act of mischief has already begun there is more than an apprehension of danger to the property and the right of private defence has come into existence. If the right of private defence has already arisen, it is not expected that a person entitled to exercise it should have recourse to the permission of the public authorities. He is entitled in view of the immediate danger of injury to defend it by exercising his right instead of having recourse to the public authorities."[1]

In the case of *State* v. *Bhima Deoraj*,[2] the deceased entered the house with the intention of outraging the modesty of the wife of the accused and did something to manifest that intention. The deceased was beaten by the accused with sticks. The accused continued to beat the deceased after he had fallen down.

Held that it could not be said that after the deceased fell down he continued the trespass. Whatever intention he entertained at the time of entering the house, it had disappeared and he continued on the premises not because he intended to commit an offence but because he was physically unable to get out. After the deceased fell down, the accused's right of private defence came to an end.

9. House-breaking.—House-breaking is house-trespass attended with force or surprise.[3] House-breaking, however, precedes house-trespass, and as house-trespass is the aim and object of house-breaking the right of private defence is enacted to last so long as such house-trespass continues. As the right of the owner against a house-breaker extends to the extent of even causing his death,[4] it follows that the owner, subject to other reservations, has the right only so long as the house-breaker is on the premises.[5] The moment he quits the premises the right too ceases. The owner has no right to run after him in the open, long after the house-trespass had ceased.[6]

10. Misappropriation and receiving stolen property.—The offences punishable under Secs. 403 and 411 are no exception to the offences against which the right of private defence exists,[7] but in such cases, of course, the accused would have to show why he had no time to have recourse to the authorities.

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1. Kirpa Ram *v.* Emperor, 48 Cr. L. J. 503 at pp. 507, 508 : 230 I.C. 105.
2. A. I. R. 1956 Sau. 77 at p. 80.
3. Section 445.
4. Section 103, "*Secondly.*"
5. Blakee Jolahed, 10 W. R. 9 at p. 10.
6. *Ibid.*; Guladan, (1885) P. R. No. 25 ; Imamuddin, (1876) P. R. No. 17; Jaffer, (1882) P. R. No. 2.
7. Jarha *v.* Surit Ram, 3 N. L. R. 177; *contra* Agra, (1914) P. R. No. 37 : 2 I. C. 833.

106. If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Right of private defence against deadly assault when there is risk of harm to innocent person.

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob and he cannot fire without risk of harming young children who are mingled with the mob. *A* commits no offence if by so firing he harms any of the children.

Analogous law.—This section should be read with Sec. 100 to which it relates. It is in accordance with English law. It is a case of extreme necessity, in which a person is entitled to run the risk of harming innocent persons in order to save himself from mortal injury. Here, again, the harm caused to innocent persons must have been necessary and it should not have been excessive.

CHAPTER V[1]

Of Abetment

107. A person abets the doing of a thing,

Abetment of a thing.

Firstly,—Instigates any person to do that thing; or

Secondly,—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly,—Intentionally aids by any act or illegal omission the doing of that thing.

Explanation 1,—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend *Z*. *B*, knowing that fact and also that *C* is not *Z*, wilfully represents to *A* that *C* is *Z*, and thereby intentionally causes *B* to apprehend *C*. Here *B* abets by instigation the apprehension of *C*.

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1. There was at one time some doubt as to the applicability of this chapter to offences subsequently added to the Code, e.g. by Secs. 121-A, 124-A, 225-A, 225-B, 294-A and 304-A. This doubt has now been removed by the Legislature which has formally extended the chapter to those offences, *see* Indian Penal Code Amendment Act, Sec. 13 (Act XXVII of 1870), as amended by the Repealing and Amending Act (XII of 1891).

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act,

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39. Charge of abetment when would be expected to fail.
40. Abetment by illegal omission.
41. Charge of abetment.

1. Analogous law.—The chapter opening with this section deals with the law of what is known as accessories in English law under which they are of three kinds: (*i*) accessory *before* the fact, (*ii*) accessory *at* the fact, and (*iii*) accessory *after* the fact. Now, where two or more persons are prosecuted for the same offence, they are classified as (*i*) principals in the first degree, (*ii*) principals in the second degree, (*iii*) accessories before the fact, (*iv*) accessories after the fact. Accessories *at* the fact are usually classified as principals of the second degree, that is to say, aiders and abettors who are actually or constructively present at the scene of offence. In fact, the early writers did not know of the distinction between principals of the first and principals of the second degree.[1] They called the latter accessories at the fact, but then there grew up a rule, out of the well-known maxim of civil law,[2] that as accessories they could not be brought up for trial till the principal offender had been convicted or outlawed, a procedure which was naturally productive of failure of justice as the accessory could never be brought to trial, if the principal offender died or escaped justice, or was unknown. In order to obviate this mischief, the Judges gradually adopted a rule by which such accessories became classed and where proceeded against as principals in the second degree.[3] Accessories at the fact and principals in the second degree are thus two designations denoting offenders of the same kind, and they have been classed as abettors under this chapter, though a distinction is made as regards the punishment appropriate to their case.[4]

English Law.

1. Fost. 347.
2. *Accessories sequitur naturam sui principal* is "An accessory follows the nature of his or its principal" 3 Just. 139: 4 Black, Comm. 36.
3. Coolheaver's case, 1 Leach 66.
4. Section 114.

Does English law differ from rules codified in this section.

As regards accessories before or after the fact, English law differs from the rules here codified. Under English law an accessory before the fact is one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime,[1] while an accessory after the fact is one who knowing a felony to have been committed receives, relieves, comforts or assists the felon. Any assistance whatever given to a felon made the assister an accessory.[2] Such persons have been rightly excluded from this chapter, though they have been dealt with elsewhere.[3] This chapter then deals only with offenders who would be classed as accessories *before* or *at* the fact, and so far only do these sections obtain their ground-work from the English cases.

So far as this section is concerned it follows closely the English rule applicable to such accessories, and the English cases decided thereon should be instructive authorities on the subject. But the difference between the two systems must be kept in view. Under English law the distinction between principals in the first degree and in the second degree is limited only to felonies and does not apply to high treason, forgery or misdemeanours in which both are treated as principals of equal degree. This distinction does not find a place in the Code,[4] which, indeed, recognises no distinction between what are classed as felonies and what are merely misdemeanours.

Again, the Code deals with the accession after the fact as an independent offence and not as a branch of the law of abetment. The chapter as such has, therefore, no application to them.

The definition of "abet" here given applies to all Acts of the Governor-General-in-Council, and Regulations under the Government of India Act, 1870,[5] made after the 14th January, 1887.[6] Sections 109, 110, 112 and 114 to 117, moreover, apply to all offences under any special or local law.[7] So where a pleader sent a circular round to other pleaders inviting them to send him their cases, offering to share with them his fees, he was held to be guilty of abetment of an offence under Sec. 36 of the Legal Practitioners Act.[8]

2. Principle.—This chapter penalises abetment as abetment leads to crime and many crimes would be impossible but for support and encouragement received from others who, though not actively co-operating with the criminal, still prepare his ground and facilitate his work. Indeed, it is seldom that a criminal acts without accomplices. He does not feel the same confidence as when he has friends to consult, advise and assist him in his nefarious plan. As the rich man requires a sentinel to guard his riches, so does a thief in his plans to rob them. It is the object of this chapter to punish all such as may have lent their assistance to the commission of a crime. As Bentham remarked: "The more these preparatory acts are distinguished for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy with the intention of stopping his enterprise. He places in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances but connected among

Objects of this Chapter V.

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1. 1 Hale P. C. 615 & 616.
2. 1 Hale P. C. 618 : 4 Black. 37.
3. E. g. Secs. 130, 136, 204 212.
4. Section 34.
5. 33 & 34 Vict., Sec. 1.
6. General Clauses Act (X of 1896), Secs. 3 (1), 4 (2).
7. Section 40. The contrary held in Kulli Mooddeen, 7 W. R. 53; Ramlugan, 5 W. R. 54; Elmstone, 7 B. H. C. R. 89 must now be considered as overruled by the Legislature.
8. Parbati Charan Chatterjee, I. L. R. 17 All. 498 at p. 504 (P.C.).

themselves, in such manner that the enemy finds in each, new dangers and new obstacles."[1]

Definition of abetment.

The definition of "abetment" here given is general. It is not even the definition of the abetment of an offence but of a thing which may or may not be an offence. This was necessary to embrace cases presented in the chapter in which the Code regards the abettor as solely liable, though the person abetted may be wholly innocent. In such a case, the act of the latter would not be an offence, as that term is defined in the Code: it is merely a "thing" the abetment of which may be nevertheless punishable. The abetment of an offence is defined in the next section. Here the term is defined in the abstract. In the next section it is defined in its relation to a person as affecting his criminal responsibility. But though the term "abet" has been generally defined here, it is to be understood only as a preliminary description of the word as used in the Code. The encouragement of virtuous act is not the "abetment of a thing" as here defined. The section describes the three shades of meaning which the term bears in the Code, which rests the degree of criminality upon the degree of abetment. The lowest form of abetment is when a person[2] instigates another to do a thing. Such instigation (*i*) may consist of a mere solicitation without more, or (*ii*) may be actively engaging with another in a conspiracy to do an act, or (*iii*) may consist of active participation in the doing of an act, in which case the abettor is what would be called in English law, an accessory at the fact or a principal in the second degree.

3. Scope.—A disc made of gold had been kept concealed in the soil by some unknown person, and a cowboy aged about 7 years old discovered it by chance. The mother of the cowboy did not ask her son to give any notice to the Collector or any other authority. *Held* that the mere connivance on the part of the mother in the sense that she did not ask her son to report the matter to the authorities did not amount to abetment within the meaning of Sec. 107 of the Indian Penal Code.[3]

4. Meaning of words.—"*Instigates any person to do that thing*": The word "instigated" has been used here not as a term of art, but in its general sense as denoting illegal solicitation. A mere request to do a thing may amount to an abetment, e.g., the offer of a bribe which is refused. It is not necessary that a person instigated should be known to the instigator, as for instance, a person may intend to instigate a general rebellion by his inflammatory writing.[4] "*Engages in any conspiracy... for the doing of that thing*": A conspiracy is an agreement by two or more persons to do an illegal act or a *legal* act in ar illegal manner. Merely taking part in the deliberations for a conspiracy is not an abetment unless one "engages" in it; which means that unless one approves and furthers its object. Moreover, there must take place "an act or omission in pursuance of that conspiracy". "*If an act or illegal omission takes place*": This means that there must be something more than a mere plotting to amount to an abetment under this clause. There must be some act or illegal omission in pursuance of that conspiracy. The words "or illegal omission" in the clause are added *exmejori cautela*. In view of the provisions of Sec. 32 they were unnecessary. "*Intentionally aids by any act or illegal omission*": This clause must be read with Explanation 2, which defines when a person is said to *aid* the doing of an act. In order to amount to abetment the aiding must have been intentional (*see* also note under Sec. 109).

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1. *Principles of Penal Laws*, Pt. 3, Ch. 15, 3. p. 560.
2. Section 108.
3. Shyam Bahadur Koeri *v.* State, A. I. R. 1967 Pat. 312 at p. 314.
4. Savarkar, 5 I. C. (Bom.) 854.

5. Essentials of abetment.—Three things are essential to complete abetment as crime: There must be an abettor; he must abet; and the abetment must be an offence. This section analyses the meaning of the word "abet" as used in this connection. It lays down that a person who *instigates* another to do a thing abets him to do that thing. In this sense, it makes instigation tantamount to abetment. But a person may not only *instigate* another, he may co-operate with him and his co-operation may consist of counsel or conjoint action. In either case there is an abetment. It is not difficult to see why a person who aids another in the commission of a crime is regarded as an abettor. Nor is it difficult to imagine why one who plots a crime and thereby facilitates it commission should be placed in the same category. But a person who merely "instigates" another may have no idea of the crime that may be committed in consequence. And, moreover, is an "instigator" worse than a co-conspirator, whose abetment is not complete unless "an act or omission takes place in pursuance of that conspiracy?" The question then depends upon the precise meanings attaching to the expression "instigates", "engages" and "intentionally aids" which have therefore to be examined.

Three essentials of abetment.

As is apparent from the above discussion the definition of abetment in this section includes not merely instigation which is the normal form of abetment but also conspiracy and aiding.[1] In order that there may be abetment there must be either instigation or intentional aiding or engaging in a conspiracy as laid down in this section. General advice is far too vague an expression to prove abetment.[2]

Definition of abetment not only includes instigation, but also conspiracy and aidings.

Under the English law a person could only be convicted as an aider and abettor if he knew all the circumstances which constituted the offence: it is immaterial whether he realised or not that those circumstances constituted an offence.[3] Devlin, J., in the last cited case said that a person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting.

6. Sections 107 and 34, distinction between.—(*See* under Sec. 34).

7. Distinction between the abetment as defined in Sec. 107 and the offence of criminal conspiracy as defined in Sec. 102-A.—In order to constitute the offence of abetment by conspiracy, there must first be combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. It is worthy of note that a mere conspiracy or a combination of persons for the doing of a thing does not amount to an abetment. Some thing more is necessary, namely, an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the

Abetment, what amounts to.

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1. Sonnappa Shina Shetty *v.* Emperor, A. I. R. 1940 Bom. 126 at p. 127 41 Cr. L. J. 481: 187 I. C. 464 : 42 Bom L. R. 205.
2. Pramathanath *v.* State, A. I. R. 1951 Cal. 581 at p. 584 : 52 Cr. L. J. 1480: 6 D. L. R. (Cal). 154: 5 A. I. Cr. D. 816.
3. National Coal Board *v.* Gamble, (1958) 3 W. L. R. 434.

thing for which the conspiracy was made. Before the introduction of Chapter V-A, conspiracy, except in cases provided by Secs. 21-A, 311, 400, 401 and 402 of the Indian Penal Code, was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy, and amounted to a distinct offence. Chapter V-A, however, introduced a new offence defined by Sec. 120-A. That offence is called the offence of criminal conspiracy and consists in a mere agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means; there is a proviso to the section which says that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The position, therefore, comes to this. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal means, some act besides the agreement is necessary. Therefore, the distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence.[1]

Gist of offence of criminal conspiracy.

Distinction between abetment by conspiracy and offence of criminal conspiracy.

The distinction between the offence of abetment under the second clause of Sec. 107 and that of criminal conspiracy under Sec. 120-A is this. In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence.

So far as abetment by conspiracy is concerned the abettor will be liable to punishment under varying circumstances detailed in Secs. 108 to 117. For the offence of criminal conspiracy it is punishable under Sec. 120-B.[2]

8. Commission of offence when unnecessary.—According to this section a person abets the doing of a thing when (1) he instigates any person to do that thing or (2) engages with one or more other person or persons in any conspiracy for the doing of that thing.... or (3) intentionally aids, by any act or illegal omission, the doing of that thing. In either of the first two cases it is immaterial for the conviction of the abettor whether the person instigated commits the offence or not, or the persons conspiring together actually carry out the objects of the conspiracy.

A person abets by aiding when by the commission of an act he intends to facilitate and does facilitate the commission thereof.[3]

In the above-noted case, the appellant was charged with an offence under Sec. 165-A of the Indian Penal Code for having abetted one Khalilur Rahman in the commission of an offence by the latter under Sec. 163, I. P. C. Khalilur

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1. Pramatha Nath Talukdar *v.* Saroj Ranjan Sarkar, A. I. R. 1962 S. C. 876 at p. 886: (1962) 1 Cr.L.J. 770: 1962 S. C. A. 253.
2. *Ibid.*
3. Faguna Kanta Nath *v.* State of Assam, A. I R. 1959 S. C. 673 at p. 676: 1959 S. C. J. 643.

Rahman was acquitted. *Held* that if Khalilur Rahman is acquitted and therefore the offence under Sec. 161 is held not to have been committed, then in this case no question of intentionally aiding by any act or omission the commission of the offence arises.

9. Instigation.—In the first place, then, when is a person said to instigate another? The word "instigate" literally means to goad,[1] or urge forward or to provoke, incite, urge or encourage to do an act, by usage now an evil act. So the words abetment, procurement, helping, maintaining and counselling have been used in the English statutes[2] as if they were synonymous and conveyed the same meaning. Abetment is there described by the words "command, counsel or hire",[3] or more loosely by use of the words "comfort, aid, abet, assist, counsel, hire or command".[4] But in all these varied expressions, there is, however, one important element present, namely, that the abettor aids the offender in the commission of the crime. And when he aids him he is said to instigate him in popular parlance, and to abet him in the language of law. Such aids must be something more substantial than mere advice. Advice is not necessarily abetment.[5] Instigation necessarily indicates some active suggestion, or support or stimulation to the commission of the act.[6] Two persons at least are, therefore, required to complete an offence by instigation. A person cannot instigate himself. He can only instigate another though that another may not be known to him. Now a person may aid another without knowing that he was aiding him to commit a crime, and his aid may be so remote as not to amount to that abetment which it is the policy of law to check and punish. A hotel-keeper or person charitably disposed may, for instance, give lodging and food to a robber on his way to the crime.[7] A smith may provide him with tools. They both assist him in a way, but are they abettors of his crime? All assistance is not abetment. As the Court remarked: "The supplying of necessary food to a person known to be engaged in crime in not *per se* criminal, but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself, while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of crime, and might facilitate it."[8]

Abetment involves something more substantial than mere advice.

At least two persons require to complete offence by instigation.

10. Mens rea.—In order to amount to abetment there must then be *mens rea* or community of intention. Without knowledge or intention, there can be no abetment,[9] and the knowledge and intention must relate to the

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1. Gk. stechen, a stick in stechen, to prick with a stick.
2. 23 Hen. VIII, c. 1, Sec. 3; 1 Ed. VI c. 12, Sec. 13.
3. 4 & 5 Ph. & M. C. 4.
4. 3 & 4 Will & M. C. 9 : 24 & 25 Vic., c. 94, Sec. 2.
5. Pramathanath, *v.* State, A. I. R. 1951 Cal 581 at p. 584 : 52 Cr. L. J. 480: 6 D. L. R. (Cal). 154: 5 A. I. Cr. D. 816. *supra*. In the absence of evidence as to what the advice was, evidence of general advice is not sufficient to prove abetment.
6. **Raghunath Dass** *v.* Emperor, A. I. R. 1920 Pat. 502 at p. 503; Milan Singh, I. L. R. 5. Lah. 1.
7. Lingham Rammanna, I. L. R. 2 Mad. 137.
8. *Ibid.*
9. The La Aunga, (1906) 12 Bur. L. R. 70; Nemur, 33 I. C. (Mad.) 655. In Lakshmi Narayan, 42 I. C. (Mad.) 989, the accused was found to have laid trap to catch a Sub-Magistrate whilst receiving a bribe. He was convicted of abetment (submitted wrongly) the Court holding the pretence of *mens rea* not a pre-requisite of abetment.

crime.[1] And the assistance must be something proximate[2] and something more than a mere passive acquiescence. Two men having quarrelled agreed to fight with their fists each one having deposited £ 1 with the prisoner who held the amount as a stake-holder to be paid to the winner. The prisoner had otherwise nothing to do with the fight nor was he present at it. He had no reason to suppose that the life of either man would be endangered. The men fought and one of them received injuries, of which he afterwards died. The prisoner having been informed who was the winner but not knowing of the other man's danger paid over the £ 2 to the winner. He was indicted as an accessory, but was acquitted. Cockburn, C. J., delivering the judgement of the Court, remarked: "To support an indictment for being accessory before the fact to manslaughter, there must be an active proceeding on the part of the prisoner. He is perfectly passive here, all he does is to accept the stakes."[3] So, too, it has been held that persons who are merely present at an unlawful fight, e.g. a prize fight or a duel, are not necessarily to be treated as its abettors[4] though the contrary has also been laid down in other cases[5] which have already been referred to elsewhere. The case of persons who do more than merely witness the fight, e. g. who keep the ring, or realise the gate money, or act as seconds, is, of course, different for they are not merely *spectator haud particeps* but *particep criminis*. That a person who is merely present at[6] or cognizant of a crime[7] or only conceals it[8] cannot be treated as an accomplice has been conceded. So words that amount to bare permission do not amount to instigation, as if *A* say to *B* "I will kill *C*" and *B* says "you may do your pleasure for me" which will not make *B* an abettor of *A* in his murder of *C*.[9] Not only acquiescence, but some degree of active support is essential to constitute instigation. Where, for example, the prisoner procured a dose of corrosive sublimate for a pregnant woman with a view to causing abortion, of which she died, and it appeared that though the prisoner knew the purpose for which it had been obtained, still he had previously dissuaded her from taking it, and in fact, he had only procured it under a threat by her of suicide and in the belief that she may change her mind. It was held that he was not an abettor of murder.[10] It is by no means necessary that the person instigated should be known to instigate, as where the accused desired to instigate a rebellion by rousing the masses by his inflammatory writings[11] nor is it necessary that the instigation should be adequate to influence them. Where the only evidence against the accused consisted of his statements in Court and his statement in the Sessions Court taken as a whole showed that he had no common intention with other people to commit the murder of Narain Singh and his only act of assistance to the murdererss was due to threats of being put to death in case of non-compliance, the assistance being unintentional did not amount to abetment of the offence of murder; even if he was guilty of abetment, the offence was committed under threat of death for non-compliance and so he committed

Community of intention to constitute abetment.

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1. Mahomed Jamal, A. I. R. 1930 Sind 64.
2. Ram Nash, I. L. R. 47 All. 268; Radha Kishun, A. I. R. 1929 Pat 157.
3. Taylor, L. R. 2 C. C. R. 148 : 44 L. J. M .C. 67 ; Sarju Prasad, 25 I C. (Oudh) 625.
4. Young, 8 C. & P. 644; Cuddy, 1 C. & K. 210 ; Coney, 9 Q. B. D. 534 ; Chatru, 431 I. C. (Pat.) 95.
5. *Per* Littledale, J., in Murphy, 6 C. & P. 103.
6. Deodhar Singh, I. L. R. 27 Cal 114 Prasad, *supra*; Nennur Rami, 33 I.C. (Mad.) 655; Ammaniammaly, 7 Cr. L.R. (Mad.) 200; Mataro, 23 S.L.R. 5.
7. Ishan Chandra, I.L. R. 21 Cal. 328.
8. 1 Hale P.C. 616; 2 Hawk P.C.C. 29, S. 23; Goman Saya, 21 I. C. (Bur.) 658.
9. 1 Hale P. C. 616; Etim Ali Muzumdar, 4 C. W. N. 60.
10. Fretwell, L. & C. 161.
11. Savarkar, 5 I. C (Bom.) 854

no offence in view of the provisions of Sec. 94 of the Penal Code[1] for murder in that section does not include abetment of murder.[2]

11. What instigation is abetment.—There must be then a direct incitement to crime. If it is so intended the instigation is complete, though it may have produced no effect upon the person abetted.[3] Nor is it necessary that the latter should have concurred in the proposal. To take an example given by the draftsmen elsewhere : "The person who without any demand, express or implied, on the part of a public servant, volunteers an offer of a bribe and induces that public servant to accept it will be punishable under the law of abetment as an instigator. But the person who complies with a demand, however, signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe."[4] In its lowest form, then, instigation may amount to a mere encouragement given in words or by conduct.[5] Persons who contribute to the payment of bribe, as by paying a subscription known to have been raised for the purpose, are strictly speaking instigators.[6] There is no doubt that there has to be a reasonable certainty in regard to the meaning of the words used by the "inciter" in order to judge whether or not there was an incitement but courts do not think it necessary in law to prove the accual words used for the incitement.[7] A person may inflame another to commit a crime not by saying so, but by harping on the injuries, real or supposed, which he has suffered, but in such a case the question would be not only what was said, but what was the speaker's intention at the time, sympathy or instigation to crime. Indeed, words of mock-sympathy are often more insidious and effective than a direct incitement to violence, but at the same time it is not always easy to lay bare their true character, and it is in very rare cases that such words would be taken to amount to an abetment of the offence they may lead up to. So the publication of obscene literature is a crime and a newspaper publishing an advertisement for the sale of obscene books is guilty of abetment as it knows that the advertisement would encourage their sale.[8] So again, where the prisoner had connived at the deceased's becoming a *suttee*, and had told her to repeat "Ram Ram" while becoming a *suttee*, he was held guilty of abetment.[9]

Instigation may amount to mere encouragement given in words or by conduct.

As stated above, advice is not necessarily abetment. In order that it may be abetment it must be either instigation, or intentional, aiding or engaging in a conspiracy as stated in this section.[10] It is the instigation to the commission of the act itself which constitutes the offence, that is regarded as abetment. To ask a person as a mere threat to fire a gun without intending that he should realy fire it, is not to instigate

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1. Bachchan Lal *v.* State, A. I. R. 1957 All. 184 at p. 187 (D. B.) : 1957 All. L. J. 20 : 1957 Cr. L. J. 344.
2. Umadasi Dasi *v.* Emperor, A. I. R. 1924 Cal. 1031 at p. 1033: I. L. R. 52 Cal. 112 : 28 C. W. N. 1046.
3. Sec. 108, Expl. 2.
4. Note E, Reprint ; Magan Lal, I. L. R. 14 Bom. 115. But now *see* Emperor *v.* Chaube Dinkar Rai, A. I. R. 1933 All. 513 : I. L. R. 55 All. 654 : 34 Cr. L. J. 623.
5. Baldeo Sahai, I. L. R. 2 All. 253.
6. Magan Lal, I. L. R. 14 Bom. 115 ; Ameeruddin Salebhoy, I. L. R. 24 Bom. 345.
7. Prem Narain *v.* State, A. I. R. 1957 All. 177 at p. 183 (D. B.) : 1957 L. J. 459 : 1957 Cr. L. J. 337.
8. DeMarney, (1907) 1 K. B. 388.
9. Mahit Panday, 3 N. W. P. H. C. R. 316 ; Gopal Singh, 1 Agra 21 ; Ram Dial, I.L.R, 36 All. 26.
10. Pramathanath *v.* State, A. I. R. 1951 Cal. 581 at p. 584 : 52 Cr. L. J. 1480.

him to fire the gun. The threat would become instigation only if it is found that in the event of the threat having no effect the gun should in fact be fired.[1]

Even if the object of the person who instigated another to commit a crime is to catch him in the act of committing the crime instigation by him nevertheless amounts to abetment of the offence.[2]

There is no reason why Sec. 107 and therefore Sec. 109 should not be applicable to cases under Sec. 182 of the Code. Where a person instigates some one to make a false report at the police station that his camel had disappointed he can be convicted under Sec. 182 read with Sec. 109.[3]

12. Withdrawal after instigation.—A person may instigate another and then repent before the offence is committed, but it does not seem that he is any the less responsible for his act. In England, the rule is in this respect different. So Lord Hale says : "*A* commands *B* to kill *C*, but before the execution thereof *A* repents and countermands *B*, and yet *B* proceeds in the execution thereof ; *A* is not accessory, for his consent continues not, and he gave timely countermand to *B*, but if *A* had repented yet if *B* had not been actually countermanded before the act committed, *A* had been accessory."[4] It may be doubted if this is even good law now in England. For the mere inciting of another to commit a crime is itself a misdemeanour in English law though no offence was committed in pursuance of the incitement.[5] In a misdemeanour, of course, there cannot be accessory under English law (para. 1, *ante*), still the result is the same. So far as this country is concerned, the retraction does not purge the instigator of his crime, though the fact is material as evidencing intention or as explanatory of the meaning of the instigation, or as showing that the offence was not committed in consequence thereof[6] and it may in any case be proved in mitigation of sentence. Even in England, it has been held in the case of conspiracy that the entering into conspiracy completes the crime though a conspirator may withdraw from it on the spot altogether and no one be harmed.[7] The accused has *locus paenitentiae* before his office is complete but not afterwards, for then though he may have done all in his power to undo the mischief, it may still remain.

English law.

Retraction of an instigation does not purge the instigator of his crime.

13. Instigation must be conveyed.—There is, of course, no instigation where the incitement to commit a crime is written and posted, but the letter

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1. Shrilal *v.* State, A. I. R. 1953 M. B. 155 at p. 156: 1952 M. B. L. J. 428.
2. *In re* Koganti Appayya, A. I. R. 1938 Mad. 893 at p. 895: 40 Cr. L. J. 103: 1938 M. W. N. 825. But *see* Queen-Empress *v.* Javacharan, I. L. R. 19 Bom. 363 ; Hazura Singh *v.* Emperor, A. I. R. 1929 Lah. 436 : 30 Cr. L. J. 941 : 118 I. C. 544 ; Emperor *v.* Chaturbhuj Sahai, I. L. R. 38 Cal. 96 : 15 C. W. N. 171 ; Govinda Balali Sonar *v.* Emperor, A. I. R. 1936 Nag. 245 : 38 Cr. L. J. 423 : I. L. R. (1937) Nag. 181 : 167 I. C. 521 ; Decoy is no accomplice.
3. Dawar Singh *v.* Emperor, A. I. R. 1937 All. 755 at p. 756 : 172 I. C. 23 : 39 Cr. L. J. 102 : 1937 A.W.R. 865.
4. Hale P. C. 648.
5. Higgings, 2 East 5 ; Gregory, L. R. I. C C. R. 77.
6. Section 116.
7. *Per* Bayley, J., in De Perenger, 3 M & S. 67 at p. 76 ; Bridgewater's case (unrep. cited *per* Lord Coleridge, L C. C. J. in Rogul Steamship Co. *v.* McGregor Gaw & Co., 21 Q. B. D. 544 at p. 549; Sushil Chandra, 6 O. L. J. 210 : 5 I. C. 449.

never reached the addressee, or if it is handed by him to someone else before reading it.[1] In such a case though there is no abetment, the attempt to abet would be complete.[2]

Instigation may be conveyed through a third party.

An instigation may be conveyed through the medium of a third party in which case there may be no direct communication between the abettor and the actor. So if *A* orders his servant to hire another to murder *B* and the servant hires *C* with the money of *A*, *A* is an abettor in the same way and to the same extent as if he had himself hired *C* to commit the deed.[3] Lord Coke commenting on the Statute of Westminster relating to abetment, said: "Under the word 'aid' are comprehended all persons, counselling, abetting, plotting, consenting and encouraging to do the act and not present when it is committed."[4]

14. Limits of liability.—But a person instigating one offence cannot be held responsible for the commision of an offence wholly different from that which he had instigated.[5] Thus, if *A* commands *B* to burn *C*'s house and he in so doing commits a robbery,[6] *A* though an abettor of the burning is not an abettor of the robber. So again if *A* incites *B* to steal *C*'s goods on the road and *B*, breaks *C*'s house for the purpose, *A* is an abettor of theft, but not of house-breaking.[7] Where several soldiers empowered to arrest a person unlawfully broke into his house and some of the soldiers began to plunder and steal his goods, the question arising whether all were equally liable Holt, C. J., said: "That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first, yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door, for this reason because they knew not of such intent but it was a chance opportunity of stealing whereupon some of them did lay hands."[8]

Instigation must have influenced the actor.

In order then to make a man liable for instigation there must be something to show that it had influenced the actor, which may be presumed if he had substantially carried out the instigation. On the other hand, if his act was substantially different, it could not be presumed to be due to the instigation. If, for instance, *A* orders *B* to murder *C* by poison and *B*, instead of poisoning him, murders him by a sword or other weapon or by any other means, *A* is an abettor of the murder, for the principal object is attained though not in the manner suggested.[9] So if *A* instigate *B* to steal *C*'s goods on the road and *B* breaks into his house as stated before, *A* is not an abettor of house-breaking though he has abetted theft. But if in such a case *A* had incited *B* to steal goods in *C*'s house, but not to break into it, and *B* nevertheless broke in to effect theft *A* would be an accessory to the breaking, because *A*, having commanded house-trespass, *B* had committed house-breaking which is not a very different offence.[10] In fact, an abettor is liable for the probable consequences of his abetment though not for the consequences not so connected with it.[11] So if *A* advises *B* to rob *C*, and in robbing him he kills him. *A* is liable as an accessory to the killing whether the killing was on resistance made or to conceal the act, or

1. Ransford, 13 Cox. C.C. 9, followed in Sheo Dayal Mal, I.L.R. 16 All. 389.
2. Ranford, 13 Cox. C.C. 9.
3. *Per* Foster, J., in McDaniel, 19 St. Tr. 746 at p. 804; Earl of Somerset, 2 St. Tr. 966.
4. *Per* Foster, J., in McDaniel, 19 St. Tr. 746 at p. 805.
5. Fost. 369.
6. 1 Hale 617; 4 Black., 37.
7. Plowd. 475: 75 E. R. 703 at p. 709 (also see *nota bena* by the Reporter).
8. Anon., 1 Leach, 7 Note (*a*).
9. Fost. 369, 370; 2 Hawk. P. C. C. 29, Sec. 20.
10. Bac. Max. Reg. 16.
11. Section 111, *post* (q. v.)

upon any other motive operating at the time of the robbery. So again, if *A* orders *B* to burn the house of *C*, which *B* does, but the flames extend and destroy *D*'s houses, *A* is liable as an abettor of the burning of the houses of both *C* and *D*.[1]

But does the same principle extend to a case in which *A* orders *B* to murder *C* and *B* by mistake murders *D*? It is said that, in such case, *A* is not liable.[2] But the soundness of this view may be gravely doubted. Suppose *A* had described *C* to *B* by his stature, appearance and the like, and *B* mistook, from the description *A* gave, *D* for *C* and killed him, could it be said that *A* was not liable, though he had compassed *D*'s death ? In such a case *A* would be certainly liable. But suppose that in such a case *B* knew *C* and *D* and *B* having a grudge of his own with *D* found it convenient to despatch him could it be said that *A* had abetted *C*'s death? The true solution of the question is thus proposed by Foster: "Did the principal commit the felony he stands charged with under the influence of the flagitious advice; and was the event in the ordinary course of things, a probable consequence of the felony or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or upon a different subject".[3]

All persons liable for offence equally committed in prosecution of common design.

But where the offence is committed in prosecution of some unlawful purpose, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be equally liable for any offence which may be committed in prosecution of the common design. But in such case, it must appear that (*i*) there was a common design and that (*ii*) the offence was committed in prosecution of that design. So, where a number of men, some of whom were armed with sticks, met to commit rioting, and *A* ordered one of them, his servant *B*, to strike, whereupon *B* who who was unarmed picked up a stick lying by chance on the ground with which he committed grievous hurt it was held that *A* was liable though *B* had not the stick when he was ordered to beat.[4] The case would have been, however, different if the assembly had previously resolved not to use sticks, and *B* had then picked it up to use it. So the creditor, who ordered his servant to carry off his debtor's cattle in satisfaction of his debt, which he did, keeping the cattle in his own custody, was convicted of abetment of theft.[6] Instigation to do a certain act implies its negative. So where a person asked another to suppress facts in giving his evidence, it was held to amount to the abetment of giving false evidence.[7]

15. Misrepresentation or concealment as abetment.—Instigation may consist not only in the direct incitement to crime but it may be wilful misrepresentation or concealment of a fact which a person is bound to disclose. In other words, a person may instigate directly or indirectly. The illustration presents a case in point. *A* knows that *B* is not *C*. There is a warrant for the arrest of *C*. He represents to the officer executing the warrant that *B* is *C*, and thereby causes the officer to arrest *B*. The officer is guilty of wrongful restraint, but *A* is guilty of abetment. Here *A* was not under any legal obligation

Explanation 8.

Scope of the illustration to he section.

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1. Fost. 370.
2. Saunders, Plowd. 475; 1 Hale 431.
3. Fost. 372.
4. Rassokoolah, 12 W.R. 51.
5. *Ibid.*
6. Madaree, 3 W.R. 2; Tarinee Prasad, 18 W.R. 8.
7. Andy Chetty, 2 M.H.C.R. 438.

to assist the officer, but having proffered his assistance he could not deceive him. But if in such a case, suppose that the officer had arrested *B*, mistaking him for *C*, and *A* had not disabused him of his mistake would *A* have been liable as an abettor ? Certainly not. Because he was not bound to correct the officer and his omission to correct him could not incur the consequence of instigation. But if he had been under some legal obligation to make the disclosure, his omission would then have been "a wilful concealment of a material fact which he was bound to disclose" within the meaniag of this explanation.[1] So an omission to give information about the commission of a crime does not amount to abetment, unless such omission involves a breach of a legal obligation.[2] So a policeman or a chowkidar, failing to give information about the commission of a cognizable crime, would be guilty of wilful concealment within the meaning of this explanation, and so would also be a zamindar in certain particular cases. But a private individual is only morally, not legally, bound and if he omits to do what he ought to do, he may suffer in coscience or character, but the law will not touch him.[3] So under the Police Act a police officer is always on duty in his district, and bound to shelter every person in custody and to arrest persons committing assaults likely to cause grievous bodily injury. If, therefore, he purposely keeps out of the way, knowing that some prisoners are likely to be tortured to make confessions, he is guilty of abetment.[4]

As all acts amounting to abetment must have been done prior to the act which constitutes the crime, any subsequent knowledge of the crime is wholly insufficient to constitute abetment.[5] And even when a person is shown to have possessed previously knowledge of a design on the part of another to commit a crime, and that he had spoken to him about it would be insufficient to constitute abetment, unless it is at the same time shown that the person aware of the design had instigated the other by word or deed to commit the offence.[6] Here again, the case of a police officer would be different, for if it is shown that he was aware of such a design, he becomes liable as an abettor[7] as he has then a higher duty to discharge, the omission of which exposes him to the same penalty as if he were an abettor.

Subsequent knowledge is insufficient to constitute crime.

16. Intention or preparation.—A mere intention or preparation to instigate is neither instigation nor abetment. A person who asks a doctor to supply her with poison to enable her to poison her son-in-law, does not attempt murder of her son-in-law. She may, however, be charged for abetting the doctor to abet her to commit murder, and in so far as she abets him, she is guilty of abetment.[8] Here there was instigation, because the object was disclosed. But suppose that in such a case the accused had asked for the poison without disclosing her object, then there would have been no abetment at all. So where one Baku took her grand-daughter from Sholapur to Tuljapur, a place in the Nizam's dominions, her object being to dedicate her to a temple as a *murli*, a class of persons who generally lead a life of prostitution, it was held with reference to the applicability of Sec. 108-A that the conduct of the accused in the British territory did not amount to anything more than mere

A mere preparation to instigate is neither instigation nor abetment.

1. Cooverji, 9 Bom. L. R. 159 at p. 161.
2. Khadim Sheikh, 4 B. L. R. (A. C.) 7.
3. *Per* Glover, J., in Khadim Sheikh, *supra*; Latif Khan, I. L. R. 20 Bom. 394.
4. Latif Khan, *supra* ; Kali Churn Gangooly, 21 W. R. 11 ; *see* Expl. 2, relied on in the last case.
5. Shumeeruddeen, 2 W.R. 40.
6. Venkatasami, (1866) Weir (3rd Ed.), 187.
7. Section 119.
8. Section 80, Expl. 4; Bakhtawar, (Rep. 1882) P.R. No. 24.

preparation, and that her intentions to dispose of her grand-daughter for prostitution did not amount to an abetment within the meaning of this section.[1] But where a number of persons, being aware of the objects of the members of an unlawful assembly, departed from the locality where such assembly was formed, it could not be said that their failure to remain and oppose the assembly amounted to instigation and indirect support of the assembly.[2] So where a person receives without objection an unstamped document, he cannot be held to have abetted its execution as such.[3]

Second mode of abetment.

17. Abetment by conspiracy.—An abettor by instigation may not only be content with his instigation. He may "engage with one or more person or persons in any conspiracy for the doing of that thing;" in which case he not only instigates but conspires to commit a crime, an act punishable under Sec. 120-B. The fact that he conspires in addition to instigating does not, however, aggravate his offence except in the four cases mentioned in Sec. 121-A (conspiracy to wage war), Sec. 311 (*thug*), Sec. 401 (belonging to a gang of thieves), Sec. 402 (being a member of an assembly of dacoits). An agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means in itself amounts to a criminal offence.[4] Before the enactment of Chapter V-A in 1913, conspiracy as such was treated as only a species of abetment and was held to be punishable as such[5] (Sec. 120). But conspiracy relates to the stage of preparation rather than abetment though when it develops beyond the preparatory stage it amounts to and is punishable as an abetment. A mere conspiracy does not amount to abetment,[6] and is not punishable as such.

18. Essentials.—In order to constitute conspiracy four things are essential : (*i*) there must be at least two persons, (*ii*) they must "engage" in the commission of an act; (*iii*) "an act or omission" must take place in pursuance of that conspiracy; and (*iv*) that act or omission must have taken place "in order to the doing of that thing".[7] A person *A* may propose to *B* : "Let us murder *C*." *B* may dissent or say nothing or he may agree. *A*'s proposal is met by the first clause. But it is clear that if *A* agrees, he is equally guilty. His case is met by this clause. As soon as *A* and *B* agree both become liable, *B* under this clause, and *A* both under this and the last clause. If *B* dissents, *A* is nevertheless liable as an instigator under the last clause, though neither *A* nor *B* is liable under this. The two clauses thus then overlap, but this clause is intended to cover cases which, but for it, would not fall under the first or next clause.

19. Two or more must join.—Now as regards the first requisite it goes without saying that a man cannot conspire with himself. He must have at least one another to conspire with. That other may or may not be an adult. In England the two must not, however, be related to each other as husband and wife, for they are regarded as one in the eye of the law,[8] though the law of this country is in this respect different.[9] As two persons

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1. Baku, I. L. R. 24 Bom. 287; *see* Sec. 108-A Comm.
2. Atim Ali, 4 C. W. N. 300. A private citizen is under no obligation to take upon himself the dispersal of unlawful assemblies, Secs. 127-132, Cr. P. C.
3. Janki, I. L. R. 7 Bom. 82 ; Mithulal, 8 All. 18; Sombhu Singh, I. L. R. 1 Oudh 33; Madan Singh, 7 C. P. L. R. 21; Hira, (1895) P. R. No. 18 ; Nga Shawe Bwin, 11 Bur. L.R. 34.
4. Section 120-A.
5. Tirumal Reddi, I. L. R. 24 Mad. 523; Sushil Chandra, 6 O. L. J. 210 : 51 I. C. 449.
6. Sher Ali, (1879) P. R. No. 18.
7. Kalit Munda, I. L. R. 28 Cal. 797.
8. 1 Hawk., c. 572, Sec. 8.
9. *See* Sec. 120-A, Comm. *post*.

are required to constitute a conspiracy, both will be acquitted of that offence if conspiracy cannot be established against any one of them.[1]

20. They must "engage".—Not only must there be two persons, but the two must be "engaged" in the conspiracy. If one engages an innocent person as his agent for the commission of a crime, there is no conspiracy, for the two had not the common intention. Conspiracy is a secret combination of men to commit a crime in concert. Such combination may be formed by an agreement, or it may be the result of an understanding. Two persons, Kelly and MacCarthy, had been engaged by the prosecutor for unloading oats from a vessel, and carrying them to his warehouse, Kelly being employed to draw them from the vessel and MacCarthy to carry them to Kelly's trams on which they were carried. Whilst one bag was being thus conveyed, Kelly said to MacCarthy: "It is all right" and shortly afterwards MacCarthy stole some oats of two sacks and put them under the tram. Kelly was absent when this was done, but returned and took away the stolen oats with the rest. It was contended for Kelly that he could not be convicted of theft, but Maule, J., said that it was all one transaction in which both concurred, and that both having concurred, and both being present at some parts of the transaction, both might be convicted.[2] They would be convicted here of conspiracy under Sec. 120-A which is much wider than the abetment punishable under this section or the rule enacted in Sec. 34. Indeed, almost all cases of abetment, resulting in crime thereupon, would fall under the head of conspiracy, the only difference being that the abettor, as such, may be less guilty than the conspirator, as where he merely instigates another to do a thing which the other may not agree to do, in which case, the offence abetted is not actually committed in consequence of the abetment. An example would suffice to illustrate the difference. *A* instigates *B* to murder *C*, *B* refuses. Here *A* has abetted *B* but there is no conspiracy. Even in such a case, if *B* agrees to commit murder, but does no other overt act in pursuance of the agreement, neither *A* nor *B* can be charged of conspiracy. But, if *B* does an overt act, both *A* and *B* would be *equally* guilty, though in a case of abetment *A* would be less guilty than *B*. The distinction between the two cases is at times fine and in many cases, it is without a difference ; but the distinction exists and has been made in the law, which must be recognised.

Abettor may be less guilty than conspirator.

21. Knowledge of common design.—So far as abetment is concerned, one thing is, however, clear, namely, that in order to charge a person with abetment under this clause, it must be shown that he had "engaged" in the conspiracy. That engagement of necessity postulates knowledge of the common design. It is not necessary that all co-conspirators should be equally informed as to the details, for there is always such a thing as an inner circle in conspiracy but they must, at least be aware of the general purpose of the plot, and that purpose must, of course, be unlawful. The engagement here spoken of may consist of nothing beyond a mere connivance and countenance on their part, as where a woman prepared herself for *sati* in the presence of the prisoners who followed her to the pyre, and stood by, one of them, her step-son, crying "Ram,

Co-conspirators at least be aware of general purpose of the plot.

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1. Manning, 12 Q. B. D. 241; Plummer, (1902) 2 K. B. 339; Jogjiban Ghose, 9 C. L. J. 663; Abdool Kurim, I. L. R. 4 Cal. 10.
2. Kelly, 2 C. & K. 379; *see* Sec. 120-A, *post*.

Ram" and another asking the deceased to repeat "Ram, Ram" in order to become *sati*, on which the Court found that the prisoners had all engaged with her in a conspiracy for the commission of the *sati*.[1] The test of guilt in such cases is not what was the object of the accused, but whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and commonsense, the abettor must have foreseen as probable.[2] Where four persons combine to attack with *lathis* their common enemy, each is abetting the conduct of the other within the meaning of Sec. 107, I. P. C. and as each one of them is present Sec. 114, I. P. C., fully applies.[3]

22. There must be consequent act.– The third essential element of this clause is that in order to constitute and complete a conspiracy there must take place "an act or omission in pursuance of that conspiracy". All that this phrase means is that there is no conspiracy so long as it rests in intention merely. Two or more persons may be animated by the same intention. But the mere community of intention is not conspiracy. The law distinguishaes between acts intended and acts done. If, however, they agree to carry out their intention into effect, their agreement is *an act* in advancement of the *intention* which each of them has conecived in his mind. So Willes, J., said: "A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means."[4]

Mere community of intention is not conspiracy.

Therefore, it may be stated that abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means.[5] But there can be no abetment of conspiracy, as a conspiracy is not "an act committed" which may be abetted.[6]

23. Proof of conspiracy.—The proof of conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties accused done in pursuance of apparent criminal purpose in common between them.[7] That purpose must be a defined act and not some vague suspicion resting upon no solid foundation. Where, for instance, one Sher Ali, a trans-frontier resident, was found concealed in a deserted house in a village in the Kohat District with three companions, all armed to the teeth, the Commissioner convicted them under Sec. 393, but the Chief Court of the Punjab reserved it on appeal, holding that the mere assembling of a number of persons together with general intention of committing theft, and not for the purpose of committing a specific theft or theft of specific property cannot be considered to amount to the abetment of an offence :

Proof of conspiracy is generally a matter of inference.

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1. Mohit Pandey, 3 N. W. P. H. C. R. 316; Ram Dial, I. L. R. 35 All. 26.
2. Mathura Das, I. L. R. 5 All. 491.
3. Jaimangal *v.* Emperor, A. I. R. 1936 All. 437 at p. 439 : 37 Cr. L. J. 864 : 1936 A. W. R. 298 : 163 I. C. 848. But *see* also State *v.* Saidu Khan, A. I. R. 1951 All. 21 for further comments on this case.
4. Mulcahy, L. R. 3 H. L. 306 at p. 317 ; Quinn *v.* Leatham, (1901) A. C. 495.
5. Emperor *v.* Abdul Hamid, A. I. R. 1944 Lah. 380 at p. 381 : 46 P. L. R. 255.
6. S. Jone Bin *v.* A. Manuel, A. I. R. 1936 Rang. 358 at p. 360 : I. L. R. 14 Rang. 597 : 146 I. C. 522.
7. Abdul Hamid, *supra*, citing The King *v.* Brisac, (1903) 4 East. 164.

"There must be a design to commit a specific offence before a person can be held guilty of abetment of such of offence by having conspired with others to commit it."[1] In this case the men were evidently lying in wait in pursuance of a conspiracy, and the nature and subject of that conspiracy was not ascertainable, but it could have been presumed that the facts warranted an inference that the men contemplated some heinous crime—it may have been theft, it may have been murder. If so, the case would appear to have satisfied the test laid down by Willes, J., of a completed conspiracy. But as a mere conspiracy is not an offence unless it is a conspiracy to commit a crime, the men could not be convicted of abetment in the absence of any evidence as to the crime that they had in view. A person intended to forge a document and for that purpose he conspired with others, and to that end he prepared a draft and purchased a stamp-paper upon which he was about to copy it; the stamp-paper purchased was of a sufficiently early date and in order to complete the instrument he applied to a witness to furnish him with a Telugu date corresponding with the English date, which it was intended the forgery should bear; it was held that the facts were sufficient to warrant a conviction of the accused for abetment of forgery.[2] In this case the accused had already performed some acts in pursuance of the conspiracy. The acts were held to have constituted forgery, but the High Court rightly remarked that the draft could not pass for the original and was, therefore, not a forgery, nor was it an attempt at one, since there was no beginning of the commission of the act. It was a preparation for an attempt, but no one can be convicted for mere preparation, as the law allows a *locus paenitentiae*, and will not hold that a person has attempted a crime until he has passed beyond the stage of preparation.

24. Attempt and preparation distinguished.—The distinction between preparation for an attempt, an attempt, and an abetment must, therefore, be clearly borne in mind. Against a preparation merely, there is a *locus paenitentiae*, against an attempt there is none. Some attempts are complete offences in themselves and they are punishable as such,[3] others are punishable under the general provisions of Sec. 511. An act may amount to a preparation, but not to attempt, whilst another may amount only to an abetment. The former consists in planning, designing and arranging means and measures necessary for the commission of an offence; the latter is the direct movement towards the commission after the preparation is made. It is not of the essence of an attempt any more than of abetment that there should be a power in the offender to complete the offence. For a person may be convicted of attempting to shoot with a gun which could not be discharged.[4] So a person may be convicted of picking a pocket, which, in fact, was empty.[5] So where a woman erroneously believing herself to be with child, conspired with other persons to administer drugs to herself or to use instruments on herself with intent to procure abortion, she was held to be guilty of conspiracy to procure abortion, though abortion was impossible.[6] In one case, the prisoner having had a quarrel with the prosecutor threatened "to burn him up". He went to a neighbouring stack and kneeling down close to it, struck a lucifer match but discovering that he was watched, blew out the match and went away, Pollock, C. B., told

Preparation.

Attempt.

Abetment.

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1. Sher Ali, (1870) P. R. 18.
2. Padala Venkatasami, I.L.R. 3 Mad. 4.
3. E. g., Secs. 121, 124, 125, 130, 307, 308, and 309.
4. Duckworth, (1892) 2 Q. B. 3; Jackson, 17 Cox. 104.
5. Ring, 7 Cox. 491.
6. Whitchurch, 24 Q. B. D. 420.

the jury that the prisoner might be convicted of an attempt if they thought that he had intended to set fire to the stack and would have done so, if he had not been interrupted. "It is clear that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crimes, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy but not in an indictment of this nature."[1]

25. Joint liability.—The acts of one co-conspirator are thus the acts of all, for which they are conjointly responsible. As Couch, C. J., said: "Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object is in the contemplation of the law the act of the whole. Each party is an agent of the others in carrying out the object of the conspiracy and doing anything in furtherance of the common design."[2] So if *A* lives in Calcutta he may be tried at Patna for the acts of his agent there.[3]

26. "In order to the doing of that thing."—Lastly, the act or illegal omission must have been done not only in pursuance of the conspiracy, but also in pursuance of the object of the conspiracy. Where an act is not performed in pursuance of the common design there can be no joint responsibility. If suppose *A* and *B* conspire to murder *C* and for that purpose *A* sends *B* to the chemist's to obtain poison, *B* starts for the chemist's but robs *D* on the way, *A* could not be held liable as an abettor of the robbery. The subject will be more fully discussed under Sec. 111.

27. Intentional aid.—The third mode of abetment described in the section is by intentionally aiding any act or illegal omission in the doing of a thing. Any facility afforded to the doing of an act is, as the explanation has it, equivalent to aiding in the doing of the thing. Intentional aid may then consist of (*i*) either the doing of an act, directly assisting the commission of the crime; or (*ii*) it may consist of an act which, though not directly assisting its commission, affords facilities for its commission; or again (*iii*) it may not be an act at all, but an illegal omission resulting in the same consequence.

Third mode of abetment.

What intentional aid may consist of.

In *Tejsingh* v. *State*,[4] the funeral procession started from the house of the deceased and the widow of the deceased dressed in new clothes and wearing her jewellery led the procession with the intention of committing *sati*. The crowd was shouting *sati mata ki jai ho, sati hona dharam hai*. The procession was joined by more and more persons as it proceeded further. About 100 to 150 people out of the procession surrounded the police party in order to make it useless for purpose of preventing *sati*. *Held* that the whole crowd which started from the house of deceased and which went on swelling till it reached the cremation ground was an unlawful assembly, the common object of which was to prevent the police from interfering

1. Taylor, 1 F. & F. 535.
2. Ameer Khan, 17 W. R. 15 at p. 18.
3. Section 180, Ill. (*a*); Ameer Khan, 17 W. R. 15 at p. 16.
4. A. I. R. 1958 Raj. 169 at pp. 171-72: 1958 Raj. L. W. 19: 1958 Cr. L. J. 967.

with the discharge of their duties in preventing the widow from committing *sati* and also to encourage the widow to remain fixed in her resolve and thus instigate her to carry out her intention. The leaders of the crowd were guilty of abetment of suicide under Sec. 306.

28. Direct acts.—Acts directly contributing to the commission of a crime do not present any difficulty. If the act was done intentionally to assist and it had that effect, the actor is unmistakably an abettor. As Bramwell, J., in a case told the jury: "Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder."[1] So where several persons act in concert to perpetrate a fraud, the act of each person is an intentional aid in prosecution of the common object. Again, if several make distinct parts of a forged instrument, each is liable, though he does not know by whom the other parts are executed; and though it is finished by one alone in the absence of the others.[2]

29. Theft and receiving stolen property.—In theft, the servant opening the door to let in thieves intentionally aids them so as to be an abettor.[3] So accomplices standing at a distance to help thieves in conveying the property stolen are abettors even if thay took no part in theft and were at such distance from the scene of offence as not to be able to assist in it.[4] Again where one stole a horse and another assisted him in colouring and disguising it, he was held to be an accessory.[5] Similarly, a person who knowingly aids in the disposal of stolen property falls under the third definition under this section and is an accomplice.[6]

30. Assisting rescue of prisoner.—Persons who assist in the rescue of a prisoner are liable under this clause. In fact, the assistance given may consist of any aid, however small and distantly connected with the crime, but if it is given with the intention of assisting the malefactor in his crime, it amounts to abetment within the meaning of this clause.

31. Abetment of extortion.—A police constable accompanied by three members of the civic guard challenged a person who was carrying a kerosene tin purchased by him. On demand by the constable the peron produced a cash memo. and then the party moved on to the *thana*. After going some way the constable demanded five rupees from the person promising that he would let him go if this was done. The three members of the civic guard did not ask for money but were pushing the person. There was some haggling. When the money was refused, the constable tore up the cash memo. and the members of the civic guard made no protest about the matter. The party moved to the *thana*.

At no stage of the proceedings, not even in the Trial Court, the three members of the civic guard ever attempted to support the victim of the extortion and go against the constable. At the *thana* they did not support his history of the existence of the cash memo. It was held though the three members of the civic guard did not themselves demand the sum they were a party to the demand and in fact were considerable aid to the constable in giving force

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1. Jackson, 7 Cox. 357.
2. Kirkwood, R. & M. 304; Bingley, R. & R 446.
3. *Per* Coleridge, J., in Tuckwell, C. & M. 215. The servant had, however, left at the time of the robbery.
4. Kelly, R. & R. 421.
5. *Per* William, J., in Lee, 6 C. & P. 536.
6. Mavuthalayan *v.* Emperor, A. I. R. 1934 Mad. 721 at p. 722: I. L. R. 58 Mad. 86 : 156 I. C. 74: 57 M. L. J. 693: 1934 M. W. N. 1140.

to his demand. They were, therefore, guilty of abetment of attempt to extort, a sum of Rupees five made by the constable.[1]

32. Bribe-giver's liability.—When considering whether the giver of a bribe is guilty of abetment, the definition of abetment given in Sec. 107, I. P. C., must be construed along with Illus. (*a*) to Sec. 109.[2] It has been accepted by all the Courts that the voluntary giver of a bribe to gain some advantage is an abettor and hence an accomplice. This is plainly so, on the ground that he intentionally aids the commission of the offence inasmuch as he intends the bribe to be taken and that the giving of the bribe facilitates the taking thereof.[3] A person who offers an illegal gratification to a public servant for any of the purposes stated in Sec. 161, is liable for abetment of an offence under that section.[4] Now by Criminal Law Amendment Act, XLVI of 1952, a new Sec. 165-A has been added in the Penal Code which provides for punishment of offences defined in Secs. 161 and 165 of the Code. Section 116 deals with an abetment of the offence where the offence abetted is not ultimately committed. Illustration (*a*) to this section deals with the case of an offer of a bribe by *A* to *B*, a public servant, as reward for showing *A* some favour in the exercise of *B*'s official functions. *A* is punishable under Sec. 116 even though *B* may refuse to accept the bribe. It would thus be clear that the offer of the bribe would amount to an abetment under that section and would necessarily constitute an offence under Sec. 165-A. The definition of the word "instigation" contained in Sec. 107 leads to the same result. Any act committed by a person which amounts to instigation as defined in Sec. 107 would attract the provisions of Sec. 165-A, Penal Code.[5]

33. Abetment by giving facility.—This leads to the question of acts affording facility for the commission of a crime. If *A* wants to strike *B* and his companion *C* lends him his stick with which he assaults *B*, *C* is guilty of abetment as by lending his stick to *A* he has facilitated the causing of hurt to *B*.[6] Such was the case of Eshan Meah who happened to be present with one Bedoo, who having had a difference with his coolies, asked Eshan to bring him a *dao* which he did, with which Bedoo severely hurt a coolie: "It is quite clear, that a person who, under the circumstances detailed by the evidence, gives a *dao* into the hands of another person, who has already given out his intention of coercing the party against whom he is acting by using the words 'I will see to this man' must be presumed to be intentionally doing something in order to facilitate the commission of the subsequent act and, therefore, in the words of the law abets the commission of that act."[7] So where a certain *namghur* (a village authority) suspecting a woman to be big with child ordered two of the accused to seize her and take her to the house of the zamindar to account for it and the accused said that they would have to beat her to make her confess, and they thereupon seized and tortured her till she died, it was held that the appellant's act in

Explanation 2.

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1. Sadak Ali *v.* Emperor, A. I. R. 1948 Cal. 47 at pp. 47, 48: I. L. R. (1945) 2 Cal. 478: 48 Cr. L. J. 587: 230 I. C. 271.
2. State *v.* Minaketan Patnaik, A. I. R. 1952 Orissa 267 at p. 275: I. L. R. (1952) Cut. 364: 1952 Cr. L. J. 1393; *see* also Bishwabhusan Naik *v.* State, A. I. R. 1952 Orissa 289: I. L. R. (1952) Cut. 107: 1952 Cr. L. J 1533.
3. Biswabhusan Naik *v.* State, A. I. R. 1952 Orissa 289 at p. 297: I. L. R. (1952) Cut. 107.
4. *See* also Emperor *v.* Chaube Dinkar Rao, A. I. R. 1933 All. 513; I. L. R. 55 All. 654; Pandita Gangaram *v.* The Crown, A. I. R. 1950 Nag. 1 at p. 5.
5. Damodar Krishana Kamil *v.* State, A.I. R. 1955 Bom. 61 at pp. 62, 63 (D. B.): 56 Bom. L. R. 1021: 1955 Cr. L. J. 181; *see* also Rameshwar Singh *v.* King-Emperor, A. I. R. 1925 Pat. 48 : I. L. R. 3 Pat. 547: 26 Cr. L. J. 119.
6. Eshan Meah, 12 W. R. 52.
7. *Ibid.*

ordering her seizure had facilitated the crime and that he was, therefore, liable as an abettor within the meaning of Explanation 2 of this section.[1] Here it will be seen the accused was told of the beating beforehand, and he did nothing to prevent it. If he had not been made aware of it, his fate would have been probably different as in the case of the head constable who had disputed two chowkidars to take a person, charged with being in possession of illicit liquor, home to fetch a bribe and the chowkidars confined and tortured him on the way, in which case, the chowkidars alone where held responsible for their acts.[2] Where the motor car of the applicant was used for the purpose of abduction, it was held that unless there was some evidence that this motor car was so used with his knowledge or under his orders, then the mere fact that motor car was certainly used doet not bring him within the definition of abetment. Section 109, I, P. C., could have no application as the abduction was never committed.[3]

Explanation 2 to Sec. 107, I. P. C., provides that whoever, either prior to or at the time of the commission of an act does any thing in order to facilitate the commission of that act, and thereby facilitates the commission thereof, aids the doing of that act.[4]

34. Facility must be essential for commission of crime.—A priest who officiates to solemnize a bigamous marriage stands in the same predicament,[5] for, by his act, he facilitates the commission of the offence of bigamy. But persons who are present at such marriage could not be charged with abetment nor those who granted accommodation in their house for the marriage, for it could have been equally celebrated elsewhere.[6] So where a theft had been committed in the house of the zamindar of a village and a report made to the police brought the accused, a Sub-Inspector of Police, upon the scene, who commenced his investigation by collecting some *khangars* in the zamindar's house where he proceeded to torture them with a view to forcing them to give information, and it appeared that the accused who had given the house was at times present when the torturing was going on, it was held that the giving of the house and its use by the Sub-Inspector was the allowing of such facility for the commission of the act as to amount to abetment within the meaning of this explanation.[7] "We also find," said Edge, C. J., and Blennerhassett, J., "that he (the accused) must have known that if he did not allow the *thanadar* to use and occupy his house for the purpose of torturing these men, the torturing would have to be stopped, and could not be proceeded with."[8] So the fact that the accused wrote and attested a sale-deed of a child purchased by a prostitute for purposes of prostitution would not expose them to the liability of abettors under Sec. 372,[9] for their assistance was not essential to the commission of the crime, which might have been completed by procuring other writers, or even without any writing. The facility afforded must then be such as was essential for the commission of the crime. In the complex organisation of human

Mere assistance is not condemned in law but it amounts to abetment if it is essential for the commission of the offence.

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1. Doorgessur, 7 W. R. 97.
2. Luchman Singh, I.L.R. 31 Cal. 710.
3. Maung Ba Youe *v.* Ma Hla Kin, A. I. R. 1933 Rang. 297 at p. 298 : 146 I. C. 402 : 35 Cr. L. J. 52.
4. Aiyappan Kuttan *v.* State, A. I. R. 1955 T. C. 266 at p. 267 (D. B.) : 1955 Ker. L. T. 417 : 1955 Cr. L. J. 1535.
5. Umi, I. L. R. 6 Bom. 126.
6. *Ibid.*
7. Faiyaz Hussain, (1895) A. W. N. 194.
8. *Ibid.* at p. 195.
9. Bondili Sankara Singh, (1884) 2 Wir 47.

society life is dependent upon constant human assistance. Such assistance is given alike to the innocent and to the wicked. It is not, however, that assistance which law condemns.

35. Supplying of food.—As the Madras High Court in a case remarked : "The supplying of food to a person about to commit a crime is not necessarily an abetment of the crime.... The supplying of necessary food to a person known to be engaged in crime is not *per se* criminal, but, if food were supplied in order that the criminal might go on a journey to the intended scene of the crime, or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it."[1]

36. Basis of criminality.—Criminality therefore rests not so much on the facility given, as on its nature and effect and the intention with which it was given. For example, it is settled that mere presence at the commission of a crime is not an abetment of it, if the person present has no authority to interfere.[2] But if the person present holds some position of rank and influence, so that his countenancing what takes place may, under the circumstances, be held a direct encouragement, it may amount to an abetment.[3] Suppose, for instance, that a faction between the servants of two zamindars is going on, and one of them appears and watches it ; would not his dependants take courage and attempt deeds which they would not have otherwise done ? Or suppose that a responsible officer of police withdraws on seeing that his subordinates were torturing a prisoner or that he does nothing to prevent them from torturing him. In the first case the zamindar facilitates the commission of his crime by his withdrawal, in the other the police officer is guilty of an illegal omission.[4]

37. When giving facility is not abetment.—When, however, there is no obligation, an act not so intended, but offering facility for the commission of the crime, connot be condemned as a criminal. For instance, one *A* knew that *B*'s wife was carrying on a criminal intrigue with *C* which *B* himself suspected. *A* informed him of an assignation which *B*'s wife has with her paramour, and *A* and *B* went thither, the latter armed with a stick and *B* finding his wife in the act of committing adultery, pursued the paramour for fifty paces and then struck and killed him. *B*'s wife wanted to run away, but *A* detained her till *B* returned and turned upon her, striking her severely and leaving her for dead. *A* was convicted of abetting the murder of *C*, but the Chief Court held that *A* had abetted no offence.[5] Here it will be observed that *A* had distinctly afforded facility to *B* to meet *C* under circumstances which could not but have made *A* believe that *B* would commit an offence, if he saw *C* with his wife. But that was not his proximate intention, and in informing *B* of the criminal conduct of his wife with *C* he had done nothing wrong. Again, *A*'s detention of *B*'s wife was not shown to have been with the object of enabling *B* to commit a murderous assault upon her. His acts, therefore, were innocent though they give *B* the facility of killing *C* and grievously injuring his own wife.

38. A man may be guilty as an abettor whether the offence is committed or not.—It cannot be held in law that a person cannot ever

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1. Lingam Ramana, I. L. R. 2 Mad. 137.
2. Shidlingappa, (1896) B. U. C. 844.
3. Lakshmi, (1886) B. U. C 303.
4. Kali Charan Gangooly, 31 W. R. 11 at p. 12; Mahomed Hossein, 5 W. R. 49.
5. Hussain, (1872) P. R. No. 30.

be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abetment was made. Under Sec. 107, I. P. C., a person abets the doing of an act in either of three ways which can be instigating any person to do an act ; or engaging with one or more person in any conspiracy for the doing of that act ; or intentionally aiding the doing of that act. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offenee, he abets such an offence and would be guilty of abetment under Sec. 115 of Sec. 116, I. P. C., even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. This is clear from Explanation 2 and Illus. (*a*) thereto, to Sec. 108, I. P. C.[1]

In *Barendra Kumar Ghosh* v. *Emperor*,[2] it was said :

> "Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart."

Supreme Court reiterated it and said in *Faguna Kanta Nath* v. *State of Assam*[3] :

> "Under the Indian law for an offence of abetment it is not necessary that the offence should have been committed. A man may be guilty as an abettor whether the offence is committed or not."

39. Charge of abetment when would be expected to fail.—It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence.[4] The case of *Faguna Kanta Nath*[5] lays this down. The observations of the Supreme Court in that case, at page 7, bring out clearly the distinction in the case of persons instigating another or engaging in conspiracy with another on the one hand and that of a person aiding the person in committing a certain offence. The observations are :

> "It is not the prosecution case that the appellant abetted the offence by instigating Khalilur Rahman to demand the illegal gratification ; nor has the prosecution set up or proved a case of conspiracy between the appellant and Khalilur Rahman for the commission of an offence under Sec. 161. On the findings of the Court the appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked him to hand over the money to the appellant. If Khalilur Rahman is acquitted and therefore the offence under Sec. 161 is held not to have been committed, then in this case no question of intentionally aiding by any act or omission the commission of the offence arises."

Before the charge of aiding can be said to have been brought home against the accused persons, it must be established that the principal

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1. Jamuna Singh *v.* State of Bihar, A. I. R. 1967 S. C. 553 at p. 554.
2. 52 I. A. 40 at p. 53 : A. I. R. 1925 P. C. 1 at p. 7.
3. 1959 Supp. (2) S. C. R. 1 at p. 5 : A. I. R. 1959 S. C. 673.
4. Jamuna Singh *v.* State of Bihar, A. I. R. 1967 S. C. 553 at p. 555.
5. 1959 Supp. (2) S. C. R. 1 : A. I. R. 1959 S. C. 673.

person had in fact committed the offence which was sought to be aided, by the accused persons.[1] In the case of *Faguna Kanta Nath* v. *State of Assam*,[2] the appellant before their Lordships was tried for an offence under Sec. 165-A of the Indian Penal Code for having abetted one Khalilur Rahman in the commission of an offence by the latter under Sec. 161 of the Indian Penal Code.

Both the appellant and Khalilur Rahman were convicted of the offence which they were charged and sentenced to one year's rigorous imprisonment. But on appeal, the High Court acquitted Khalilur Rahman but maintained the conviction and sentence of the appellant. The complainant in that case, Narendra Nath Brahma was taking two carts carrying paddy for sale to Billashipara Bazar along the path which runs by the side of the river Gauranga. When he had gone only a short distance, he was stopped by the Paddy-checking Inspector, Khalilur Rahman, who was accompanied by the appellant and three others. Khailur Rahman demanded Rs. 200 as bribe and threatened the complainant that unless the amount demanded was paid his cart and paddy would be seized.

In this he was supported by the appellant and three others. The complainant expressed his inability to give that much amount but ultimately he agreed to pay Rs. 150. He borrowed Rs, 100 from one Surajmal Oswal out of which he offered Rs. 80 to Khalilur Rahman who asked him to hand them over to the appellant who counted the money and made it over to Khalilur Rahman. The complainant was also forced to execute a promissory note for a sum of Rs. 70 in favour of the appellant and he promised that the money would be paid. The complainant learnt later in the bazar that another person who was in a similar position like him was let off with only Rs. 15 and he came back to the appellant for the refund of his money and the return of his promissory note.

On refusal, the complainant presented a written complaint to the Deputy Commissioner which resulted in Khalilur Rahman and the appellant being prosecuted, the former under Sec. 161 of the Indian Penal Code read with Sec. 5 (2) of the Prevention of Corruption Act, 1947 (Act 2 of 1947) and the latter under Sec. 165-A of the Indian Penal Code and they were convicted and sentenced by the Special Judge as already stated. In that case, the main argument raised on behalf of the appellant was that as Khalilur Rahman had been convicted on the facts and circumstances of the case, the conviction of the appellant for abetment cannot be sustained.

It was not suggested in the case before their Lordships that there was any instigation by the appellant for the commission of the offence nor was there any suggestion or proof of any conspiracy. The case of the prosecution was that the abetment committed by the appellant in that case was that by aiding. A person abets by aiding when by the commission he intends to facilitate and does facilitate the commission thereof. By the acquittal of Khalilur Rahman in that case, the High Court must be deemed to have held that there was no offence under Sec. 161. That being the case, their Lordships observed that there could be no question of intentionally aiding by any act or omission the commission of the offence.[3]

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1. Dayaram Phukan *v.* State, A. I. R. 1967 Assam 66 at p. 67.
2. A. I. R. 1959 S, C. 673.
3. Dayaram Phukan *v.* State, A. I. R. 1967 Assam 66 at pp. 67-68.

40. Abetment by illegal omission.—At times even refraining from action and mere impassivity makes a person liable to penalty. There are two kinds of "impassivity". In the one a person remains passive because although he has formed an intention to accomplish something prohibited he does nothing and thereby he fails to accomplish it. In these circumstances he commits no offence. In the other the remaining passive and doing nothing, a person accomplishes something prohibited. It is the latter form of impassivity which is punishable as an offence.[1] Simply doing nothing is not an act, and unless there is a duty to do something there is no illegal omission.[2]

Unless there is duty to do something there is no illegal omission.

In the case of illegal omission criminal liability for abetment depends no less upon the provisions of this Code than upon the obligation created or duty imposed by other laws. In the case of a person under such obligation, in order to constitute abetment, it must be shown that the accused intentionally aided the offence by his non-interference.[3] But encouragement would be presumed in the case of a police officer whose duty as a conservator and warden of peace is to prevent the commission of crime. If, therefore, he knows that a crime is being committed and does nothing to prevent it, he is guilty of an abetment on account of his illegal omission. So where a head constable of police, perceiving that his subordinates were about to torture a prisoner, left the place so as not to be a witness of what occurred, it was held that he was guilty of abetment of the offence that was committed in his absence. He certainly omitted to do that which he was bound to do. It was illegal in him, knowing that an offence of this kind was to be committed, to go away in order that the crime should be committed.[4] In such a case it is immaterial that the torture was being applied by or under the orders of a superior officer. It is the duty of the police to shelter a person in custody, and to arrest persons committing assault likely to cause grievous bodily injury. When law imposes on a person duty to act, his illegal omission to act renders him liable to punishment. Consequently, a policeman who stands by and does nothing to prevent a person being tortured by another is guilty of abetment in the same manner as if he had actually encouraged it.[5] The same responsibility rests on Magistrates and other guardians of peace.[6] In such cases the measure of responsibility is the duty imposed by law. A village chowkidar in Bengal is not, for example, bound to prevent the commission of a non-cognizable offence, e.g. extortion.[7]

Illegal omission to prevent an offence and illegal concealment of an offence about to be committed.

The law casts no duty upon a person presiding at a meeting to interrupt songs or to forbid their continuance at the meeting. Therefore, where a boy sings revolutionary songs at a meeting whereof the accused was the president in the absence of anything to show that the accused positively encouraged the boy or that the songs were sung in pursuance of an agreement between the accused and the boy, the accused is not guilty of abetment.[8]

The conduct of a wife, who had contracted an illegal connexion with the accused, in not warning her husband against danger to his life from

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1. N. Kan Majura *v.* The Queen, P.C.A. No. 29 of 1953, dated 14th January, 1954 (P. C.), reported in *Yearly Digest*, 1954 August, Part. Col. 1191.
2. Emperor *v.* Bepin Behari Ganguly, A. I. R. 1932 Cal. 549 at p. 550: 33 Cr. L. J. 699 : 138 I. C. 763 : 36 C.W. N. 191.
3. Khaja Noorul Hossein *alias* Khaja Wahced Jan, 24 W. R. 26 at pp. 27-28.
4. Kali Churn Gangooly, 21 W. R. 11 at p. 12.
5. Latif Khan, I.L.R. 20 Bom. 394.
6. Appana Hegode, (1899) 1 Weir 52; Krishna Shetti, (1891) 1 Weir 50.
7. Gopal Chundar, I. L. R. 8 Cal. 728.
8. Emperor *v.* Bepin Behari Ganguly, A.I.R. 1932 Cal. 549 at pp. 549-50.

the accused and letting him go to his doom without a warning is certainly open to censure. But this would not amount to abetment of murder of her husband by the accused.[1]

There is a difference between an illegal omission to *prevent* an offence and the illegal concealment of an offence about to be committed. The latter is, of course, punishable,[2] but as the Law Commissioners remarked: "This is a remote and precarious aid, which though deserving of punishment, is surely very different from that which is supposed to be rendered in the former case, conducting by an immediate influence and a positive efficacy to the commission of the offence."[3]

41. Charge of abetment.—Section 107, I. P. C., shows that abetment may be by instigation, or by engaging in a conspiracy to commit the offence abetted, or by intentionally aiding a person to commit it, it is not necessary to specify the particular species of abetment in the charge. It is open to the prosecution to charge abetment generally, and then, if the evidence does not establish abetment other than in one particular form, to rely on this particular form for a conviction.[4] But the charge framed on the accused must give him an intimation of the fact that on the allegations stated therein he has to meet a charge of the abetment of the offence and not of the substantive offence itself. The accused clearly does not get any notice of the fact that he has to meet a charge of abetment when the facts alleged against him are said to be constituting the substantive offence itself and when the accused is examined as regards those facts in relation to substantive off-nce, the important point to note is that unless the accused knows precisely the charge he has to meet, he cannot lead his defence properly.[5] Where a criminal conspiracy amounts to an abetment under the present section it is unnecessary to invoke the provisions of Secs. 120-A and 120-B because the Code has made specific provision for the punishment of such a conspiracy. Where the offences which are alleged to have been the object of the conspiracy were in fact committed; the conspiracy amounts to abetment and hence additional charges under Sec. 120-B should not be made.[6]

108. A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.[7]

Abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abetter may not himself be bound to do the act.

Explanation 2.—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or

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1. Mst. Rup Devi *v.* State of H. P., A.I.R. 1955 H. P. 15 at p. 20: 1955 Cr. L. J. 679.
2. Section 119.
3. First Report, Sec. 210.
4. Harendra Kumar Mondal *v.* Emperor, A.I.R. 1938 Cal. 125 at p. 126: 39 Cr. L. J. 395: 174 I. C. 36: 66 C. L. J, 196.
5. Shri Lal *v.* State, A. I. R. 1953 M. B. 155 at p. 156.
6. Jageshwar Singh *v.* Emperor, A. I. R. 1936 Pat. 346 at p. 348; I.L.R. 15 Pat. 26: 164 I.C. 68: 37 Cr. L. J. 893.
7. Person—Sec. 11. Act—Sec. 33. Intention—Secs. 34, etc. Knowledge—Sec. 35. Offence—Sec. 40. Abets—Sec. 107.

that the effect requisite to constitute the offence should be caused.

Illustrations

(*a*) *A* instigates *B* to murder *C*. *B* refuses to do so. *A* is guilty of abetting *B* to commit murder.

(*b*) *A* instigates *B* to murder *D*. *B* in pursuance of the instigation stabs *D*. *D* recovers from the wound. *A* is guilty of instigating *B* to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations

(*a*) *A*, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as *A*. Here *A*, whether the act be committed or not, is guilty of abetting an offence.

(*b*) *A*, with the intention of murdering *Z*, instigates *B*, a child under seven years of age, to do an act which causes *Z*'s death. *B*, in consequence of the abetment, does the act in the absence of *A* and thereby causes *Z*'s death. Here, though *B* was not capable by law of commiting an offence, *A* is liable to be punished in the same manner as if *B* had been capable by law of committing an offence, and had committed murder, and he is, therefore, subject to the punishment of death.

(*c*) *A* instigates *B* to set fire to a dwelling-house. *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of *A*'s instigation. *B* has committed no offence, but *A* is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(*d*) *A*, intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z*'s possession. *A* induces *B* to believe that the property belongs to *A*. *B* takes the property out of *Z*'s possession, in good faith, believing it to be *A*'s property. *B*, acting under this misconception, does not take dishonestly and therefore does not commit theft. But *B* is guilty of abetting theft and is liable to the same punishment as if *B* had committed theft.

Explanation 4.—The abetment of an offence being an offence the abetment of such an abetment is also an offence.

Illustration

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence, in consequence of *B*'s instigation. *B* is liable to be punished for his offence with the punishment for murder; and, as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if

he engage in the conspiracy in pursuance of which the offence is committed.

Illustration

A concerts with *B* a plan for poisoning *Z*. It is agreed that *A* shall administer the poison. *B* then explains the plan to *C*, mentioning that a third person is to administer the poison, but without mentioning *A*'s name. *C* agrees to procure the poison, and procures and delivers it to *B* for the purpose of its being used in the manner explained. *A* administers the poison; *Z* dies in consequence. Here, though *A* and *C* have not conspired together, yet *C* has been engaged in the conspiracy in pursuance of which *Z* has been murdered. *C* has therefore committed the offence defined in this section, and is liable to the punishment for murder.

SYNOPSIS

1. Analogous law.
2. Principle.
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4. Who is an abettor.
5. No offence, no abetment.
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12. Bribe-giver's liability.
13. Abetment of abetment—Explanation 4.
14. Explanation 5.

1. Analogous law.—This section was re-drafted after it left the hand of the original committee, in whose draft it stood as Cl. 87. It is now far more comprehensive and complete, and in substance it is based on the English law, with this difference that while in England a person employing an innocent agent to commit a crime will be dealt with as a principal here he still remains an abettor, though the principal was only a tool in his hands. Thus, in England the abettor of a child under 7 or a mad man, or any person of defective mind would be the principal *ex necessitate*, though he were absent when the thing was done;[1] he would be under the Code liable only as an abettor. But, as the Law Commissioners remark, the effect in each case is the same.[3] In other respects the section is in entire harmony with the English law and the explanations are taken from its decided cases.

Section based on English law.

2. Principle.—The section defines an abettor to mean (*i*) the abettor of an offence, and (*ii*) the abettor of act which would have been normally an offence, were it not for the incapacity of the actor. The reason for holding the abettor liable in the second case is self-evident. He is in fact the sole author of the crime, but as the punishment is in each case the same it is a distinction without a difference for, whether he is called an abetor or the principal, he can in either case be equally punished.

3. Meaning of words.—"*The commission of an act*" which is criminal though the actor is exempt from punishment. "*The abetment of an illegal omission,*" as where a private person advises a police officer to withdraw from a scene of torture. Here he would not have been guilty if he had himself withdrawn, but his abetment of the police officer who was in duty bound to stay and stop the torture is criminal. "*Or that the effect requisite should be caused*": Suppose, for instance, that a person advises another to kill by means of charms, would it be an abetment ? Under the clause it will be but this seems doubtful (*see* para. 10, *post*). "*Should be capable by law,*" e.g. a child, a person *non compos mentis*; *vide* illustrations. "*Abetment of an abetment,*" as when

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1. Fost., 349.
2. First Report,' 182
3. Section 109.

A requests *B* to induce *C* to murder *D*, and *B* does so. Here *B* abets murder and *A* abets *B*'s abetment.[1] "*Abetment by conspiracy*": Members of secret societies seldom know the actual perpetrators of the crime. So where persons are balloted for to commit crimes only the person reading the ballots knows the name of the person deputed to the deed.

4. Who is an abettor.—The last section defines only the abetment of a *thing*. Now a thing may or may not be an offence. If it is an offence the person who abets is here defined to be the abettor. If it is not an offence because of the incapacity of the actor, the person abetting its commission is also an abettor. But if it is not an offence at all, then the person abetting its commission is not an abettor, and that act ceases to have any meaning in the Code.[2] In other than that there should be an abettor liable to punishment, there must be at least an act which must possess the ingredients of an offence. But every act implies the author of that act. That person may not himself be liable to punishment, but he must have committed the act either by himself or in participation with some one else. In the former case he is the principal and in the latter case a conspirator. An abetment is possible only in these two cases. If, therefore, there is neither, no person can be proceeded against as an abettor though his act may have been illegal.

5. No offence, no abetment.—Such was the case where a Mohammedan infant girl, aged six, possessed of considerable properties had been thrice married to three different persons by persons who professed to be her guardians. She was first given away in marriage to *A* by her mother, which marriage was, however, invalid, as the proper persons to give her away in marriage were her paternal uncles and not her mother. Consequently, another marriage was solemnized between the same parties at which one paternal uncle, Abdul Subhan, was alleged to be present and to have given away the bride. A few weeks later her third marriage was solemnized at which both her guardian uncles Abdul Karim and Abdul Subhan were alleged to be present, who gave her away in marriage to another man. Thus her two uncles were charged for abetting a bigamous marriage under Secs. 109 and 494 of the Code. The Sessions Judge found that Abdul Subhan who had taken part in the second marriage was not present at the third marriage. He was accordingly acquitted, Abdul Karim alone being convicted of abetment. But the High Court, on appeal, set aside his conviction, holding that as the infant was a mere cypher in the transaction, the acquittal of Abdul Subhan removed the only other ground upon which the accused could have been convicted: "To establish a charge of abetment under the Penal Code, the accused must be proved either to have instigated or aided some other person to commit the offence, or to have engaged with another in a conspiracy for the commission of the offence. The acquittal of Abdul Subhan, who was jointly charged with the prisoner, puts an end to the case of the conspiracy for except with Abdul Subhan, there is no evidence to support a case of conspiracy. If, therefore, the conviction can be upheld, it must be in consequence of the prisoner having instigated or aided Harunissa to contract a second marriage. The evidence shows that Harunissa took no part in nor was present at the ceremony which the prisoner caused to be performed in her name . . . Although the effect of the ceremony would have been, supposing the prisoner was acting within the authority given him by law, to bind the infant by the marriage so contracted yet she was not less personally a stranger to both the ceremony and the contract. Assuming the facts and law to be as found and laid down by the

Abettor must be either instigator or a conspirator.

1. Srilal, I. L. R. 46 Cal. 607. Prapravan *v.* Morgan, 1 Weir 18.
2. Purana Chandra, I. L. R. 41 Cal. 17;

Sessions Court, the prisoner has committed an illegal act in disposing of his infant ward in marriage after he knew that she had been previously lawfully disposed of in marriage by the younger paternal uncle; but, in doing this act, he was, according to the evidence, the sole actor; and the act, though illegal, is not, if done by one person alone, an offence provided for by the Penal Code."[1] This case then establishes that an abettor must either be an instigator or a conspirator. Consequently, a married woman cannot be held to abet her own abduction.[2]

An offence of abetting the making of a false document can be committed by attesting the document even if the document does not need attestors to complete it, if the person who brings this document into existence intended that it should be attested and that the accused should be one of the attestators.[3]

6. Offence of abetment—When complete.—It cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abetment was made. Under Sec. 107, I.P.C., a person abets the doing of an act in either of three ways which can be: instigating any person to do an act; or engaging with one or more persons in any conspiracy for the doing of that act; or intentionally aiding the doing of that act. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under Sec. 115 or Sec. 116, I.P.C., even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. This is clear from Explanation 2 and Illus. (*a*) thereto, to Sec. 108, I.P.C.[4]

In *Barendra Kumar Ghosh* v. *King-Emperor*,[5] it was said:

> "Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart."

The Supreme Court reiterated it and in *Faguna Kanta Nath* v. *State of Assam*[6]:

> "Under the Indian law for an offence of abetment it is not necessary that the offence should have been committed. A man may be guilty as an abetter whether the offence is committed or not."

7. Subsequent acts inoperative.—Then again, as the Code does not regard accessories after the fact in the light of abettor,[7] persons who support the abettor cannot be tried for subsequent abetment. Where for instance a person makes a false charge against another, the offence is complete. Persons who support his false charge by their evidence cannot then be tried

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1. Abdul Kareem, I.L.R. 4 Cal. 10.
2. Jhundoo *v.* Ahmed Deen, (1866) P. R. No. 40; Phalia *v.* Jiwan Singh, (1871) P.R. No. 6; Wahabji, Mst., (1875) P. R. No. 14; Natha Singh, (1883) P. R. No. 11, overruling Syed Ahmad, (1868) P.R. No. 17.
3. *In re* P. Rama Naidu, A.I.R. 1942 Mad. 92 (1) at p. 92: 43 Cr. L. J. 227: 197 I.C. 630: (1941) 2 M.L.J. 746: 1941 M.W.N. 1036.
4. Jamuna Singh *v.* State of Bihar, A.I.R. 1967 S.C. 553 at p. 554: 1967 A.L.J. 300.
5. 52 I.A. 40 at p. 53 : A.I.R. 1925 P.C. 1.
6. A.I.R. 1959 S.C. 673 at p. 675: (1959) Supp. 2 S. C. R. 1.
7. Hazarilal, 61 I.C. (Pat.) 836.

as abettors not for their previous acts, but for having given ther evidence subsequent in support of the charge.[1] So, where the accused removed certain things from the house of his father with whom he was living, and gave them to a woman with whom he was on intimate terms, it was held that the woman could not be an abettor of theft[2] though on a proper case being made out, she might have been convicted of receiving stolen property. So where *A* entered the house of *B* without his permission and committed adultery with his wife, could be convicted of house-trespass and adultery, the two offences being distinct, but *B*'s wife could not be convicted of the abetment of house-trespass though she may have invited *A*.[3] A person may be charged both for the abetment as well as for the commission of an offence, but if he is convicted of the main offence, he cannot be also convicted of the abetment of the same offence.[4]

8. Agent innocent.—It will be observed that the section makes no distinction between a principal who is innocent and one who is himself guilty. In either case the offence of the abettor remains the same.[5] In England, however, in the former case the principal is regarded merely as an agent and the abettor is treated as the real principal. The difference is, however, not material, for the result in each case is the same. In England such an offender would be punished as a principal—here he would be punished as an abettor. For example, if a person cashed a forged note in England through another who was ignorant about the forgery, the act of the latter would be the act of the former, though he was then absent: *qui facit per alium facit per se*. He will then be punished as the principal,[6] though under this section his act would be that of an abettor only. So if *A* poisons through *B*, *A* is an accessory only if *B* is amenable as a principal but not otherwise.[7]

9. Explanation 1.—The case contemplated in the first explanation is different from the cases arising under the section. It assumes the presence of two persons and it then apportions their criminal liability. The explanation relates to the same person and shows that he may be guilty as an abettor though as a principal he may be innocent. Such a case arises where a private person instigates a police officer to leave a scene of cognizable offence which it is his duty to prevent. Here the policeman is guilty of an illegal omission, and therefore, of an abetment of the offence committed in his presence. The private person is guilty of no such offence, as it was not his duty to interfere. He is, however, guilty of abetting the police officer in his illegal omission and a such he is guilty of abetment, though he was not himself bound to do the act which it was the duty of the police officer to do.

10. Act or effect immaterial—Explanation 2.—The second explanation lays down a rule which has already been considered, and which indeed flows from the definition of abetment. As remarked before abetment depends upon the instigation, and not upon the effect it has upon another. As was observed in a case, "the offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets".[8] The conviction of the

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1. Ram Pandal, 9 B.L.R.A.C. 16; Paun Pundah, 18 W.R. 28; Joghut Mohini *v.* Madhan Sudhan, 10 C.L.R. 4.
2. Loodun, (1869) P.R. No.11.
3. Sheikh Mungali, (1871) P.R. No. 5.
4. Jeetoo, 4 W.R. 23; Ramnarain, 4 W. R. 37.
5. Braj Mohan, 7 N.W.P. 134.
6. Palmer and Hudson, 1 New Rep. 96.
7. Fost. 349.
8. Imamdi Bhooyah, 21 W. R. 8; Dinonath Burroa, 18 W.R. 32.

abettor is, therefore, in no way dependent upon the conviction of the principal.[1] The offence of abetment is complete with the instigation notwithstanding that the act abetted is not committed or the person abetted refuses to do the thing, or doing it the expected result does not follow, or that the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should be caused by them.[2] So Lawrence, J., said in a case of abetting abortion: "It is immaterial whether the shrub was saving or not, or whether it was payable of procuring abortions or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute[3] and he is guilty of the offence laid to his charge.[4] So in another case the prisoner was indicted for administering saffron to a female for a similar purpose, and her counsel was cross-examining her as to her having taken something else before the saffron, and also to the innocuous nature of the article whereupon Vaughan, B., said: 'Does that signify'? It is with the intention that that the jury have to do; if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient."[5] But these cases were decided upon the language of the statute which used the words "any medicine or *other thing*". They illustrate no sound principle and their soundness has since been disposed of by the Legislature.[6] Suppose a person commands another to commit murder by sorcery and by no other means, would that be an abetment of murder which is impossible. It appears to have been the opinion of Westropp, C. J.,[7] that it would not, but the point was not *res integra* before him. On the other hand, the Punjab Chief Court have, in a considered judgment, upheld the view that abetment is none the less complete because it is physically impossible to produce the effect by the means suggested.[8] That Court supports its conclusions on the analogy of Sec. 571. The clause should probably be read in the light of Illus. (*b*), as meaning that an abetment may be complete though the effect contemplated was not caused, but not if it was initially impossible.

Offence of abetment is complete with the instigation.

An abetment may be complete though the effect contemplated was not caused but not if it was initially impossible.

11. Agent may be innocent—Explanation 3.—The terms of Explanation 3 particularly of Illus (*a*), show clearly that persons may be guilty of abetment even though the persons whom they have abetted are not guilty, because their act, which would have been a criminal act if it had been done with guilty intention or knowledge, has not been shown to have been done with such intention or knowledge.[9] The explanation really strives to make clear what was already clear from the section. According to Explanation 3 of Sec. 108, I.P.C., it is not necessary that the person abetted should have committed the offence and punished, and Illus. (*d*) to the explanation is quite clear on this point.[10] The employment of a person legally incompetent to commit an offence, or of an innocent agent does not absolve the abettor from his criminal liability; on

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1. Maruti Dada, I.L.R. 1 Bom. 15, overruling Chawan Bapaji, therein cited; Dinonath Burroa, 18 W. R. 32 ; Sahib Ditta, (1885) P. R. No. 20.
2. Sahib Ditta, *supra*; *see* also D. P. Minwalla *v.* Empress, A. I. R. 1935 Sind 78: 36 Cr. L. J. 877: 156 I. C. 189.
3. 43 Geo. III, c. 58, Sec. 2, now *see* 24 & 25 Vict., c. 100, Sec. 58.
4. Phillips, 3 Camp. 73 at p. 76.
5. Coe, (1834) 6 C. & P. 403.
6. The corresponding words of the new Statute, 24 & 25 Vict., c. 100, are "any poison or other noxious things".
7. Pestonji Dirshai, 10 B. H. C. R. 75.
8. Sahib Ditta, *supra*.
9. Khushi Mohammad, 42 P. L. R. 477.
10. State *v.* Keshav Rao Ingle, A. I. R. 1956 M. B. 65 at p. 66: 1955 Madh. B. L. R. Cr. 500: 1956 Cr. L. J. 229.

the other hand it rests undivided upon him and is thus an element of aggravation. The innocent agent is then merely his tool and the abettor is really the principal, and is so regarded and dealt with in England (*see* para. No. 1, *ante*). Here he is punishable as an abettor, though the principal is innocent and escapes scotfree.[1] Such are Illus. (*b*), (*c*), and (*d*). The last illustration was relied upon in a case where one *A* had sold some trees belonging to *B* to *C* with the intention that *C* should cut them down. *C* knew nothing about *B*'s interest in them. *A* did, and it was, therefore, held that, though *C*'s felling of the trees was an offence still *A*'s act was an abetment of theft of *B*'s trees by *C* for which he was rightly convicted.[2]

12. Bribe-giver's liability.—Explanation 5, Sec. 108, applies only to abetment by conspiracy but applies to abetment generally and there is nothing to indicate that it applies only to abetment by investigation and not to other kinds of abetment.

The bribe-givers are not exonerated merely because the Judge took the money without any guilty intention.[3]

This view is supported by a decision of the Lower Burma Chief Court in *Emperor* v. *Nga Hnin*.[4] In that case the accused persons handed a sum of money to a Magistrate as a bribe. The Magistrate at once called in witnesses and instituted a prosecution. The accused were acquitted on the ground that the Magistrate by his silence and conduct had induced the accused to offer him the bribe, so the accused too could not be held guilty of instigating the Magistrate to receive the bribe. The learned Judge of the Chief Court pointed out that a person may abet not merely by instigation, but also by intentionally aiding and made the following observations:

> "If a public servant solicits a bribe and the person solicited complies with the demand and hands him the money, he intentionally aids by his act, and therefore abets the taking of the bribe by the public servant; the fact that the bribe was solicited at most renders the abetment less culpable than it would otherwise be."

It must be noted that, in this reported case also, although the Magistrate was held to have solicited the bribe, he clearly had no intention of receiving the money as a bribe because he at once had the bribe-givers arrested. If the public servant's intention, as the person abetted, is immaterial it is difficult to escape the conclusion that the bribe-givers are guilty of the offence of abetment, although they only complied with a demand made by the public servant, and although the public servant had no intention of receiving the money as a bribe.[5]

13. Abetment of abetment—Explanation 4.—The abetment of an abetment is an offence when the principal abetment was an offence. Such would be the case where a third person intervenes between the abettor and the actor. In such a case all that is required is that the substantive abetment must be the abetment of an offence. It is not necessary that such offence should be committed. So where *A*, the servant of *B*, was approached by *C*, with the intention of robbing *B* and *A* reported the fact to *B*, and *B* wishing to entrap *C*, allowed *A* to assist *C* in robbing

1. Joan Bleadsdale, 2 C. & K. 765; Dhanram, 14 C. P. L. R. 192.
2. *Per* Banerji, J., in Ram Charan, (1898) A. W. N. 147 at p. 148.
3. Emperor *v.* Chaube Dinkar Rao, A. I. R. 1933 All. 513 at p. 516.
4. A. I. R. 1917 L. B. 33: 38 I. C. 439.
5. Emperor *v.* Chaube Dinkar Rao, A. I. R. 1933 All. 513 at pp. 516, 517: I.L. R. 55 All. 656: 34 Cr. L. J. 623: 143 I. C. 66; *see* also Emperor *v.* Nga Hnin, 18 Cr. L. J. 327: 38 I. C. 439; Emperor *v.* Kesri Chand, A. I. R. 1945 All. 207: 1945 A. W. R. (H. C.) 167; 1945 O. W. N. (H. C.) 195.

him, whereupon *A* made over his master's goods to *C*, who was then prosecuted for abetment of theft by *A*, the question was whether *A* had committed theft and *C* had abetted him. So far as *A* was concerned, he had removed the goods with his master's consent. He could not, therefore, be held to have committed theft. The question was then reduced to this; did *C* abet *A* for the commission of theft which in fact he did not commit? and it was held that *C* was guilty of abetting an offence. As Jackson, J., observed: "Under Explanation 4 the abetment of an abetment being an offence, and the prisoner having instigated Cummins (*A*) to do that which, if committed, would have been an offence, he has himself thereby committed an offence, and inasmuch as by Explanation 2, to constitute the offence of abetment, it is not necessary that the act abetted should be committed, therefore, the circumstance that owing to the property being removed, with the knowledge of the owner, the technical offence of theft had not been committed does not save the prisoner from the consequence of the abetment which he has been guilty of and, therefore, he has been properly convicted."[1]

Conviction of abettor in no way dependent upon conviction of principal.

Consequently, as remarked before, the conviction of the abettor is in no way dependent upon the conviction of the principal. The latter may have absconded or, if tried, may have even been acquitted, but the abettor is not entitled to claim the same verdict on the ground that his principal has been acquitted.[2]

English and Indian view same.

In this respect the English rule was at one time different (*see* para. No. 1 of Sec. 107), but the modern rule is now in both countries the same,[3] abetment being made in England,[4] as it is in this country, a substantive offence. So where *A* and *B* were jointly indicted for stealing, and *B* alone was separately indicted for receiving stolen goods and at the trial no evidence was offered against *B*, and he was acquitted, in order that he might be called as a witness against *A*, and it was proved as against *A* that he had abetted *B* to steal, and that he afterwards received the goods so stolen, *A* was convicted on both the counts, Earle, C. J., observing: "We consider the accessory is captured before the principal; under the statute,[5] he may be at once tried and convicted. If afterwards the principal is taken, tried, and acquitted, has the accessory a right to be discharged? We are of opinion that he has no such right. His sentence may have expired; is any wrong done him? We think not; whether he is tried before or at the same time as the principal, he may be guilty as an accessory, although the principal be acquitted, it being by no means certain that, although acquitted, the principal is not really guilty."[6] But, of course, though the principal may not be punished, the evidence against the abettor must establish all the points necessary to complete his guilt. If, for instance, a person is charged for an abetment of murder, the murderer may not have been brought to book, but there must be evidence against the abettor to show that there had been a murder, and that the accused had instigated it.[7]

If, therefore, in such a case a person had been tried for committing the murder, and he was acquitted on the ground that there never had

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1. Troylukho Nath Chowdhury, I. L. R. 4 Cal. 366; to the same effect, Ghazi Khan *v.* Emperor, A. I. R. 1934 Pesh. 110: 36 Cr. L. J. 278; *In re* Reddy Raja Ratnam, A. I. R. 1950 Mad. 827: (1950) 2 M. L. J. 201: 63 M. L. W. 835: 1950 M. W. N. 247 (I. L. R. 46 Cal. 607 foll.).
2. Maruti Dadai, I. L. R. 1 Bom. 15; Umadasi Dasi, I. L. R. 40 Cal. 143.
3. Hughes, (1860) 6 Jur. (N. S.) 177.
4. By 11 & 12 Vict., c. 46, Sec. 1.
5. 11 & 12 Vict., c. 46.
6. Hughes, *supra*; Bell, C.C. 242.
7. Askur, (1864) W. R. 12.

been any murder, the abettor thereto could not be convicted on a finding, however arrived at, that there had been a murder. So it was ruled by the Punjab Chief Court following the practice of the late Sudder Court at Agra that the conviction of the abettor could not be maintained if it involved findings of fact inconsistent with the findings already recorded against the principal and that in such a case whether on appeal or on revision, the Court would be justified in reversing the findings so as to avoid the two remaining inconsistent and contradictory.[1] Where the prisoner asked an Indian doctor to supply her with medicine for the purpose of poisoning her son-in-law which he refused, it was held that the prisoner's act was a mere preparation and not an attempt to commit murder, but that it might be held to have been an abetment of the doctor to abet the accused in the commission of murder within the meaning of this explanation, and therefore, punishable under Secs. 302 and 116 of the Code.[2]

14. Explanation 5.—The last explanation is based upon an English precedent[3] already noticed. As remarked before, it is not necessary, and not indeed always possible that all conspirators should be equally informed of the details of the plot. This is because all conspiracies are hatched in secret and all cannot be equally trusted with its plans. Nor are all perhaps equally interested and zealous workers. As the General has his Council of War, so has the arch-conspirator his chosen satellites. They form as it were his cabinet, and they are the sole repositories of the secrets, in furtherance of which the rank and file are content to work under orders. It is, therefore, the purpose of the clause that all should be amenable to law, and a conspirator will be equally liable with his chief, though he may not be directly connected with him, and though he may not have shared his secrets.

A conspirator to be equally liable with his chief.

[4][**108-A.** A person abets an offence within the meaning of this Code who, in [5][India], abets the commission of any act without and beyond [5][India] which would constitute an offence if committed in [5][India].

Abetment in India of offence outside India.

Illustration

A, in [5][India], instigates *B*, a foreigner in Goa, to commit a murder in Goa. *A* is guilty of abetting murder].

SYNOPSIS

1. Analogous law.
2. Amendment.
3. Principle.
4. Abetment of "offence" under special Act.
5. Abetment of foreign offence.
6. Abetment in foreign territory.

1. Analogous law.—This section is new, and was added to the Code by the Amending Act of 1898,[6] in order to overrule a decision of the Bombay High Court[7] in which it was held that the abetment in India by a citizen of India of an offence committed in foreign territory was not an offence under

1. Lal Khan *v.* Kureem Khan, (1866) P. R. No. 71.
2. Mst. Bakhtawar, (1882) P. R. No. 24; *see* Ghazi Khan *v.* Emperor, A. I. R. 1934 Pesh. 110 : 36 Cr. L. J. 278.
3. Bull, 1 Cox. 28.
4. Added by Act 4 of 1898, Sec. 3.
5. The words "British India" have successively been subs. by the A.O. 1948, A.O. 1950 and Act 3 of 1951, Sec. 3 and Schedule, to read as above.
6. Indian Penal Code Amendment, 1898 (Act IV of 1898), Sec. 3.
7. Ganpat Rao Ramchandra, I.L.R. 19 Bom. 105.

the Code. This section remedies the defect existing in the Code and noticed in that case.[1]

2. Amendment.—In the sections as originally enacted the words "British India" stood both in the body of the section as well as is in the illustration in place of the word "India". The words "British India" were replaced by the words "the Provinces" by the Adaptation of Laws Order, 1948. Later on, the words "the Province" were substituted by the words "the States" by the Adaptation of Laws Order, 1950. Finally, by Act III of 1951, the words "the States" have made room for the word "India".

3. Principle.—It is against international comity and the laws of nations that one State should breed conspirators threatening the peace and security of its neighbours. Conspiracies to commit offences in friendly Foreign States are therefore regarded as offences against the State itself, and they are punishable as such. But being international offences, they require the co-operation and assistance of the Foreign State concerned from where witnesses may have to be summoned. There may be cases too in which it would be a matter of high political expediency to consult the State concerned before instituting a prosecution. The Criminal Procedure Code restricts indiscriminate prosecutions accordingly.

4. Abetment of "offence" under special Act.—The contraction of a child marriage outside British India is not an offence under the Child Marriage Restraint Act. The word "offence" in Sec. 108-A denotes an act or acts made punishable under the Penal Code, which a child marriage celebrated outside British India is not. Persons helping in the preparation for wedding are, therefore, not liable for abetting a marriage of this nature.[2]

5. Abetment of foreign offence.—This section provides for the punishment of abetment of the commission of an offence outside India. It requires only that the offence abetted shall also be an offence recognised in India, and that its abetment shall be complete in India. If, therefore, the only act committed in India amounts to a mere preparation, the actual abetment being committed in foreign territory, it cannot be punished under this section. So where one Baku, and her husband Tukaram, took her minor grand-daughter by name Piri, a girl, under sixteen years of age, from Sholapur to Tuljapur, a place in the Nizam's dominions, her object being to dedicate her there to the goddess Amba, and thus to make her an *aradhin murli*, who generally led the life of prostitution, it was held that the mere removal of the girl from India did not amount to abetment. "Mere intention not followed by any act cannot constitute an offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence or an attempt or abetment of the same."[3] The accused were accordingly acquitted. As regards the first requirement, it follows the well-established principle that "an act authorised by the law of country in which it takes place, cannot be the subject of a legal proceeding here.[4] And as a person cannot be tried for a substantive offence, which is not penal under the law of the land, he cannot be tried for its abetment which follows the same rule.

A person not triable under the law of the land is equally not triable for abetment.

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1. For Report of the Select Committee, *see Gazette of India*, (1897), Pt. VI, p. 138. The language used is that of West, J., in his dissentient judgment in Moorga, I. L. R. 5 Bom. 338 at p. 359.
2. Sheikh Haidar Sheikh Rahimmo Attar Musalman *v.* Syed Issa Syed Rahiman Musalman, A. I. R. 1938 Nag. 235 at pp. 235, 237 : I. L. R. (1939) Nag. 241: 39 Cr. L. J. 651 : 175 I. C. 615.
3. Baku, I. L. R. 24 Bom. 287.
4. *Per* Cockburn, C. J., in Phillips *v.* Eyre, L. R. 4 Q. B. 225; Story's *Conflict of Laws*, Sec. 18.

6. Abetment in foreign territory.—"This section does not deal with the abetment of an offence outside India. Such offence is not punishable in India."[1]

109. Whoever abets any offence, shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations

(*a*) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B*'s official functions. *B* accepts the bribe, *A* has abetted the offence defined in Sec. 161.

(*b*) *A* instigates *B* to give false evidence. *B*, in consequence of the instigation, commits that offence. *A* is guilty of abetting that offence, and is liable to the same punishment as *B*.

(*c*) *A* and *B* conspire to poison *Z*. *A*, in pursuance of the conspiracy, procures the poison and delivers it to *B* in order that he may administer it to *Z*. *B*, in pursuance of the conspiracy, administers the poison to *Z* in *A*'s absence and thereby causes *Z*'s death. Here *B* is guilty of murder, *A* is guilty of abetting that offence by conspiracy, and is liable to the punishment for the murder.

SYNOPSIS

1. Analogous law.
2. Scope.
3. Applicability.
4. Principle.
5. Distinction detween Secs. 109 and 114.
6. Meaning of words.
7. Offences under special or local law.
8. Aiding and abetting.
9. "Instigation."
10. Abetement followed by act.
11. Act abetted.
12. Act committed.
13. Abetment—Kidnapping.
14. Offence committed must be consequential.
15. No offence, no abetment.
16. Conviction of abettor alone, legality of.
17. Cases.

PRACTICE AND PROCEDURE

18. Summary trial.
19. Joint trial.
20. Sanction for prosecution.
21. Sentence.
22. Jurisdictions, etc.
23. Charge.

1. Analogous law.—An offence under this section constitutes a substantive offence, and it may be so charged. And the procedure applicable is the same as if the offence abetted had been committed. So as regards the power of the police to arrest, it is provided that they "may arrest without warrant, if arrest for the offence abetted may be made without warrant, but not otherwise" the same test being applied where a warrant or summons

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1. Balwant Singh, (1918) P. R. No. 31: 48 I. C. 865; Raj Bahadur, (1918) P. R. No. 23: 47 I. C. 447.

is necessary and the matters as regards bail, the compounding of offences, the competency of the Court trying the offence and the measure of punishment.[1]

2. Scope.—Active abetment at the time of offences is covered by Sec. 109.[2]

Section 109, Indian Penal Code, is concerned only with the punishment of abetments, and lays down nothing more than that if the Indian Penal Code has not separately provided for the punishment of an abetment as such, then it is punishable with the punishment provided for the original offence.[3] In cases of abetment by conspiracy, the proof is generally a matter of inference.[4] In a case there was nothing to show that the accused instigated a person to commit the offence of which he was convicted or helped him in anyway to do so. It was held that mere failure to prevent the commission of an offence is not by itself an abetment.[5] It cannot be said that the mere omission to bring to the notice of the higher authorities offences committed by other persons amounts to an abetment of those offences. It may form the foundation for diciplinary action against him in a departmental way, but it cannot in law amount to abetment of the offence committed by his fellow clerk.[6] It is not unoften the servants and partisans do things, on their own initiative, which they consider to be in the interests of their masters or principals without the latter's knowledge or consent. Where, therefore, the master was nowhere on the scene of occurrence, the mere fact that an unlawful assembly consisted mostly of his servants and tenants and its common object was to do something which was in the interests of the accused, is not sufficient to warrant the conclusion that the accused must necessarily have ordered or instigated the formation of the unlawful assembly or commission of the crime.[7] The evidence of the alleged abetment has not been considered or analysed. It is a matter of common experience that charges of abetment are easily made against accused persons and are difficult to refute.[8] In the absence of any definite information as to what the words actually used by the accused in abetment of an offence were the other circumstances which the Magistrate has relied to base his conviction, loose much of their force. In the absence of any definite reliable evidence as the exact words used by him, it is not safe to convict him for abetment of an offence.[9]

Conviction for abetment not to be made unless evidence anaylsed.

3. Applicability.—This section only deals with a case of abetment for which no *express* provision is made by this Code. It, therefore, does

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1. Schedule 2, Cr. P. C.
2. Ahmed Hasham *v.* Emperor, A. I. R. 1933 Bom. 162 at p. 162: I. L. R. 57 Bom. 329: 34 Cr. L.J. 559: 35 Bom. L. R. 240; *In re* Joguli Bhaig Naik, A I. R. 1927 Mad 97: 27 Cr. L. J. 1198; Jadunandan Jha *v.* Emperor, A. I. R. 1937 Pat. 317: 38 Cr. L. J. 790; Brimchipada Dafadar *v.* Emperor, A. I. R. 1938 Cal. 625: 39 Cr. L. J. 964.
3. V. Sesha Ayyer *v.* Venkatasubba Chetty, A. I. R. 1924 Mad. 487 at p. 488 : 19 M. L. W. 201.
4. Emperor *v.* Abdul Hamid, A. I. R. 1944 Lah. 380 at p. 381: 46 Cr. L. J. 341 : 217 I. C. 387 : 46 P. L. R. 255.
5. Upendra Chandra Poddar *v.* Emperor, A. I. R. 1941 Cal. 456 at p. 457 : 42 Cr. L. J. 796 : 195 I. C. 850.
6. *In re* G. Ananthachari, A. I. R. 1938 Mad. 996 at p. 997: 40 Cr. L. J. 302 : 179 I. C. 971 : (1938) 2 M. L. J. 574 : 1938 M. W. N. 908 : 48 M. L. W. 471.
7. Hira Singh *v.* Emperor, 47 Cr. L. J. 955 at pp. 960, 961.
8. Mewalal Singh *v.* Emperor, A. I. R. 1938 Pat. 34 at p. 34 : 18 P. L. T. 869.
9. Raj Hari Prasad *v.* Emperor, A. I. R. 1936 Pat. 608 at p. 610 : 38 Cr. L. J. 90 : 65 I. C. 952.

not apply to the following sections which contain such express provisions :

Sections 110—120 (specific sections on abetment).
Sections 121—123 (abetting the waging of war).
Section 130 (abetting the escape of State prisoners).
Section 132 (abetting mutiny).
Section 134 (abetting assault of a soldier or sailor on his superior officer).
Section 136 (abetting insubordination of same).

When in the complaint, there is no allegation that the accused persons abetted accused no. 1 in the commission of any offence the accused can be charged under Sec. 109 for abetment, if the offence is clearly made out on the allegations. There are clear provisions of the Criminal Procedure Code, which enable the Court to frame proper charges for offences disclosed in the allegations and proper cases even alter it at any stage of the trial in accordance with the evidence, provided no prejudice is caused to the accused.[1]

Applicability of Secs. 104 or 109.

There was a *puja* known as "Badawat" where many persons assembled. They all belonged to the same village. The deceased also came there and sat in the assembly. His presence was however objected to by accused no. 2 on the ground that he had an illicit connection with the wife of his son. Deceased,s denial of the fact resulted in some quarrel at which accused no. 2 asked his son accused no. 1 to beat him. Accused no. 1 accordingly took up a log of wood lying nearby and gave on the head of the deceased a heavy blow. Deceased fell down and the two accused ran away. The deceased succumbed to the injuries. Doctor of the hospital found a fracture of temporal bone which according to him was sufficient in the ordinary course of nature to cause death. The two accused were prosecuted under Secs. 302 and 302 read with Sec. 114, I. P. C., but ultimately have been convicted under Sec. 304 (Part II) and Sec. 304, Part II read with Sec. 114, I. P. C., respectively. *Held* that so far as accused no. 1 was concerned his conviction under Sec. 304 (Part II), I. P. C., was therefore quite in order.

A reading of the Sec. 114, I. P. C., will show that it applies to cases where a person abets a commission of the offence some time at different place and also remains present at the time offence is committed. The words "if absent would be liable to be punished as an abettor" in Sec. 114 would show that abetment has been made some time prior to the actual commission of the offence. But in the instant case the accused no. 2 was present on the spot and it is at his instigation that the offence was committed. Therefore, the appropriate section would be Sec. 109 and not Sec. 114, I. P. C.[2]

4. **Principle.**—Four things are considered in determining the criminality of the abettor. What act he had abetted and with what intention, and what act was committed and with what intention. If there was identity of intention of the abettor and the actor and the act was committed as it

1. State *v.* Nathumal Damumal, A. I. R. 1962 Bom. 21 at p. 23 : 1961 N. L. J. 271 : I. L. R. 63 Bom. 362 : (1962) 1 Cr. L. J. 16.

2. Nanboo Kedar *v.* State, A. I. R. 1962 M. P. 91 at p. 92: (1962) 1 Cr. L. J. 435 : 1961 M. P. L. J. (Notes) 205.

Disability of abettor and actor where equal.

was abetted, then the liability of the abettor and the actor is equal. Such a case is met by the present section. But such complete union between two confederates is not always possible and it may be that there may be a variation in act,[1] or intention,[2] or the effect produced,[3] or the encouragement given[4] and again some discrimination is necessary between the abetment of heinous crimes such as murder, and those of a lesser kind. The remaining sections in this chapter consequently deal with the penalty involved in these variations. They, however, mainly relate to three facts following abetment, (*i*) where no offence is committed, in which case the offender is punished for what is a mere attempt to stir up crime (Secs. 115 and 116) ; (*ii*) where the act abetted is committed, in which case the offender is punished under Secs. 109, 110 ; (*iii*) where some act different but naturally flowing from the act abetted is committed, in which case the abettor is punishable under Secs. 111, 112 and 113.

5. Distinction between Secs. 109 and 114.—When a person who abets the commission of an offence is present and helps in the commission of the offence he is guilty of the offence and not merely of abetment except in a few cases like rape or bigamy where the person committing the offence alone can be guilty of the offence. Section 114 of the Indian Penal Code applies to a case where a person abets the commission of an offence sometime before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission of the offence.[5]

A Division Bench of the Bombay High Court in *Ahmed Hasham* v. *Emperor*,[6] said :

> "Section 114 applies where a criminal first abets an offence to be committed by another person, and is subsequently present at its commission. Active abetment at the time of committing the offence is covered by Sec. 109, and Sec. 114 is clearly intended for an abetment previous to the actual commission of the crime, any time, that is, before the first steps have been taken to commit it."

In *Jadunandan Jha* v. *Emperor*,[7] one Dhorai Dhobi was on his way home in the evening when he was waylaid by Madho and Bhutto Jha along with Jadunandan Jha at whose instigation Madho and Bhutto inflicted certain injuries on Dhorai. This was the prosecution case on which the Courts accepting these allegations, Madho and Bhutto were convicted under Secs. 324 and 325, I. P. C., respectively, and Jadunandan was convicted under Sec. 324 and 325 read with Sec. 114. *Held* that the conviction of Jadunandan should have been under Secs. 324 and 325 read with Sec. 109.[8]

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1. Section 111.
2. Section 110.
3. Section 113.
4. Sections 114, 118-120.
5. *In re* Jogali Bhaigo Naiks, A.I.R. 1927 Mad. 97 : 97 I. C. 958 : 27 Cr. L. J. 1198.
6. A. I. R. 1933 Bom. 162.
7. A.I.R. 1937 Pat. 317 at pp. 317-18: 169 I. C. 489.
8. *See* also Sital *v.* Emperor, A. I. R. 1935 Oudh 468 : 36 Cr. L. J. 1151: I. L. R. 11 Luck. 364 ; Chotey *v.* Emperor, A. I. R. 1948 All. 168 : 49 Cr. L. J. 168 : I. L. R. (1948) All. 114 ; Basharat *v.* Emperor, A. I. R. 1934 Lah. 813 : 36 Cr. L. J. 308 ; Chet Ram *v.* State of U. P., 1958 A. W. R. (H. C.) 159 : 1955 A.L.J. 82.

In a case reported in *Jamuna Singh* v. *State of Bihar*,[1] the Supreme Court has maintained a distinction between abetment by instigation and conspiracy on the one hand and abetment by aiding on the other. In the latter, i. e. abetment by aiding, the charge against the abettor would normally fall when the principal offender is acquitted. The learned Judges observed :

> "It cannot be held in law that a person cannot even be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted, and the manner in which the abetment was made. Under Sec. 107, I. P. C., a person abets the doing of an act in either of three ways which can be, instigating any person to do an act; or engaging with one or more persons in any conspiracy for the doing of that act; or intentionally aiding the doing of that act. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under Sec. 115 or Sec. 116, I. P. C., even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. This is clear from Explanation 2 and Illustration (*a*) thereto, to Sec. 108, I. P. C..... It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. The case of *Faguna Kanta Nath*[2] lays this down. The observations of this Court in that case bring out clearly the distinction in the case of persons instigating another or engaging in conspiracy with another on the one hand, and that of a person aiding the person committing a certain offence. The observations are :
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> 'It is not the prosecution case that the appellant abetted the offence by instigating Khalilur Rahman to demand the illegal gratification ; nor has the prosecution set up or proved a case of conspiracy between the appellant and Khalilur Rahman for the commission of an offence under Sec. 161. On the findings of the Court the appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked him to hand over the money to the appellant. If Khalilur Rahman is acquitted and therefore the offence under Sec. 161 is held not to have been committed then in this case no question of intentionally aiding by any act or omission the commission of the offence arises'."[3]

Offences created by Secs. 109 and 120-B, I. P. C., are quite distinct. There is no analogy between Sec. 120-B, and Sec. 109, I. P. C. There may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Conspiracy to commit an offence is itself an offence and a person can be separately charged with in respect to such conspiracy.[4]

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1. A. I. R. 1967 S. C. 553.
2. A. I. R. 1959 S. C. 673.
3. State of Kerala *v.* Syed Mohammed Rawther, 1969 Ker. L. T. 849 at pp. 851-52.
4. Bijoyanand Patnaik *v.* Mrs. K. A. A. Brinnand, A. I. R. 1970 Cal. 110 as p. 116.

6. Meaning of words.—"*If the act abetted is committed*" : The act means here the specific offence abetted. "*No express provision,*" as has been for instance, made by the ensuing sections, and Secs. 121, 130, 132, 134 and 136. "*An act is committed in consequence of abetment*" : The words following paraphrase Sec. 107. "*Punishment provided for the offence*" : Under this Code and not under any special or local law.[1]

7. Offences under special or local law.—"Offence" in Sec. 109 now denotes a thing punishable under the Code, or any special or local law.[2] But the term cannot be extended to offences under rules framed under those laws.[3]

8. Aiding and abetting.—A man may be properly convicted of aiding and abetting an offence under Sec. 4 (1) of the English Explosive Substances Act, 1883.

Section 4 (1) of the Act of 1883 reads as follows :

> "Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of a felony...."

If it is found : (*a*) that he knew that the principal offender had explosives in his possession or under his control ; (*b*) that he knew facts giving rise to a reasonable suspicion that the principal offender did not have such explosives in his possession or under his control for a lawful object ; (*c*) that he was present actively encouraging or in some way helping the principal offender in the commission of this offence.[4]

9. "Instigation."—"A person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement."[5] It is not necessary that express and direct words should be used to indicate what exactly be done by the person, to whom directions are given. But considering the definition of abetment strictly the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation.[6] As enacted in Sec. 107, an abetment of an offence may be by *instigation*, by conspiracy or by intentionally aiding by any act or illegal commission. The law does not require that instigation should be in a particular form that it should be only in words and may not be by conduct, for instance, a mere gesture, indicating "beat" or mere offering of money by an arrested person to the constable who arrests him may be regarded as instigation, in the one case to beat and in the other to take a bribe. Whether there was instigation

Abetment by instigation.

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1. Mg. Pukai, I. L. R. 7 Rang. 329 (F. B.).
2. V. Shesha Ayyar *v.* Venkatasubba Chetty, A. I. R. 1924 Mad. 487 at p. 488 : 25 Cr. L. J. 442 : 19 M. L. W. 201 : 1924 M. W. N. 268.
3. Ganda Shah, (1894) P. R. No. 23.
4. R. *v.* McCarthy, (1964) 1 All E. R. 95 at pp. 96, 97.
5. Russell on *Crimes*, cited in Emperor *v.* Amruddin Salebhoy Tyabjee, A. I. R. 1923 Bom. 44 at p. 46 : 24 Bom. L. R. 534.
6. Baby John *v.* State, A. I. R. 1953 T. C. 251 at p. 252 : 1952 Ker L. T. 737.

or not is a question to be decided on the facts of each case. It is, however, not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation, and nothing else, so long as there was instigation and the offence has been committed, or the offence would have been committed, if the person committing the act had the same knowledge and intention as the abettor. It is impossible for any human tribunal to decide exactly how much the instigation actually weighed in the mind of the person abetted when he committed the act or offence.[1]

Decision of instigation is a question of fact.

10. Abetment followed by act.—This section prescribes the panalty for abetment on commission of the act in consequence of the abetment. It excludes two classes of cases, namely (*a*) those in which the Code contains express provisions elsewhere, and (*b*) those in which the act abetted is committed but *not* in consequence of the abetment. The cases covered by express provisions have been already set out (*see* para. no. 3, *supra*). In these cases the punishment will be that prescribed in those sections. In order, therefore, to see if this section applies, the Court has to first glance through the other sections hereby excluded, for this is a general provision and has no application so long as there are more specific sections applicable. If there are no such sections applicable, the question is then narrowed down to this : (*i*) what was the act abetted ; (*ii*) what was the act committed ; (*iii*) was the act committed the same as the act abetted, and (*iv*) was is committed in consequence of the abetment ?

Law of abetment takes four facts into account.

11. Act abetted.—As regards the act abetted the question is a question of fact which has to be sifted in the light of the rules discussed under Secs. 107 and 108. In order to establish the charge of abetment there must be evidence that an act was abetted, and that it was abetted by the person charged. The act abetted must, moreover, amount to a crime,[2] and in order to connect the abettor with the crime, it is not sufficient to prove that he had taken part in those steps of the transaction which are innocent, but it must be proved that he had taken part in those steps of the transaction that are criminal.[3] Where, therefore, a person is charged with abetment of perjury, it is not only necessary to show that he had instigated another to make the statement which he did, but that in doing so he intended that those statements should be made falsely.[4] So where a person is charged with the abetment of forgery, it is not enough to show that he had taken part in the making of the document, but it must be shown that he was thereby promoting forgery. So where the accused wrote out a document purporting to be a *kabala* of one Khettar Nath Das then deceased, but to which no signature was affixed in his presence, it was held that the offence committed was under this section, inasmuch as by his act he had abetted the commission of forgery whenever and by whomsoever it may have been committed.[5] So where a Hindu father after having given away

Abettor must be proved to have participated in steps of transaction that are criminal.

1. *In re* G. Ananthachari, A. I. R. 1938 Mad. 996 at p. 998 : 40 r. L. J. 302 : 197 I. C. 971 : (1938) 2 M. L. J. 574 : 1938 M. W. N. 908 : 48 M. L. W. 471.
2. Purna Chandra *v.* Hashanalli, I. L. R. 41 Cal. 17 ; Raja Khan, 61 I. C. (Cal.) 800.
3. Nim Chand Mookerjee, 20 W. R. 41 at p. 44.
4. *Ibid.* at p. 44 ; Khandu Vishnu, 1 Bom. L. R. 351.
5. Kashi Nath Naick, I. L. R. 25 Cal. 207.

in marriage his daughter, aged about 8, to one person, married her again to another, his act was held to amount to abetment within the meaning of this section.[1] It was contended in this case that as the girl was only aged 8, she had not the requisite knowledge and intelligence to commit an offence under Sec. 494, and as there was no offence, there could be no abetment, but it was held that the case was amply covered by Sec. 108, Explanation 3, Illustration (*a*).

12. Act committed.—Sometimes the only indication of the act abetted will be found in the act done. So where the lessee of house allowed gamblers to congregate therein, who caused annoyance to the neighbourhood by their noise and disorderly conduct, it was held that the lessee was rightly convicted under this section read with Sec. 290 of the Code, as the nuisance was caused in consequence of his turning his house into a common gaming-house, which he could have anticipated.[2] So in the Himalayan Bank fraud case Edge, C. J., directed the jury to find the accused, Moss and Greenaway, Manager and Accountant, guilty of abetment under this section if they came to the conclusion that they had assisted the directors of the Bank by the issue of false balance-sheets to obtain the sanction of the shareholders to the paying of the dividends, and of the depositors to the retention of their deposits in the Bank.[3]

Was the act done such as the abettor knew was the probable consequence of his abetment.

A person may be charged with abetment under this section, though he may not have abetted the offence committed. *A* killed his wife in consequence of a quarrel, and he then called his brother *B* to assist him in disposing of her body to which he agreed and for which purpose he accompanied him; *A* asked him to carry his child *C* which he did, and while on the way *B* asked him what he intended to do with the child, *A* replied that he should either kill him or abandon him in the jungle. *B* thereupon continued to carry the child and, after proceeding with it some distance, declined to proceed any further. He then left the child with *A* and left him to call his brother who was in the neighbouring field, whom he sent to *A*, himself returning home. *A* killed *C*, and it was held that *B* was liable as an abettor both under this and Sec. 111, his abetment consisting in the fact that after he had known of his brother's murderous intention he continued to carry the child and left him with *A*, in consequence of which he was killed.[4] In this case the abettor had the means of knowing the nature of the act committed, for the commission of which he offered facilities. He was, therefore, rightly convicted of abetment.

The question in these cases is, was the act committed the same as the act abetted? This question is answered in Sec. 111, under which it will have to be discussed. Here, however, it may be stated that the test in such cases is, was the act done such as the abettor knew was the probable consequence of his abetment? If so, he is liable in the same manner and to the same extent as if he had himself directly authorised the act. For the purpose of determining the identity of the offence committed with that abetted, it is not necessary that the two offences should be called by the same name, provided that they are otherwise identical. Where, for instance, a woman *A* volunteered to become a *sutti*, and *A* ordered her pyre

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1. Nandlal Singh, 6 C. W. N. 343, distinguishing Abdul Karim, I. L. R. 4 Cal. 10 on the ground that the parties were Hindus and there was a marriage of the girl in the usual manner.
2. Thandavarayudi, I. L. R. 14 Mad. 64.
3. Moss, I. L. R. 16 All. 88.
4. Sadu, (1884) B. P. J. 207.

to be lighted, whereupon *A* fled, but *B* induced her to return, it was held that though *A* was guilty of attempted suicide, *B* was liable for abetment of homicide.[1]

13. Abetment—Kidnapping.—Sometimes a person's liability for abetment may depend upon the stage which his assistance was given. If he had assisted after the offence was already complete, his assistance *ex post facto* could not amount to abetment (*see* next para. no. 14). If the offence was, on the other hand, a continuing one, abetment is in such a case still possible. As regards the offence of kidnapping punishable under Sec. 363 of the Code, it is now agreed that it cannot be so regarded.[2] Consequently there cannot be abetment of kidnapping by an act subsequent to the removal of the minor out of the custody of his guardian, since the offence does not continue so long as the minor is kept out of such guardianship.

Is kidnapping a continuing offence?

14. Offence committed must be consequential.—The same rule extends to other offences. A person cannot be convicted of the abetment of theft merely on the ground that he had subsequent knowledge of the offence.[3] This is clear from the meaning assigned to the term abetment, in Sec. 107 and to the fact that this section contemplates that the act abetted should be committed in consequence of the abetment.[4] Now, how is it to be known that an act was commited in consequence of the abetment. According to the explanation, an act would be deemed to be so committed if it is committed (*a*) in consequence of the instigation, or (*b*) in pursuance of the conspiracy, or (*c*) with the aid which constitutes the abetment. These three clauses, it will be noticed, closely follow the three corresponding clauses of Sec. 107, to which reference must be made. (For the meaning of the terms here employed, *see* comments under Sec. 107.) The questions that call for discussion here are the acts committed to be deemed to be done in consequence of the instigation in pursuance of the conspiracy, or with the aid of that act constituting abetment?

Explanation.

What constitutes acts committed in consequence of the abetment.

In ordinary cases it is not difficult to trace an effect to its cause. *A* tells *B* to strike *C*. *B* strikes *C*. The assault on *C* is, of course, in consequence of the instigation of *A*. This is, however, the case of direct instigation, but there are cases in which the influence of instigation is left to inference. Such inference may be drawn not only from the acts and conducts of the abettor prior to the commission of the act, but also his contemporaneous and subsequent conduct in reference to the transaction. For instance, if a person stands by while a crime is being committed by another, he may be either a spectator or an accomplice. But if, suppose, he came and left with the actual perpetrator would not the inference be strong that he was an abettor?[5] So again there may be circumstances when such an inference may be drawn

Influence of instigation to be inferred.

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1. Saheblall, (1863) R. J. P. J. (C.). 174.
2. Nemai Chattaraj, I. L. R. 27 Cal. 1041 (F. B.), followed in Chekutty, I.L.R. 26 Mad. 454; Ram Devi, I.L.R. 18 Mad. 380 at p. 382; Ram Sundar, I. L. R. 19 All. 109. To the same effect, Rakhal Nikhari, 2 C. W. N. 81; Mula, (1888) P. R. No. 13; Chanda, (1893) P. R. No. 13; Chanda, (1894) P. R. No. 6, followed in Muhammad Buksh, (1894) P. R. No. 8; Durga Das, (1904) P. R. No. 13; Faimal Singh, (1901) P. R. No. 1.
3. Shumeerudden, 2 W. R. 40.
4. Raj Coomar Banerjee, Ind. Jur. (O.S.) 150.
5. In Jan Mahomed, 1 W. R. 49, merely standing-by was held to constitute abetment, but it is not so.

from a mere standing-by. Suppose a gentleman's house is being robbed at night and two men armed with sticks are found watching at the gate. Could they be regarded as mere spectators? And could they be regarded as otherwise than spectators, if they happened to be respectable neighbours who had probably been attracted by the sound of burglars? Where certain persons pointed out to the dacoits the houses to be robbed, and took charge of the camels of the dacoits whilst the dacoity was being committed it was held to be a case of abetment under this section.[1] The question, in each case, is then a question of fact depending upon the proved facts and circumstances of each case.

15. No offence, no abetment.—It is clear from the language of this section that there can be no abetment of an offence which is non-existent. A case in point is that of the accused, taxi-driver, who several days after dismissal of the case against him for a petty offence under the Motor Car Act was said to have offered a bribe to the prosecuting sergeant for withdrawing the case against him; the High Court held that the sergeant was powerless to show any favour to the accused after his discharge by the Magistrate and no money could have been paid to the sergeant as a motive or reward for doing anything for the accused could not therefore be convicted of abetment of the offence of bribery (Sec. 161).[2] The liability of a person for abetment must be distinguished from his responsibility as a co-offender. Where the accused merely said "Beat" but took no further part in the consequent assault, he was held liable for no more than the abetment of assault under Secs. 352 and 109.[3]

16. Conviction of abettor alone, legality of.—In the Supreme Court case[4] all the accused persons formed an unlawful assembly the common object of which were (1) to dismantle the hut of Mst. Rashmi, (2) to set fire to it and (3) to commit assault if resisted. The accused Gallu Sah ordered another member of the unlawful assembly named Budi to set fire to the hut. The hut was burnt. Accused were charged under various Secs. 147, 148, 323, etc. Budi was further charged under Sec. 436, I.P.C., and the accused Gallu Sah under Sec. 436, read with Sec. 109. The evidence against Budi in respect of allegation that he had set fire to the hut of Mst. Rashmi was not very satisfactory and he was acquitted of charge under Sec. 436. So far as the accused Gallu Sah was concerned it was satisfactorily established that he had given the orders to set fire to the hut and the hut was actually set on fire by one member or the other of the unlawful assembly. Gallu Sah was convicted for an offence under Sec. 436 read with Sec. 109. *Held* that conviction of accused Gallu Sah for the offence under Sec. 436 read with Sec. 109 was not bad in law.

17. Cases.—If a person abets the commission of murder by the public, and murder is committed in consequence of the abetment, though it cannot be said that the offence does not fall under Sec. 117, yet the appropriate section for such an offence would be Sec. 109.[5] It is not possible to say that a man who makes a theft or robbery feasible by giving another person money

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1. Section 71; Sita Ram Rai, I.L.R. 3 All. 181.
2. Shamsul Huq *v.* Emperor, 23 Cr.L.J. 1: 64 I. C. 369: A. I. R. 1921 Cal. 344 at p. 344: 33 C. L. J. 379.
3. Mir Hyder, 29 I. C. (Mad.) 88.
4. Gallu Sah *v.* State of Bihar, A. I. R. 1958 S. C. 813 at p. 816: 1958 S.C.J. 1257: 1958 A. L.J. 716: 1958 M. P. C. 670: 1958 B.L.J.R. 762: 1958 Cr. L.J. 1352.
5. Emperor *v.* Lavji Mandon, A. I. R. 1939 Bom. 452 at p. 453: 41 Cr. L. J. 183: 41 Bom. L. R. 980.

for that person to be robbed, is abetting the actual robber with whom he has never had any communication whatsoever.[1] But a person meeting the band of dacoits just prior to the commission of the dacoity and bringingthem food is guilty of abetment even if it was uncertain whether he took part in the actual dacoity.[2] Similarly, it has been held that any person who instigates a raider or leader of a raid in which murder is committed is guilty of abetment of murder.[3] The substantive offence under Sec. 6, sub-section (1) of the Calcutta Suppression of Immoral Traffic Act is an offence of which only a male person can be guilty. A female though incapable of committing the main offence under Sec. 6 (1) of the Calcutta Suppression of Immoral Traffic Act is capable of abetting such offence or in other words can be convicted under Sec. 6, sub-section (1) of the Calcutta Suppression of Immoral Traffic Act read with Sec. 109, Penal Code.[4] Where no particular person is found to have committed the offence under Sec. 4 (*ii*), of the Madras Gaming Act, III of 1930, which the accused could be said to have abetted his conviction under Sec. 109, Penal Code, read with Sec. 4 (*ii*) Gaming Act, as accessory either before or after the abetting is clearly wrong. Where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, Secs. 120-A and 120-B of the Penal Code are wholly irrelevant. Conspiracy is one form of abetment (*see* Sec. 107) and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under Sec. 109, I. P. C. In an Oudh case while complainant was weeding his field, the accused and his son came armed with *lathis* and on account of previous enmity attacked the complainant and that when he fell down on receiving the *lathi* blows dealt on him, the accused held up the complainant's legs and son thrust a *lathi* into his rectum causing profuse bleeding. It was held that the accused was guilty of abetment of son's act as he, by his act did facilitate son's act.[5]

Where the accused forged the thumb-impression of the payee on a money order form and it was established that the money order amount was never paid to the payee, in the absence of proof by the accused that he paid the money to the payee, and obtained her thumb-impression in token of her having received the money order the accused would be liable to be convicted under Sec. 467 read with Sec. 109.[6]

When *A* is guilty of criminal conspiracy along with *B* for the commission of the offence under Secs. 364 and 386 Penal Code. On the circumstantial evidence, both must be held equally guilty of the main offences themselves under Sec. 34, Penal Code. Further, in view of the fact that the offence were actually committed in pursuance of the conspiracy or in pursuance of the

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1. J. W. Atkinson *v.* S. W. H. Xavier, A. I. R. 1936 Rang. 242 at p. 246: 37 Cr. L. J. 723: 162 I. C. 988.
2. Nga Pyaun *v.* Emperor, A. I. R. 1934 Rang. 30 at p. 31: 35 Cr. L. J. 863.
3. Emperor *v.* Surya Kumar Sen, A.I.R. 1934 Cal. 221 at p. 225: 147 I.C. 32: 35 Cr. L. J. 334 (F. B.).
4. Padmamoni Dasi *v.* Emperor, A. I. R. 1932 Cal. 457 at p. 458: I. L. R. 59 Cal. 1260: 138 I. C. 661: 33 Cr. L. J. 681: 3 C. W. N. 650: 55 C. L. J. 435.
5. Sital *v.* Emperor, A. I. R. 1935 Oudh 468 at p. 469: I. L. R. 11 Luck. 384: 157 I. C. 370: 36 Cr.L.J. 1151: 1935 O.W.N. 902.
6. Sheikh Mohammed Hussain, *In re*, A.I.R. 1957 Mad. 47 at p. 48 (D.B.): (1956) 2 M. L. J. 427: 1957 Cr. L.J. 73 (2).

common intention, the accused *A* would be equally guilty with the accused *B* of the two substantive offences under Secs. 364 and 386 of Penal Code and would be liable to the same sentence (*see* Sec. 120-B, Penal Code, taken with Sec. 109, Penal Code).[1]

Where the alleged offence of offering a bribe was committed in 1948, the accused could not be convicted under Sec. 165-A of the Penal Code since the section was introduced for the first time in the Penal Code by Sec. 3 of the Criminal Law Amendment Act (XLVI of 1952), which came into force on 28th July, 1952. Such a conviction would be an infringement of Art. 20 of the Constitution which provided *inter alia*, that no person shall be convicted of an offence except for violation of law in force at the time of the commission of that act charged as an offence. This legal objection is no doubt void but the defect would not be a bar for the conviction of the accused on the same facts under Sec. 161 read with Sec. 109 of the Penal Code. If it be otherwise permissible, it would be open to the High Court in the exercise of its appellate jurisdiction under Sec. 423 of the Criminal Procedure Code to alter the finding as to the accused's liability from one under Sec. 165-A to that under Sec. 161 read with Sec. 109 of the Penal Code. In view of the provisions of Sec. 537, Criminal Procedure Code, there would be no ground for setting aside the conviction of the accused merely on the ground of this irregularity in the charge unless the irregularity has in fact occasioned a failure of justice.[2]

The question as to when the giver of a bribe has to be treated as an accomplice came up for consideration in *Papa Kamalkhan* v. *Emperor*,[3] and there it was pointed out that "the objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice, i.e. the person who pays the bribe, is not a willing participant in the offence, but is really a victim of that offence". In *State* v. *Minaketan*,[4] also this question arose for consideration. In dealing with the question Narasimham, J., made the following observations:

> "From Sec. 109, Illustration *A*, and Sec. 161, Illustration *A*, Penal Code, it is clear that mere offer of money or illegal gratification to a public servant would not amount to an offence of abetment of bribery unless that offer is made as a reward for showing that person some favour in exercise of the official functions of the public servant.
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> "That is to say, there must be the necessary criminal intention on the part of the officer. In the case of a trap witness engaged for the purpose of decoying a public official by offering him marked currency notes, this essential criminal intention is wanting....A person engaged by the police to give marked currency notes to a public officer with a view to detect the offence of bribery, is not an accomplice, because he lacks the necessary criminal intention."

When such criminal intention was totally absent on his part, it cannot be said that he aided or abetted the commission of the offence of receiving illegal gratification by the accused.[5]

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1. Ram Chandra *v.* State of U. P., A. I. R. 1957 S.C. 381 at p. 389: 1957 Cr. L. J. 559.
2. Om Prakash *v.* State, A.I.R. 1957 All. 388 at p. 389: 1958 A. W. R. (H.C.) 81: 1957 Cr. L. J. 695.
3. A. I. R. 1935 Bom. 230 : 36 Cr. L. J. 968.
4. A. I. R. 1952 Orissa 267: 1952 Cr. L. J. 1393.
5. K.M. Narayanaswami *v.* Kerala State, A. I. R. 1957 Ker. 134 at pp. 137, 138.

PRACTICE AND PROCEDURE

18. Summary trial.—The procedure for the trial of abetment generally follows the procedure applicable to the trial of the offence abetted. Consequently an abetment is triable summarily, if the offence abetted was so triable.[1]

19. Joint trial.—The principal offender under Sec. 366 and the abettor can be tried together in the Court within whose jurisdiction the principal offences took place.[2]

An abettor may be tried jointly with the principal offender.[3]

20. Sanction for prosecution.—There is no bar to prosecuting an offender for abetting under Sec. 109, Penal Code, an offence which has in fact been committed in pursuance of a conspiracy, notwithstanding the fact that a prosecution under Sec. 120-B Penal Code, could rot be launched without previous complaint or consent.[4] As regards offences mentioned in Sec. 198 of the Criminal Procedure Code, a complaint of the aggrieved party is necessary even if the offence charged be an abetment.[5]

There is nothing in Sec. 196-A, Cr. P. C., to indicate that the offence of abetment by conspiracy also requires a previous sanction. Only where there is a charge of conspiracy pure and simple, whether to commit any non-cognizable offence or commit any illegal act, such previous sanction is necessary. Therefore, no such previous sanction under Sec. 196-A, Cr. P. C., could be necessary for taking cognizance of offence of abetment of forgery.

It is clear where the offence has been actually committed it would be more appropriate to proceed for the trial of the principal offence and abetment thereof rather than with the offence of criminal conspiracy. Therefore, even if the charge of criminal conspiracy does become irrelevant, it may not be held at least the charge of criminal conspiracy could not be regarded as the primary charge where offence in pursuance of the conspiracy has been committed.

Criminal conspiracy is complete as soon as the agreement to commit the offence is made. If the offence has not been carried out, naturally for criminal conspiracy sanction under Sec. 196-A would be required; but where the object of the criminal conspiracy has been carried out it would be appropriate to regard the principal offence and the abetment thereof as the primary offences committed and to frame charges in respect thereof.[6]

21. Sentence.—A sentence of whipping passed for the offence under Sec. 380 read with Sec. 109, I. P. C., is not legal.[7] Whipping as a form of punishment has been abolished by the Abolition of Whipping Act, 44 of 1955. A person found guilty of abetment of theft could not on the same facts be convicted of receiving stolen property,[8] nor could persons punished as principals be punished for abetment of the same offence.[9]

22. Jurisdiction, etc.—Offence triable by Court by which offence abetted is triable—Cognizable if offence abetted is cognizable—Warrant

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1. Section 260 (*k*), 261 (*c*), Cr. P. C.
2. Mohan Singh *v.* State, 64 Punj. L. R. 193.
3. Section 239, Cr. P. C. Dwarka Singh, 28 I.C. (Cal). 732.
4. Amarlal Wassanmal Hingorani *v.* Emperor, A. I. R. 1945 Sind 51 at p. 53: I. L. R. (1944) Kar. 411.
5. Jit Mal, (1888) P. R. No. 4; Sardar Dayal Singh, (1898) P. R. No. 9.
6. Surendra Mohan Basu *v.* Saroj Ranjan Sarkar, A. I. R. 1961 Cal. 461 at pp. 465, 466, 467.
7. Emperor *v.* Veerappa, A. I. R. 1937 Rang. 310 at p. 310: 171 I.C. 71: 38 Cr. L. J. 1013.
8. Chattar Singh, (1901) P. R. No. 15.
9. Schedule II, Cr. P. C.

or summons according as warrant or summons may issue for offence abetted compoundable or not according as offence abetted is compoundable or not.

23. Charge.—In charge under this chapter, the section of the principal offence, and the section of this chapter under which the case falls should be mentioned with the circumstances which bring it under the said section.[1] It is not possible to frame a charge under Sec. 109 alone because that section has, for its application, to be read with some other sections defining the offence, say Sec. 420 read with Sec. 109 or Sec. 467 read with Sec. 109 and so on. So a charge under Sec. 109, when framed should be along with some substantive offence.[2] A person cannot be convicted unless he is specifically charged under the section.[3]

Where a case is covered under Secs. 236 and 237, Cr. P. C. and the accused had notice of all the facts which go to make up the charge of abetment, he can be convicted for such abetment, even in cases where the charge framed against him is only for the substantive offence. On the other hand, if in a given case, it is found that the accused had no notice of the facts constituting abetment, and as such, had no chance of meeting such a case, a conviction for abetment will not be justified when he is charged with the substantive offence.[4]

Offence of abetment falls through if the principal offence is not substantiated.

The offence of abetment falls through if the principal offence is not substantiated.[5] It is not competent to the Appellate Court to alter the conviction for theft into one for its abetment under this section of which he was never charged.[6] A charge under this section cannot be substituted for charge under Sec. 120-B.[7] But where two charges are framed, one under Sec. 120-B/467 and another under Secs. 467, 109, I. P. C., but the former charge is subsequently cancelled for want of sanction under Sec. 196-A, Cr. P. C., a conviction on the latter charge for abetment by conspiracy cannot be held to be illegal, unjust or unfair to the accused.[8] Nor can a conviction under this section be altered to one under Sec. 471.[9] But it has been held by the Orissa High Court that an accused person can be convicted of abetment though charged for the main offence only if the accused had notice of the fact constituting abetment and suffered no prejudice from the omission to frame a separate charge for abetment.[10]

Where the conspiracy is to commit a single act, the persons concerned can be charged with the actual commission of the offence or with abetment of the offence as abetment includes abetment by conspiracy. Where the entire case can be covered by framing a charge of the offence or of its abetment it may be improper and certainly unnecessary to frame a charge of conspiracy separately. But where the specific charges are only about two permits and the charge of conspiracy is not with respect to these two permits only but with respect to eleven other permits about which perhaps it was not possible to get the same kind of

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1. Cr. Letter 3 W. R. 5: 1 W. R. 9.
2. Rex *v.* Alimuddin, A. I. R. 1950 All. 77 at p. 79: 51 Cr. L. J. 365: 5 D. L. R. (All.) 8.
3. Darbari Chowdhary, 60 I. C. (Pat.) 999.
4. Prasanna Kumar Samal *v.* Anand Chandra Swain, A.I.R. 1970 Orissa 10 at p. 11.
5. Raja Khan, 61 I. C. (Cal.) 800; Umadasi, I. L. R. 52 Cal. 112.
6. Chand Nur, 11 B. H. C. R. (A. C.) 240; Padmanabha, I. L. R. 33 Mad. 264; Singaravelu, 14 I. C. (Mad.) 203; Varyal, 1 I. C. (Mad.) 319; Govind, 66 I. C. (Pat.) 334; *contra* Yeditha, 15 I.C. (Mad.) 85.
7. Rex *v.* Alimuddin, *supra*.
8. Syed Yawar Bakht Chowdhary *v.* Emperor, A.I.R. 1940 Cal. 277 at p. 279: I. L. R. (1940), 1 Cal. 531 : 41 C. L. J 719: 44 C. W. N. 474 : 189 I. C. 173.
9. 24 I. C. (Mad.) 976.
10. Damodar Sahu *v.* State, A. I. R. 1955 Orissa 156 at p. 158 (D. B.) : 21 Cut. L. T. 296 : 1955 Cr. L. J. 1373.

evidence as it was possible to get in the case of two permits, the entire case cannot be covered by a mere charge of abetment and a charge of conspiracy under Sec. 120-B separately is necessary and has to be properly framed against the various accused persons.[1]

Conspiracy, it should be borne in mind, is one form of abetment and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission of the offence should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under Sec. 109, I. P. C.[2]

The charge may be worded as follows:

"*I* (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :

"That *A. B.* (*the name of the principal, if the person is unknown* say *that an unknown person*) on the——day of——at——committing the offence of——, and that you at——abetted the said *A. B.*, (or *person unknown*) in the commission of the said offence of——which was committed in consequence of your abetment and you have thereby committed an offence punishable under Sec. 109 and—— of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge (by the said Court, *if the case is committed to the Session*)."

When the abettor is charged with the principal offender, the charge should then run thus:

"That you——on or about the ——day of——at——abetted the commission of the offence of——by——which was committed in consequence of your abetment, and that you have thereby committed an offence punishable under Sec. 109 and——of the Indian Penal Code, and within the cognizance of my Court (*or* the Court of Session)."

110. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Punishment of abetment if person abetted does act with different intention from that of abettor.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Offence committed with different intention.
4. Procedure.

1. Analogous law.—This section refers to a case contemplated in Sec. 198, Expl. 3, of which Illus. (*d*) furnishes a concrete example.

This section applies equally to offences under special or local laws.

2. Principle.—As remarked before, the law of abetment takes note of four things: (*a*) the act abetted, (*b*) the act done, (*c*) the intention of the abettor, and (*d*) of the actor. The last section presents a case in which there

1. Rex v. Alimuddin, A. I. R. 1950 All. 77 at p. 80 : 51 Cr. L. J. 365 : 5 D. L. R. (All.) 8.
2. Mallimoggala Venkataramiah, *In re*, A.I.R. 1938 Mad. 130 at p. 132 : 46 M. L. W. 709 ; *see* also Karam Singh *v.* State, 1956 Raj. L. W. 234: 1957 Cr. L. J. 234.

is no variation between the abetment and the act, and this section supplements the provisions of that section by enacting that a variation between the intention and knowledge of the abettor and those of the person abetted is immaterial so long as the act done is the same as the act abetted. Where even the act is different, the rules formulated in the next section would have to be called into requisition. So far as this section is concerned it makes inconsequential that the person abetted had an incentive of his own or no incentive at all for committing the act. He had committed it in consequence of the abetment, and his abettor must take upon his shoulders all the blame that attaches to the offence. It was he that had moved the hand of the other, and the presumption is that it would not have moved otherwise. His responsibility is, therefore, single and undivided. This does not mean that the person abetted is thereby rendered free from punishment. His liability as an offender still remains, and will be measured by the enormity of his crime and the criminality of his intention. If he was an innocent agent, then *respondeat superior*. If a *particeps criminis*, then he must suffer as much as his mentor.

Abettor has to shoulder all the blame attaching to the crime.

The principle of this section applies to offences under Sec. 149.[1]

3. Offence committed with different intention.—As no man can be punished for his evil intentions so no man can be held liable if his act was prompted by his own intention provided that it was the act abetted by another. If, therefore, *A* orders *B* to kill *C* and *B* kills him because he has a malice of his own against *C*, *A* is liable to the extent as if *B*'s act was due to the malice of *A*. So *A* asks a railway porter *B* to remove a certain luggage from the train, and the porter removes it believing it to be *A*'s though *A* intended to steal it; he is liable for abetment of *B*'s theft though *B* being an innocent agent is not liable for his own act.

4. Procedure.—With reference to this section, it is provided by the Code of Criminal Procedure that the police may arrest without warrant if they could have done so for the offence abetted. So, ordinarily a warrant or summons will issue in the first instance according as a warrant or summons may issue for the offence abetted. The offence is bailable and compoundable if the offence abetted be bailable and compoundable. The same test applies to the jurisdiction of the Court trying the case.[2]

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it :

Liability of abettor when one act is abetted and different act is done.

Provided that the act done was probable consequence of the abetment and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Proviso.

Illustrations

(*a*) *A* instigates a child to put poison into the food of *Z*, and gives him poison for that purpose. The child in consequence of the instigation, by mistake puts the poison into the food of *Y*, which is by the side of that of *Z*. Here,

1. Bhagwat Singh *v.* Emperor, A. I. R. 1936 Pat. 481 at p. 485 : 37 Cr. L. J. 630 : 162 I. C. 563.

2. Jeetoo Chowdhury, 4 W. R. 23 ; Ram Narain Jash, 4 W. R. 37.

if the child was acting under the influence of *A*'s instigation, and the act done was under the circumstances a probable consequence of the abetment, *A* is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of *Y*.

(*b*) *A* instigates *B* to burn *Z*'s house. *B* sets fire to the house and at the same time commits theft of property there. *A*, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(*c*) *A* instigates *B* and *C* to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. *B* and *C* break into the house, and being resisted by *Z*, one of the inmates, murder *Z*. Here if that murder was the probable consequence of the abetment, *A* is liable to the punishment provided for murder.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Scope and applicability.
5. Limits of vicarious liability.
6. Probable consequence.
7. Procedure.
8. "When an act is abetted."

1. Analogous law.—This statement of the law coincides with the English view. So Foster laid down the following rules: "If the principal totally and substantially varies: if solicited to commit felony of one kind, *he wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal in *substance* complies with the command, varying only in the circumstances of time or place or manner of execution, in these cases the person soliciting to commit the offence will, if absent, be an accessory before the fact, or if present, a principal. *A* commands *B* to murder *C* by poison; *B* does it by sword or other weapon, or by some other means; *A* is accessory to this murder, for the murder of *C* was the principal object, and that object is effected. So where the principal goes beyond the terms of the solicitation, *if in the event, the felony committed was the probable consequence of what was ordered or advised*, the person giving such order or advice will be an accessory to that felony. *A*, upon some affront given by *B*, ordered his servant to way lay him and beat him. His servant does so, and *B* dies of the beating; *A* is accessory to this murder. *A* solicits *B* to burn the house of *C*; he does so, and the flames catch the house of *D*, which also is burnt. *A* is accessory to this felony. The principle in all these cases is that, though the event might be beyond the original intention of the accessory, yet, as in the ordinary course of things that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable for the offence."[1]

Section coincides with the English view.

Illustration (*a*) follows the view of Sir Michael Foster and dissents from that of Hale, in a case in which he held that, if *A* ordered *B* to kill *C*, and *B* by mistake killed *D* but missed *C*, *A* was not accessory to the murder of *D*, because the person was different. Sir Michael Foster animadverts on this view, holding that order was to commit murder and the fact that a wrong person was murdered was no exoneration of the crime.[2]

This view is enacted in the section, and Illus. (*a*) shows that the view adopted by the Legislature is that commented by Foster and is opposed to that of Lord Hale.

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1. Fost., *Criminal Law*, 369, 370. To the same effect, 1 Hale P. C. 617; 2 Hawk. P. C., c. 29, Sec. 18.
2. Fost., *Criminal Law*, 372; 1 Hawk. P.C., c. 29, Sec. 22.

2. Principle.—It is a rule of acknowledged authority that a man is responsible for the probable consequences of his own act.[1] No man can say that he did not authorise an act when he could have foreseen that consequence. If he did not, he might and ought to have foreseen it, and he is liable to the same extent as if in fact he had foreseen it. If the rule were otherwise, criminal law would be more compassionate to felons than civil law is to those who employ agents. The rule, therefore, has always been that those who employ agents to perpetrate crimes must bear the brunt of liability for all acts done by the agent so long as the agent has not *substantially* varied from the terms of the abetment.

3. Meaning of words.—"*The act done was the probable consequence of the abetment*[1]. This means the same thing as that the act done was in consquence of the substantial compliance of the abetment. "*And was committed*" that is, to say, that the act was done in consequence of the abetment.[2]

4. Scope and applicability.—It is to be observed that the definition of abetment in Sec. 107, I.P.C., includes not merely instigation, which is the normal form of abetment, but also conspiracy and aiding, and those three forms of abetment are dealt with in the proviso to Sec. 111. The section comes to this. Where an act is abetted, and the abetment takes the form of instigation of an act, and a different act is done, that different act must be a probable consequence, and committed under the influence of the instigation; and where the abetment takes the form of aiding or a conspiracy, the different act must be a probable consequence and also with the aid or in pursuance of the conspiracy.[3]

In the above-noted case the facts were that the applicant and two others considered that they had a moral claim on a man named Ichhanna to extract Rs. 10 from him, and they were proceeding to extract those ten rupees by force. The applicant and a man named Shanta beat Ichhanna with their fists, and another man named Sunderrao threatened him with a knife. Thereupon Ichhanna's companion, the complainant, intervened, and Sunderrao with his knife stabbed him on the ear and inflicted grievous hurt. The question arose whether the applicant was guilty of that assault on the complainant by virtue of Sec. 111, I. P. C. *Held* that it could not be said that the stabbing of the complainant was in pursuance of the conspiracy to assault Ichhanna. Assuming that it was a probable consequence, it was difficult to see how it could be said that the stabbing of the complainant was in pursuance of the conspiracy to assault Icchanna. The applicant was not liable to be convicted under Sec. 111, I. P. C.[4]

5. Limits of vicarious liability.—Following the rule of English law (*see* para No. 1 *ante*), this section defines the limits of the abettor's responsibility for effects produced in consequence of his abetment. Criminal law regards the criminal abettor at least as much responsible for his act as civil law makes one responsible for delegated authority. The rule here enacted makes the abettor liable for all acts of the person abetted provided that they were performed in consequence of the abetment and were its probable consequence. For instance, *A* orders *B* to burn *C*'s house and he in so doing commits a robbery; now *A* though accessory to the burning is not accessory to robbery, for that is a thing of distinct and inconsequential nature.[5] So if *A* counsels *B* to steal goods of *C* on the road, and *B* breaks into

Abettor in criminal law as much responsible as delegated authority in criminal law.

1. Section. 109, Expl.
2. *Ibid.*
3. Sonappa Shina Shetty *v.* Emperor, A.I.R. 1940 Bom. 126 at p. 127 : 42 Bom. L. R. 205.
4. *See* also Naimuddi *v.* Emperor, A.I.R. 1943 Cal. 47: 204 I. C. 567 : 15 C. L. J. 110.
5. 1 Hale 617 : 4 Black. 37.

C's house and steals them there *A* is not accessory to the house-breaking, because is is a felony of another kind.[1] He is, however, accessory to the stealing.[2] But if in such a case *A* had counselled *B* to steal goods in *C*'s house and he broke into it, *A* would be accessory to the breaking, for it was only incident to trespass[3] (*see* para No. 12 of Sec. 107). But a person abetting robbery is not, according to Straight, J., liable for the excessive violence therein used, which culminated in the death of the person robbed.[4] That decision so far as it may have been founded upon the facts of that case may be right, but it is no authority for enunciating a general rule that an abettor of robbery is not liable for murder if it is committed in consequence. Indeed, in abetting robbery, the abettor authorises the use of such force as will suffice to overcome resistance. Could it be then said that the abettor has no reason to believe that it may lead to murder and if so, why should he not be responsible for it ? At any rate, this is the view taken by Sir Michael Foster (*see* para. No. 1, *ante*).

6. Probable consequence.—A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act. An unusual or unexpected consequence cannot be described as a probable one. When the consequence of an act is such that a reasonable man could not be expected to foresee that it would follow from such an act, such consequence cannot be described as a probable one. On the contrary it can only be described as an unexpected, unlikely and improbable consequence. It is a well-established rule of construction that words in a statute creating a criminal offence must be construed strictly. So a wider meaning to the phrase "probable consequence" in Sec. 111, Penal Code, should not and cannot be given, otherwise it would be impossible to fix any limits to an abettor's liability.[5] Sir Douglas Straight is perfectly right in counselling strict and close construction of the highly penal provisions of this section.[6] He is also right in saying that the test in these cases must always be whether having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which according to ordinary experience and common sense, the abettor must have foreseen as probable. The determination of this question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusion should not be formed without the most anxious and careful scrutiny of all the facts. Two appellants connived at a robbery to be committed by a third appellant. In the robbery excessive violence was used which resulted in the death of the person robbed. Straight, Offg. C. J., whilst upholding the conviction of the appellant for murder held that the other two appellants were not guilty of abetment of murder, but only of the offence of robbery on the ground that the excessive violence was not a likely consequence of the instigation, but on the contrary, it was most unexpected and one which the two appellants could not reasonably have been expected to foresee.[7] In the last cited case, Straight, Offg. C. J., gave the following example: ". . . if *A* says to *B*: 'You waylay *C* on such and such a road and rob him, and if he resists, use this sword, but not more than is absolutely

If principal offender aggravates the offence the abettor is liable for the consequence of act of principal.

1. Plowd, 475 : 75 E. R. 708, 709.
2. 1 Hale 617.
3. Bac. Max. Reg. 16.
4. Mathura Das, I.L.R. 6 All. 491. followed in Girja Prasad, I. L. R. 57 All. 717 at p. 724.
5. Girja Prasad Singh *v.* Emperor, A. I. R. 1935 All. 346 (2) at p. 349 : I. L. R. 57 All. 717: 36 Cr. L. J. 438.
6. Fost., 370, Sec. 1066.
7. Mathura Das, I. L. R. 6 All. 491; Ghanshyam Singh, I. L. R. 6 Pat. 627 relied upon in Nawabali *v.* Emperor, A. I. R. 1928 Cal. 752; Emperor *v.* Surjya Kumar Sen, A. I. R. 1934 Cal. 221 (F.B.); *see* also Sonappa Shina Shetty *v.* Emperor, A. I. R. 1940 Bom. 126: 41 Cr. L. J. 481 : 42 Bom. L. R. 205; Mumtaz Ali *v.* Emperor, A. I. R. 1935 Oudh 473: 36 Cr. L. J. 1201.

necessary'; and *B* kills *C*, *A* is responsible as an abettor of the killing, for it was a probable consequence of the instigation." In the words of the learned Chief Justice, "the law virtually says to a man, 'If you choose to run the risk of putting another man in motion to do an unlawful act, he, for the time being represents you as much as he does himself; and if, in order to effect the accomplishment of that act, he does another which you may fairly from the circumstances be presumed to have foreseen would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former." The foregoing remarks reproduce the effect of Secs. 111, 112 and 113 of the Penal Code: these sections make it clear that if a person abets another in the commission of an offence and the principal goes further and does something more which has a different result from that intended by the abettor and makes the offence an aggravated one, the abettor is liable for the consequences of the acts of his principal.[1] Where, however, a head constable having arrested one Kurpa Sahu on a charge of illicit possession of country liquor promised to release him on payment of a bribe, to procure which Kurpa Sahu was sent in charge of two *chowkidars*, who for that purpose beat and confined him, it was held that the maltreatment of which the accused were guilty could not be said to have been abetted by the head constable.[2] The question what was the probable expectation of the abettor in a given case, of course, depends upon the circumstances of each case. If a person abets one merely to beat another, it may be safely inferred that the amount of hurt he thereby sanctions, is simple or grievous hurt, but it would be extending too far the liability of the abettor to hold him liable if murder is the consequence.[3]

Probable expectation of the abettor is a question of fact depending upon intention of abettor and nature of act abetted.

In such a case a good deal, though not all, depends upon the intention of the abettor and the nature of the act abetted.[4] Where, for instance, three soldiers went together to rob an orchard, and two got upon a pear tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared him and asked him what business he had there, whereupon the soldier stabbed him, it was held that only the soldier who stabbed was guilty of murder the order two being innocent. It was considered that they had come to commit a small inconsiderable trespass, and the murder was committed upon a sudden affray without their knowledge, and they could not, therefore, be held liable as abettors.[5] But it would have been different if they had gone to steal with a general resolution against all-comers, in which case the murder would have been committed in prosecution of their original purpose (*see* para. Nos. 18 and 19 of Sec. 107). Indeed, where persons start with a general resolution against all-comers, whether such resolution appears evident to have been actuly or explicitly entered into by the confederates, or may be resasonably collected from their number, arms or behaviour, at or before the scene of action and homicide is committed by any of the party every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow.[6] The question then does not necessarily depend upon the abettor's intention. If the act was the probable consequence of the abetment he is liable, whatever may have been his intention. Suppose, for instance, *A* orders *B* to take a loaded gun and rob *C*, whom he has seen proceed on his

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1. Irala Palle Ramiah, *In re*, A. I. R. 1957 A. P. 231 at p. 235: 1957 Cr. L. J. 815.
2. Luchman Singh, I. L. R. 31 Cal. 710.
3. Golock Chang, 5 W. R. 75; Doorgesur Sumra, 7 W. R. 97; Girja Prasad Singh *v.* Emperor, A. I. R. 1935 All. 346 (2) : I. L. R. 57 All. 717 : 36 Cr. L. J. 438.
4. Imamdi Bhoayah, 21 W. R. 8.
5. Skeet, 4 F. & F. 931; Fost, 353.
6. Fost, 353, 354 : 2 Hawk. P. C., c. 29, Sec. 8; Russel, Bk. 1, Ch. 3, p. 163 ; *see* Sheo Barhi *v.* Emperor, A. I. R. 1930 Pat. 164.

way armed with a sword. *A* counsels *B* not to murder *C*, *B* attacks him, and is met with resistance, whereupon he kills him. Here *A* had not intended to abet the murder of *C*, but he knew that from the way that *B* and *C* were armed, that murder may probably be the consequence. *A* is, therefore, liable for abetment of the murder of *C*.

7. Procedure.—The procedure in an offence under this section is the same as in the case of the offence abetted. Punishment is the same as that for the offence intended to be abetted.

The illustrations to Sec. 111 show that it contemplates cases not only where different act is done but also where a different person is attacked in pursuance of the conspiracy.[1]

8. "When an act is abetted."—The section refers to the abetment of a criminal act. It will not apply where the act abetted is not a criminal act, e. g. peaceful picketing; and it does not necessarily follow as a natural and probable consequence of the instigation of a lawful action that an offence will be committed.[2]

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Abettor when liable to cumulative punishment for act abetted and for act done.

Illustration

A instigates *B* to resist by force a distress made by a public servant. *B* in consequence resists that distress. In offering the resistance, *B* voluntarily causes grievous hurt to the officer executing the distress. As *B* has committed both the offence of resisting the distress and the offence of voluntarily causing grievous hurt, *B* is liable to punishment for both these offences; and if *A* knew that *B* was likely voluntarily to cause grievous hurt in resisting the distress, *A* will also be liable to punishment for each of the offences.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Cumulative offences.

1. Analogous law.—Obviously, this section does not override the provisions of Sec. 71, under which a person cannot be separately punished for what are the parts of the same offence. The provision for cumulative punishment made in this section was explained by the Law Commissioners to vary from the English law[3] "in making the abettor liable to cumulative punishment if the intended offence be also committed according to the principle of this Code".[4]

Section varies from English law.

The words "knew to be likely to be committed" in the original section were objected to,[5] which necessitated the change of language. Appended to the draft section there were two illustrations, one of which, since omitted ran as follows :

"(*a*) *B* with arms, breaks into an inhabited house at midnight, for the purpose of robbery. *A* watches at the door, *B*, being resisted by *Z*, one of the

1. Mangta *v.* Emperor, 38 Cr. L. J. 628 at p. 632 : 168 I. C. 748.
2. Ganesh Prosad *v.* Emperor, A. I. R. 1931 Pat. 52 at p. 54 : 32 Cr. L. J. 478.
3. Digest Ch. I, Sec. 4, Art. 13.
4. First Report, Sec. 212.
5. *Ibid.*, Sec. 213.

inmates, murders *Z*. Here, if *A* considered murder as likely to be committed by *B* in the attempt to rob the house, or in the robbing of the house or consequence of the robbing of the house, *A* is liable to the punishment provided for murder."

2. Principle.—The section extends the doctrine of constructive criminality beyond the recognised limits of English law[1] (*see* para. 1 above). But in holding the abettor liable to the punishment of a different offence which may be committed in consequence of his abetment of the intended offence he knew that such different offence was likely to be committed in the attempt to commit the intended offence, the section only pushes to its logical consequence the rule enacted in the last section.

3. Meaning of words.—"*If the act for which the abettor is liable,*" i. e., if the offence *probable* is committed in addition to the offence actually instigated and it "*constitutes a distinct offence*", for the meaning of which *see* Sec. 71 "*the abettor is liable for punishment for each of the offences*", i. e., liable to cumulative sentences.

4. Cumulative offences.—This section materially enlarges the liability of the abettor to punishment both for the offences actually abetted as well as that which was a probable consequence of the abetment, provided that the two offences were "distinct" (*see* para. No.13 of Sec.71), that is to say if they were such in which cumulative sentences might be legally passed. It has already been seen as to what offences are to be considered "distinct" for this purpose (*see* para. Nos.9 and 10 of Sec.71). As that list is fairly full, all that need be said here is that if the person abetted commits not only the act abetted but also another act as a probable consequence of the abetment, and by reason thereof, the abettor may be punished for both, if such punishment would be otherwise legal. This provision does not affect the abettor's liability *aliunde*, as, if in addition to abetting a theft by house-breaking, he receives stolen property, in which case he may be charged for the house-breaking and theft under this section, and for receiving stolen property independently of it.

113. When an act is abetted with the intention, on the part of the abettor of causing a particular effect, and an act, for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect provided he knew that the act abetted was likely to cause that effect.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.

Illustration

A instigates *B* to cause grievous hurt to *Z*. *B*, in consequence of the instigation, causes grievous hurt to *Z*. *Z* dies in consequence. Here, if *A* knew that grievous hurt abetted was likely to cause death, *A* is liable to be punished with the punishment provided for murder.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Abettor's liability for likely effect.
5. Procedure.

1. Analogous law.—This section is complimentary to Sec. 111 from which its provisions are, however, distinguishable upon ground stated in the next article.

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1. Digest, Ch. 1, Sec 4, Art. 13

2. Principle.—This section supplements the provisions of the last section which deals with the doing of a different *act* to the act abetted, while this section deals with a case where the act done is the same as the act abetted but its *effect* is different. The liability of the abettor is also, consequently, in the two cases different. In the first case, his liability for his constructive act depends upon the determination of the question whether the act done is a probable consequence of the abetment. In this case, his liability depends upon his "*knowledge of the likelihood of the effect*". The measure of criminal responsibility in a case arising under Sec. 111 is the probability of the consequence, but the measure in a case arising under this section is not the probability but the knowledge of the likelihood of the effect produced. An act may be probable without the abettor knowing it likely; on the other hand, the abettor may know it is likely and yet the effect may not be probable. Knowledge is subjective while probability is objective. In one sense, one cannot be said to possess knowledge of a future contingency (*see* Sec. 26 and Sec. 39). But knowledge merely includes a higher degree of belief founded upon the accumulated experience of the past that the effect was likely under the given circumstances. Both Sec. 111 and this section depend upon warrantable inference only, in a case under this section, the facts warranting the inference must be stronger.

This section is complementary to Sec. 111.

3. Meaning of words.—"*With the intention of causing a particular effect*", which intention must necessarily be communicated to the principal. "*An act for which the abettor is liable*": Could this include a case under Sec. 111? If so, the abettor will be liable both for his constructive act as well as for its adventitious effect (*see* Sec. 111). "*Provided he knew that the act abetted was likely*" for the meaning of which *see* Sec. 39.

4. Abettor's liability for likely effect.—The distinction between this and Sec. 111 has been already considered (*see* para No. 2 above). That section appears to deal with abetment in which the abetment consists of the act to be done and not of the effect to be produced. The act done may, indeed, invariably thus produce the effect, but the production of the effect is neither directly intended nor necessarily expressed. Under this section, however, the abettor has an object in view and he abets the principal to attain that object and not to go beyond. This section defines his liability if the principal in attaining one result produces another which the abettor may, or may never, have bargained for. But as the primary author of the mischief, he is not wholly irresponsible for the effect produced, though he should not be taken by surprise. He is, therefore, declared liable only in case he knew that the effect produced was likely. This section does not necessarily exclude a case under Sec. 111, as it is conceivable that the act done may both be the probable consequence of the abetment as well as cause the effects which the abettor knew was likely. Suppose, for instance, that *A* orders *B* to take a loaded gun and waylay *C* and rob him. *C* was armed with a sword and *A* cautions *B* on no account to kill him unless to save himself. *B* attacks *C*, whereupon *C* draws his sword, *B* then fires and kills *C* and robs him. Here *A* is liable both under Sec. 111 as well as this section, inasmuch as *A* knew that *C*'s murder was probable. He also knew that, though he wanted *B* only to rob *C*, still *B* was likely to kill him if he was resisted, and which *C* was likely to do.

Section does not necessarily exclude a case under Sec. 111.

Of course, neither Sec. 111 nor this section contemplates that the act abetted or the effect caused should be merely an attempt. *Prima facie* any

violence to another would fall under one of two categories, viz. to cause death, or hurt, whether grievous or simple.[1]

5. Procedure.—Same as under Sec. 109. The punishment is same for the offence committed.

114. Whenever any person who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

Abettor present when offence is committed.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Object and scope.
5. Sections 114 and 34, relative scope of.
6. Liability of present abettor.
7. Proof.
8. Previous abetment necessary.
9. Where presence insufficient.
10. Admissible evidence.
11. When is an abettor present.
12. Community of purpose essential.
13. This section and Sec. 149 compared.
14. Confession of co-accused.
15. Cases.
16. Procedure.

1. Analogous law.—This section deals with what is known in English law as accession at the fact or principal in the second degree (*see* para. No 1 of Sec. 107). An abettor who is present at the time of the commission of the crime is, in the eye of the law, regarded as an actual perpetrator of the crime, though, as a matter of fact, the offence was committed by another person altogether. In this respect this section is somewhat wider than Sec. 34 which defines the joint liability of persons acting in "furtherance of the common intention of all". An instigator working through an innocent agent would not be liable under Sec. 34. He is liable under this section. Section 34 deals with the case of conspiracy which is not the only form of abetment dealt with in this section.

It will be observed that an abettor present at the fact is not now regarded as an abettor under English law. He becomes a principal in the second degree. In this respect, the section differs, for even though present and punishable in the same manner and the same extent as the principal offender he does not, thereby, cease to be an abettor and assume the character of principal. The difference then between the two systems is merely verbal.[2]

2. Principle.—In order to bring a case within Sec. 114, I. P. C., the abetment must be complete, apart from the presence of the abettor; in other words, the act of abetment must have taken place at a time prior to the actual commission of the offence and it is only when the abettor happens to be present at the time of the commission of the offence itself, that the operation of Sec. 114 would be attracted.

Reference may be made to the decision in *Ram Ranjan Roy* v. *Emperor*,[3] which was followed in *In re Vijayaranga Naidu*,[4] and other cases. In an early

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1. *Per* Fox, J., Nga Po Kya, (1903) 9 Bur. L. R. 190.
2. Act—Sec. 33. Offence—Sec. 40. Abettor—Sec. 108.
3. A. I. R. 1915 Cal. 545: I. L. R. 42 Cal. 422.
4. A. I. R. 1927 Mad. 1115: I. L. R. 51 Mad. 263; Mian Gul v. Emperor, A. I. R. 1932 Lah. 483.

case in *Abhi Misser* v. *Lachmi Narain*,[1] the law on the subject has been laid down in the following terms:

> "In order to bring a person within Sec. 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that if absent, he would have been liable to be punished as an abettor and then to show that he was also present when the offence was committed."[2]

A person who merely abets is not so great an offender as one who abets and is present at the scene of offence. Between him and the actual perpetrator there is nothing to discriminate. To the one there remained, at any rate, the *locus paenitentiae*, to the other there remains nothing. He is indistinguishable from the actual offender; he ceases to be a mere abettor and becomes liable for the offence abetted.

3. Meaning of words.—"*Who is absent would be liable to be punished as an abettor*", i.e. whose offence of abetment is otherwise complete.[3] "*is present*", not necessarily during the whole of the transaction, not necessarily as an eye- or ear-witness. If a thief is inside the house committing theft and his confederate is standing outside watching, he is present at the theft. The presence required is at the time when the act abetted is committed. His presence at any other time will not be enough to charge him with the same liability. "*The act in consequence of the abetment is committed*", for the meaning of which *see* Sec. 109, explanation. "*He shall be deemed to have committed such offence*": The words "*shall be deemed*" imply that the change of status is only by way of legal fiction—not that he actually commits the offence he is present at[4] though he is liable for the offence abetted.[5]

4. Object and scope.—The whole object of Secs. 34 and 114, I. P. C., is to provide for cases in which the exact share of one of several criminals cannot be ascertained, though the moral culpability of each is clear and identical. Neither of these two sections should be so interpreted as to defeat the very object which underlies them.[6] If a person is present, who if absent would be liable to be punished as an abettor, he is deemed under Sec. 114 to have committed the crime.[7] This idea that Sec. 114 is applicable to every case in which the abettor is present at the commission of the offence abetted is quite erroneous and while Sec. 109, I. P. C., is a section dealing generally with abetment, Sec. 114 applies to those cases only in which not only is the abettor present at the time of the commission of the offence but the abetment has been completed prior to and independently of his presence. The real test to see whether or not Sec. 114 is applicable, lies in the words of the section "who if absent would be liable to be punished as an abettor". Section 107, I. P. C., shows that abetment is of three kinds, namely: (1) abetment by instigation; (2) abetment by conspiracy; and (3) abetment by intentionally aiding by any act or illegal omission, the commission of the offence. Every abetment must of course precede the commission of the offence abetted. There is however a difference between an abetment which

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1. I. L. R. 27 Cal. 566.
2. Kochu Cherukka Panicker *v.* State of Kerala, (1964) 1 Cr. L. J. 375 at p. 377.
3. Ram Ranjan, I. L. R. 42 Cal. 422.
4. Kashia Antoo, 10 L. B. R. 26, *Cf.* the language used in a cognate section (149), where in the case there supposed the accused is declared to be guilty of that offence.
5. *See* Barendra Kumar Ghose *v.* Emperor, A. I. R. 1925 P. C. 1: I. L. R. 52 Cal. 197 at p. 212 (P. C.).
6. Jaimangal *v.* Emperor, A. I. R. 1936 All. 437 at p. 439 : 37 Cr. L. J. 864 : 1936 A. W. R. 298: 163 I. C. 848; *see* also State *v.* Saidu Khan, A. I. R. 1955 All. 21.
7. Mahadeo Nath Khetri *v.* Emperor, A.I.R. 1941 Pat. 550 at p. 553: 42 Cr. L.J. 603, 194 I. C. 622.

is done at the time the principal offence is committed or, so to say, on the spur of the moment and one, that is done prior to and independently of the commission of the offence. If abetment is divided into these two kinds, it follows that while abetment by instigation and abetment by intentionally aiding the offence can both be done either immediately before the commission of the offence or prior to it abetment by conspiracy can hardly be committed at the time of the commission of the offence. In other words, one can abet an offence by instigation either at the time of the commission of the offence or an hour, a day, a week or a month before the commission. Similarly, abetment by aiding can precede the commission of the offence immediately or by an hour, a day, a week and so on. Abetment by conspiracy, however, presupposes a deliberate and previous act on the part of the abettor.

The words "who if absent would be liable to be punished as an abettor" clearly show that abetment to come under Sec. 114 must be one which is prior to the commission of the offence and complete by itself and not an abetment which is done immediately before or at the time of the commission of the offence, for in the latter case the abettor would not have committed the abetment if he had not been present and would not therefore have been liable to punishment as an abettor.[1]

Section 114 is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of the crime is proved in addition.[2]

Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime and the abettor has been present thereat and the way in which it deals with such a case as this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence *plus* prior abetment can mean nothing else but participation. The presumption raised by Sec. 114 brings the case within the ambit of Sec. 34.[3] To a case therefore where the alleged abetment was committed at the time when the offence was being committed by the other accused, the proper section to apply is Sec. 109 and not Sec. 114.[4]

In *Birendra Kumar* v. *Emperor*,[5] their Lordships at page 7 observed :

> "As to Sec. 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition....Section 114 deals with

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1. Sital *v.* Emperor, A. I. R. 1935 Oudh 468 at p. 470: 36 Cr. L. J. 1151 : I. L. R. 11 Luck. 384; *see* also Chhotey *v.* Emperor, I. L. R. (1948) All. 114: 49 Cr. L. J. 168 : A. I. R. 1948 All. 168; Basharat *v.* Emperor, A. I. R. 1934 Lah. 813:36 Cr. L. J. 308; Chet Ram *v.* State of U. P., A. I. R. 1958 All. W. R. (H. C.) 159: 1958 A. L. J. 32.
2. Abhi Misser *v.* Lachmi Narain, I. L. R. 27 Cal. 566: 4 C. W. N. 546.
3. Barendra Kumar Ghose *v.* Emperor, A.I.R. 1925 P. C. 1 at p. 7: I. L. R. 52 Cal. 197: 52 I. A. 40: 26 Cr. L. J. 431; Mian Gul *v.* Emperor, A.I.R. 1932 Lah. 483: 33 Cr. L. J. 564 ; Abhi Misser *v.* Lachmi Narain, I. L. R. 27 Cal. 566; Chhotey *v.* Emperor, A.I.R. 1948 All. 168 at p. 170.
4. Chhotey *v.* Emperor, A.I.R. 1948 All. 168 at p. 170; *see* also Jadunandan Jha *v.* Emperor, A. I. R. 1937 Pat. 317: 38 Cr. L. J. 790; Ahmad Hasham *v.* Emperor, A. I. R. 1953 Bom. 162: 34 Cr. L. J. 559: 35 Bom. L. R. 240.
5. A. I. R. 1925 P. C. 1: I. L. R. 52 Cal. 197 : 52 I. A. 40: 85 I. C. 47 : 26 Cr. L. J. 431.

the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat."

In another case in *Abhi Misser* v. *Lachmi Narain*,[1] a similar view was expressed and it was held that in order to bring a person within the scope of Sec. 114, Penal Code, it was necessary first to make out the circumstances which constitute abetment, so that if absent, he would have been liable to be punished as an abettor, and then to show that he was also present when the offence was committed.

In *In re Krishnasami Naidu*,[2] it was held that in order to sustain a conviction under Sec. 114, Penal Code, the abetment must be complete, apart from the mere presence of the abettor.[3]

Section is evidentiary and not punitory.

This section is evidentiary and not punitory. Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. This is irrebuttable presumption raised by Sec. 114 and bring the case under Sec. 34.[4] In a criminal trial whether the charge is framed in terms of Sec. 302 alone or Sec. 302 read with Sec. 114, the offence denoted is substantially the same. As the two charges overlap each other they cannot be regarded as implying two separate offences.[5]

5. Sections 114 and 34, relative scope of.—*See* under Sec. 34, *supra*.

6. Liability of present abettor.—In point of culpability law discriminates between an absent abettor, and one who is present at the fact. The one is not guilty in the same degree as the other. Indeed, between a person who both abets and countenance the crime by his presence, and one who actually engages in it there is no difference. The one is as culpable as the other, and in England both are regarded as principals, the actual perpetrator being designated a principal in the first degree, the abettor being called principal in the second degree. There being no degrees of principal in the Code, both are here declared to be equally culpable, and so far as the abettor is concerned "he shall be deemed to have committed" the offence of which he was both an abettor and a witness. The words "shall be deemed" do not, however, mean that the abettor's status is completely merged into that of the principal. Nor is he a principal in any case. He is only regarded as a principal for the purpose of punishment.[6] Consequently, his conviction for the principal offence read with this section would amount to a previous conviction "for an offence punishable under

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1. I. L. R. 27 Cal. 566.
2. I.L.R. 51 Mad. 263 : A.I.R. 1927 Mad. 1115: 106 I. C. 584: 29 Cr. L. J. 72.
3. Chhotey *v.* Emperor, A. I. R. 1948 All. 168 at pp. 169-70.
4. Mathurala Adi Reddy *v.* State of Hyderabad, A.I.R. 1950 S.C. 177 at p. 180: 1956 Cr. L. J. 341; Barendra Kumar Ghose *v.* Emperor, A.I.R. 1925 P.C. 1: I.L.R. 52 Cal. 197 (P.C.); Nga Po Kyo *v.* Emperor, I. L. R. 11 Rang. 354: 35 Cr. L. J. 41 : A. I. R. 1933 Rang. 236; M.F. Rego *v.* Emperor, A.I.R. 1933 Nag. 136: 34 Cr.L.J. 505: 29 Nag. L. R. 251.
5. M.F. Rego *v.* Emperor, A.I.R. 1933 Nag. 136 at p. 139: 34 Cr. L. J. 505: 29 Nag. L. R. 251.
6. Proceedings, 8-3-1869, 4 M. S. C. App. XXXVII; Kashia Antoo, 10 B. L. R. 26. This point was overlooked in Mohamad Asgar, 23 W. R. 11, in which an abetter was called a "principal" which he was not.

Chapter XII or Chapter XVII of the Code", for the purpose of enhanced punishment under Sec. 75.[1]

7. Proof.—Now, in order to create even the legal fiction of this section, it is essential to establish that (*i*) the person was an abettor and that as such (*ii*) he was liable to be punished, even if absent from the scene of offence (*iii*) it is then to be shown that the abettor had aggravated his crime by being even present there.[2]

8. Previous abetment necessary.—The first requisite of an offence under this section is that the person should have been a previous abettor of the offence.[3] If he was not an abettor, his mere presence is insignificant. For he may be a bystander. And even where the mere presence amounts to abetment (*see* Sec. 107), a person present may be dealt with as an abettor but he cannot be proceeded against under this section as well. For, if absent, he would not be liable to be punished as an abettor. A policeman present and doing nothing to prevent a prisoner being tortured has been held to be an abettor, by the very fact of his presence. Consequently, he cannot be punished under this section, for if he were absent he would not have been punishable as an abettor. So, again, where no instigation, conspiracy or act or illegal omission is proved, and the abetment consists only of participation in the actual commission of the offence, Sec. 109 and not this section is applicable.[4] Such a case arises where persons yield to sudden temptation, as where they join in a riotous crowd seeing them commit plunder.

9. Where presence insufficient.—It has already been observed that the mere presence of a person at the commission of a crime does not condemn him to the liability of an abettor (*see* Sec. 107). This is true not only of a person innocent of the crime as of one who had otherwise abetted it. A person who is present and joins with others in committing a crime may be either an abettor or a principal. But, if an abettor, he cannot be punished under this section. If, for instance, several persons join together in beating a man, and one of them actually causes grievous hurt, he will be guilty of an offence under Sec. 325, but others who have assisted him by their presence and encouragement cannot merely on that account be punished under this section.[5] So where the five accused illegally rescued one Dhunuk from the lawful custody of the police who had arrested him for causing grievous hurt, and who to effect that purpose beat the

Person present and joining in crime may be either abettor or offender.

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1. Mahendranath, I. L. R. 62 Cal. 629 at p. 632 ; Mg. Pukai, I. L. R. 7 Rang. 329 (F. B.), *contra* Kashia Antoo, 10 B. L. R. 26, dissented from Patethuva Raoji Bala, 28 Bom. L. R. 1929.
2. Niruni (Mst.), 7 W. R. 49; Abhi Missar *v.* Lachmi Narayan, I.L.R. 27 Cal. 366, explaining Chatradhari Goala, 2 C.W.N. 49; Ram Ranjan, I. L. R. 42 Cal. 422.
3. Barendra Kumar Ghose *v.* Emperor, I. L. R. 52 Cal. 197 (P. C.); *see* also Mahendranath, *supra*; Ramranjan *supra*, Nga Po Kyone *v.* Emperor, I. L. R. 11 Rang. 354 : 35 Cr. L. J. 41; Krishnaswami, I. L. R. 51 Mad. 263; Chotey *v.* Emperor, A. I. R. 1948 All. 168: I. L.R. (1948) All. 114 : 49 Cr. L. J. 168 ; Jadunandan Jha *v.* Emperor, A. I. R. 1937 Pat. 317 : 38 Cr. L. J. 790; Ahmad Hasham *v.* Emperor, A. I. R. 1933 Bom. 162: 34 Cr.L.J. 559: 35 Bom. L. R. 240; Sital *v.* Emperor, A.I.R. 1935 Oudh 468: 36 Cr. L. J. 1151: I.L.R. 12 Luck. 484.
4. Abdulla Khan, (1899) P. R. No. 15; *see* also Gandu *v.* King-Emperor, A. I. R. 1923 Lah. 170.
5. Abhi Misser *v.* Lachmi Narayan, I. L. R. 27 Cal. 366, explaining the *contra* in Chatradhari Goala, 2 C. W. N. 49, as follows: "We have referred to the learned Judges who passed the judgment reported in Chatradhari Goala, on which the Sessions Judge relies, and we are authorised by them to state it was not intended to declare that the mere presence as an abettor of any person would, under the terms of Sec. 114 render him liable for the offence committed, and it has been explained that in that case it was found that the abetment had been committed before the actual presence of the accused at the commission of the offence abetted.

Sub-Inspector so as to cause him grievous hurt, the question was whether the mere joining in beating the Police Sub-Inspector rendered them liable to punishment under this section, and it was held that it did not, for *in addition* to showing that they were present when the beating took place, there must have been given evidence to show that whether by conspiracy, intentional aiding or instigation by illegal act or omission they had already abetted the assault before they took part in it.[1] In another case, seven persons joined in mortgaging a piece of land to another and at the time of the registration the two accused falsely personated two of the mortgagors and affixed false signatures to the registration endorsement. One of the mortgagors was then present, and he was prosecuted for abetment, but it was held that there being no presumption of common dishonest intention, or evidence of previous abetment, his mere presence as silent witness of the fraud was not an illegal omission rendering him liable as an abettor of any offence committed by the personators.[2] The mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities does not constitute him an accomplice, unless it is shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiation for its payment.[3]

10. Admissible evidence.—It is thus apparent that no one can be convicted of a constructive offence under this section, unless he is shown to have been first an abettor, and then present at the commission of the offence. Such previous abetment may of course be proved by or inferred from his subsequent co-operation, but this is not the invariable rule. Suppose, for instance, that a number of thieves enter a house at night and while they are looting it, one of the men stands outside the house to watch; is it not reasonable to suppose that he was a co-conspirator, and that he was watching in pursuance of that conspiracy? In such a case his mere presence is sufficient to prove previous abetment, and he may, therefore, be legitimately convicted under this section of abetment of the offence which the thieves within may have committed.[4] But now suppose that in such a case the latter commit murder whilst committing the theft; could the gate-keeper be punished as an abettor of murder under this section? No : because (*a*) there is no evidence of previous abetment of murder and (*b*) because he was not present at it.

11. When is an abettor present.—This raises the question when is a person "present" at the commission of the offence which he has abetted? In the last example the man at the gate was not actually present inside the house, and yet he was held to be liable as one so present. The word "present" does not therefore necessarily mean present as an ear or eye-witness of the transaction; he is in the eye of the law present, if he is near enough to afford assistance, should occasion arise.[5] The word "present" has been therefore used in its legal and not literal sense as meaning sufficiently near to render assistance.[6] A strict actual immediate presence, such a presence as would make one an eye or ear-witness of what passes, is not then required. Constructive presence is enough, if it was such as may be inferred as due to a common design and intended to achieve a common purpose, and if it is sufficiently near to afford to the other confederates sufficient aid and encouragement.

Word "present" used in its legal and not literal sense.

1. Abhi Misser *v.* Lachmi Narayan, I.L.R. 27 Cal. 366.
2. Tun Aung Gaw, 3 B. R. 222.
3. Deodhar Singh, I. L.R. 27 Cal. 144; Deo *v.* Aundan Pershad, I. L. R. 33 Cal. 649 distinguishing Chando Chandline, 24 W. R. 55, in which the question was as to the sufficiency of accomplice evidence to justify a conviction.
4. Khandu Vithu Sathee, 1 B. L. R. 351; Charles Gogerly, (1818) R. & R 343; Dhani, 27 Punj. L. R. 716; Patethuva, 97 I. C. (Bom.) 737.
5. Stewart, R. & R. 363; Kelly, R. & R. 421.
6. Stewart, *supra*; Kelly, *supra*; Bingley, R. & R. 446.

Thus if several persons set out together, or in small parties upon one common design, be it murder or some other felony or for any other purpose unlawful in itself, and each takes the part assigned to him, some to commit the act, others to watch at proper distances and stations to prevent a surprise or to favour if need be, the escape of those who are more immediately engaged, they are all, in the eye of the law, present at it; provided the act be committed, for it was made a common cause with them; each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise.[1]

Not necessary that confederate should have been present during the whole of the transaction.

Such is the case where one commits theft in a house and throws the stolen property to an accomplice posted outside to receive it,[2] or where a pick-pocket steals and throws the stolen article to another who disappears with it.[3] Consequently, it is not even necessary that the confederate should have been present during the whole of the transaction. This was the case of two prisoners Kelly and McCarthy[4] who were indicted for stealing oats, the facts of which have been given elsewhere (*see* Sec. 107). There the two had conspired to steal their employer's oats, and McCarthy put them in a place from where Kelly's afterwards removed them. Kelly was not present when McCarthy put them under Kelly's train; Mc Carthy was not present when Kelly removed them; still Maule, J., said: "I think the evidence shows that this was all one transaction in which both concurred; and I think that having concurred and both being present at some parts of the transaction, both may be convicted,"[5] and they were both convicted as principals. Where, however, the abettor was at such a distance from the theft as not to be able to assist, he was held not to be "present," aiding and abetting the theft. So, where *A* and *B* went to steal two horses and *A* left *B* half a mile from the scene of theft, and then he brought the two horses stolen when both went away with them : it was held that *B* could not be held to have been present at *A*'s theft.[6] The same view was taken in another case in which the servant had left the door open to let in the thieves and then left the premises twenty minutes before the thief came.[7] So, where three men were indicted for wounding the prosecutor and it appeared that one of them, the prisoner, only came up after the wound had been inflicted, it was held that he was only an abettor not present at the fact, though it appeared that the prisoner had kicked the prosecutor several times after he came up.[8] If two started to commit theft, and one of them was apprehended as soon as he entered the house, he was held not to be present when the other entered afterwards and committed the theft.[9]

12. Community of purpose essential.—It has been remarked before that the mere presence of the abettor at the fact does not make him liable to the enhanced penalty prescribed by this section.

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1. Fost., 350; 2 Hawk. P. C., c. 29, Secs. 7, 8; 1 Russ. (6th Ed.), 162; Howell, 9 C. & P. 437; Vanderstein, 10 Cox. (Irish) 177.
2. Owen, R. C. Mood C. C. R. 96; Coggins, 12 Cox. 517.
3. Hilton, 1 Bell C. C. 20, in which, however, the jury convicted the accomplice of only receiving stolen property, evidence as to the community of purpose being wanting.
4. Kelly, 2 C. & K. 379.
5. *Ibid.*
6. Kelly, R. & R. 421.
7. Jafferies, 3 Cox. 85.
8. McShane, C. & M. 212.
9. Johnson, C. & M. 218.

An abettor must not only be present, but he must have been present as an abettor of the offence committed, which implies that his abetment must continue down to the time of the commission of the offence. An abettor may at any time before that event change his mind, and withdraw from the abetment. The law allows a *locus paenitentiae* in such cases; and if he distinctly withdraws at any moment before the final act is done, he cannot be liable as an abettor present at the fact.[1] Examples have already been given of cases in which an abettor though liable for abetment of one offence was not held liable for the commission of a wholly different offence though committed in his presence (*see* Sec. 107). So it has been elsewhere provided by the Code that "if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."[2] Both under this as well as under Sec. 149 of the Code, the presence of the abettor at the act and the community of purpose are essential. Indeed, it will sometimes be a question whether a given case falls under this section or under Sec. 149. The two sections present some common features but at the same time they materially differ both as to their applicability as well as in the after-effects of the resultant conviction for, while a conviction under this section does not count as a previous conviction, one under Sec. 149 undoubtedly does for the purpose of enhanced punishment under Sec. 75.[3]

Both under this section and under Sec. 149 the presence of the abettor at the act and community of purpose are essential.

13. This section and Sec. 149 compared.—A case under Sec. 149 arises only when the persons composing the unlawful assembly are at least five persons. There is of course no such limit fixed for an abetment under this section. A person under Sec. 149 need not be "present" at the time of the committing of the offence—it is sufficient if he was then a member of the "unlawful assembly" which committed that offence. Under this section his presence is essential. Both sections, however, deal with constructive criminality, and in both cases the object is to punish abettors whose assistance is extended to the time of the commission of the offence. When their number is or exceeds five, the law takes a more serious view of their conduct, and regards them all as principals, and punishable as such, irrespective of their individual contribution to the violence used or of the offence committed. It would thus appear that rioters are then all liable to be convicted as principals and there can be no abetment of a riot within the meaning of this section, though it is quite conceivable that rioters may be even further liable to be punished under this section if in addition to rioting they had abetted any other offence which might be committed by the mobs under their orders or instigation, or in prosecution of the comon object.[4]

Then again the section has no application where the abettor is not only present, but takes part in the commission of the offence. So where a blow is struck by *A* in the presence of, and by the order of *B*, there is no question of

1. Amrita Govinda, 10 B. H. C. R. 497.
2. Section 149.
3. This difference is due to the difference in the language of the two sections. A person under the section is only "deemed to have committed" the other offence, while Sec. 149 declares him "guilty of that offence".
4. *Cf.* Dadan Ghazi, 10 C. W. N. 890 at p. 891.

abetment, for both are principals in the transaction, in the same way as if the two had actually joined in the beating, in which case both would be held jointly responsible for the effect their beating had produced upon their victim.[1] In such a case the law apportions the individual responsibility of offenders, if it can, but where this is not possible, it holds them all jointly responsible for the consequence. Where four persons combine to attack with *lathis* their common enemy, each is abetting the conduct of the other within the meaning of Sec. 107. When each one of them is present, Sec. 114 applies. If Sec. 114, I. P. C., otherwise applies such of them as were not directly responsible for the grievous hurt caused should be deemed to have abetted the causing of the grievous hurt by the person who actually caused it, provided grievous hurt was the probable consequence of the assault. The test is whether, in the circumstances of a given case, grievous hurt should have been foreseen as the probable result of their concerted action. The case may be different where the surrounding circumstances, including the comparatively harmless character of the weapons used by the assailants, did not make it probable that grievous hurt would result though it did in the course of assault through accident or some act of one of the assailants which had not been contemplated by the others.[2]

14. Confession of co-accused.—Though on abettor may be legally tried jointly with the principal offender, it was formerly held that as the abettor was not tried jointly with him for the *same* offence, a confession made by him was not admissible in evidence against his co-accused.[3] This view was perfectly logical on Sec. 30 of the Indian Evidence Act as it then stood, though even then the tendency was to strain the point in favour of their admissibility, for the Courts could not afford to lose so good a piece of evidence. It was consequently laid down in some cases that a present abettor, tried conjointly with another, was really being tried for the same offence so that the confession of one was admissible against the other.[4] The amendment of the section in 1891[5] has now legalized the view, as the word "offence" as used in that section is enacted to include the abetment of, or attempt to commit, the offence.

15. Cases.—Where a driver of a motor lorry permitted a minor sitting by his side to drive the car and the latter, unable to control the lorry going at a high speed, made an attempt to stop it by suddenly applying the brakes but the lorry was overturned resulting in injuries to some of the passengers, it was held that the driver was by virtue of Sec. 114 liable to be dealt with as a principal offender under Secs. 338 and 279 of the Code.[6] Where one of the accused Lalu was present from the very beginning and had an open knife in his hand at the time of rape, Lalu was found guilty under Sec. 376 read with Sec. 114.[7] Where two persons attack another armed with *dao* and there is evidence that one of them announced his intention of killing, both the persons are liable for the act committed by one. Even if Sec. 34 does not apply to such a case, Sec. 114 will

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1. Mohd. Asgar, 2 W. R. 11.
2. Jaimangal *v.* Emperor, A. I. R. 1936 All. 437 at p. 439 : 37 Cr. L. J. 864: 1936 A. W. R. 298 : 163 I. C. 848; *see* also State *v.* Saidu Khan, A. I. R. 1951 All. 21.
3. Nur Ahmad, (1874) P. R. (Cr.) No. 8; Amrita Govinda, 10 B. H. C. R. 497.
4. Bag Shah, (1879) P. R. (Cr.) No. 3; Thakur Singh, (1882) P. R. No. 32 ; Tejo, (1885) P. R. (Cr.) No. 39.
5. Act III of 1891.
6. Ram Rup, 5 D.L.R. (Simla) 223: 52 Punj. L. R. 193 : 4 A. I. Cr. D. 534.
7. Lalu Kamumal *v.* State, A. I. R. 1953 Ajmer 12 at p. 14.

apply.[1] In a Bombay case,[2] one Kalimuddin, brother of Akbaralli was found travelling with a monthly ticket. It was found that the ticket had been issued to Akbaralli. Akbaralli's own defence before the Magistrate was clearly based on the assumption that the ticket had been issued to him and that he was the person entitled to use it. It was not contended by Akbaralli that Kalimuddin had taken his ticket without his consent or knowledge. It was held that it must be presumed that it was Akbaralli who gave the ticket to Kalimuddin for use. On this view of the case, Akbaralli must be held to have abetted the offence committed by Kalimuddin. Where an accused, while grappling with the deceased, called out her son who in response to the call came with a *lathi* and in the fight gave a *lathi* blow on the head of the deceased, it was held that the accused was guilty of abetment but that the abetment was covered Sec. 109 and not by Sec. 114.[3]

A mere direction from one person to another and the carrying out of that direction by the other may only be instigation of the latter's act and may not be a case of joint act under Sec. 34, I.P.C. But where two persons, with their followers all of them armed move about together for a set purpose and one gives instructions to the other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that the act is not one which was done in furtherance of the common intention of both. The accused's saying, "People are collecting let us fire", brings out the common intention clearly. But if the evidence makes out no more than mere instigation, it is, even so, instigation by a person who is present at the scene of offence when the act is committed. In such a case, the instigator is "deemed" to commit the murder by virtue of Sec. 114, I.P.C. As pointed out by Lord Sumner in *Barendra Kumar Ghosh* v. *Emperor*,[4] "actual presence *plus* prior abetment can mean nothing else but participation". This is the irrebuttable presumption raised by Sec. 114, I. P. C., and brings the case under Sec. 34, I. P. C.[5]

16. Procedure.—Same as in the case of the offence abetted.

115. Whoever abets the commission of an offence punishable with death or [6][imprisonment for life], shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

Abetment of offence punishable with death or imprisonment for life if offence not committed.

and if any act, for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment for either description of a term which may extend to fourteen years, and shall also be liable to fine.

If act causing harm be done in consequence.

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1. Nga Shwe Din *v.* Emperor, A. I. R. 1934 Rang. 98 at p. 101 : 35 Cr. L. J. 905.
2. Akbar Ali v. Emperor, A. I. R. 1933 Bom. 412 at pp. 412-13 : 34 Cr. L. J. 1257 : 35 Bom. L. R. 875.
3. Mumtaz Ali *v.* Emperor, A. I. R. 1935 Oudh 473 at p. 474 : 36 Cr. L. J. 1201.
4. A. I. R. 1925 P. C. 1.
5. Mathurala Adi Reddy *v.* State of Hyderabad, A. I. R. 1956 S. C. 177 at p. 180 : 1956 Cr. L. J. 341.
6. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "transportation for life", (w. e. f. 1st January, 1956).

Illustration

A instigates *B* to murder *Z*. The offence is not committed. If *B* had murdered *Z*, he would have been subject to the punishment of death or [1][imprisonment for life]. Therefore *A* is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to *Z* in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Sections 115 and 117 distinguished.
5. Charge.
6. Procedure.

1. Analogous law.—This and the next section deal with abetment not otherwise provided for. In both cases the abetment is abortive and does not result in the commission of the offence abetted. These two sections were added since the original draft. They supplement the provisions of Sec. 109 which prescribes the penalty of the abettor "if the act abetted is committed in consequence". This section provides for the abetment of more heinous crimes in which the offence abetted is either not committed at all, or is only partially committed, or if committed, is not in consequence of the abetment.

2. Principle.—It is, of course, by no means an essential ingredient of the offence of abetment that the act abetted should be committed, or that the effect intended should be produced.[2] Such abetment being ineffectual is naturally deserving of lenient punishment. Such would be the case where the accused gave aconite to a woman to win the love of her husband, in consquence of which two persons, other than the husband, died. He was held guilty under Secs. 302/115.[3]

3. Meaning of words.—The words "express provision" refer to sections such as 121 and 131, I. P. C., where there is an express provision for abetting an offence punishable with death or imprisonment for life. Section 117 is not an express provision for abetment of an offence punishable with death or imprisonment for life. It covers all offences and is a general provision for abetment by any number of persons exceeding ten. "Express provision" seems to refer to sections in which specific cases of abetment of offence punishable with death or imprisonment for life are dealt with.[4]

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1. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "transportation for life" (w. e. f. 1st January 1956).
2. Ganesh, I. L. R. 34 Bom. 394.
3. Amode Ali, I. L. R. 58 Cal. 1228.
4. Emperor *v.* Dwarika Nath Goswami, 34 Cr. L. J. 164 at p. 165: I. L. R. 60 Cal. 427 : *see* also Emperor *v.* Lavji Mandan, A. I. R. 1939 Bom. 452: 185 I. C. 418 (2) : 41 Cr. L. J. 183: 41 Bom. L. R. 980 : *contra* Santa Singh *v.* Emperor, A. I. R. 1933 Lah. 660 : 1934 Cr. L. J. 1002.

4. Sections 115 and 117 distinguished.—Abetment has reference both to the person or persons abetted and to the offence, or offences the commission of which is abetted. Section 117 deals with the former whatever be the nature of the offence abetted, while Sec. 115 deals with the latter, without having regard to the person or persons abetted. Section 115 is not confined to the abetment of a single person or a specified individual or individuals and covers the case of the abetment of a class of persons also. It does not apply only if "no express provision is made by this Code for the punishment of such abetment". The words "such abetment" evidently refer to the abetment of the offence specified in the section itself, namely, an offence punishable with death or imprisonment for life, and only Secs. 121 and 134 provide for the punishment of the abetment of such offence. There is no express provision in the Code for the punishment of abetment of murder. Hence the abetment of the commission of murder, whether by a single individual or by a class of persons exceeding ten, falls under Sec. 115. In the latter case it may fall under Sec. 117 also but as Sec. 117 prescribes a lesser punishment, Sec. 115 is the more appropriate provision for such an offence. Although both the sections be applicable there cannot be separate sentences under the two sections for the same criminal act and conviction should properly be under that section which inflicts the higher punishment. If a person abets the commission of murder by the public, and murder is committed in consequence of the abetment, it cannot be said that the offence does not fall under Sec. 117, but the appropriate section for such an offence would be Sec. 109. Similarly, if in consequence of such abetment murder is attempted but only hurt is caused, the appropriate section would be the second paragraph of Sec. 115.[1]

"Such abetment", meaning of.

This section more appropriate for punishment of abetment of murder.

5. Charge.—An offence under this section may be charged as follows:

"I (*name and office of Magistrate or Judge*) hereby charge you (*name of accused*) as follows:

"That you, on or about the——day of——at——abetted the commission by one *AB* of an offence of——punishable with death (*or* imprisonment[2] for life), which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under Sec. 115 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge [by the said Court (*in the case of committal to the Sessions*)]."

6. Procedure.—The offence under this section is non-bailable; otherwise the offence is cognizable, and compoundable if the offence abetted is

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1. Amodi Ali, I. L. R. 58 Cal. 1228.

2. Subs. by Act 26 of 1955, Schedule.

cognizable and compoundable; and it is triable by the same Magistrate as the offence abetted.

Abetment of offence punishable with imprisonment —if offence be not committed;

116. Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both ;

if abettor of person abetted be a public servant whose duty it is to prevent offence.

and if the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence or with such fine as provided for the offence, or with both.

Illustrations

(*a*) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B*'s official functions. *B* refuses to accept the bribe. *A* is punishable under this section.

(*b*) *A* instigates *B* to give false evidence. Here, if *B* does not give false evidence, *A* has nevertheless committed the offence defined in this section, and is punishable accordingly.

(*c*) *A*, a police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, *A* is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) *A* abets the commission of robbery by *A*, a police officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, *B* is liable to one-half of the longest term of imprisonment provided forthe offence of robbery, and also to fine.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Meaning of words.
4. Relative scope of Secs. 115, 116 and 117.
5. Abortive abetment.
6. Abortive attempt to give bribe.
7. Paragraph 2.
8. Deterrent punishment for abetment of bribery.

1. Analogous law.—This section is really a continuation of the last, the two together exhausting abetment not followed up by the offence abetted.

2. Principle.—This section discriminates between the peace-officers and the public, the abetment of the former being regarded as doubly penal. The reason for this difference is obvious. If the public incur no greater liability for tampering with those whose duty it is to prevent crime, it will be difficult to maintain that high standard of integrity and honesty which it is in the interest of the public that peace-officers should possess. The enhanced penalty, it will be observed, applies only to public servants "whose duty is to prevent the commission of such offence". Other public servants fall into the general category.

3. Meaning of words.— "*Abets an offence punishable with imprisonment,*" i.e. as a substantive and not as an alternative sentence. Offences punishable with fine only are thus excluded, though the sentence of imprisonment would even then be awarded in default of payment of fine. "*Offence be not committed in consequence of the abetment,*" for the meaning of which (*see* Secc. 109). "*No express provision made,*" e. g. Secs. 121, 123, 130, 132, 134 and 136. "*Whose duty is to prevent the commission of such offence,*" e.g. a civil surgeon is a public servant, but he is not a public servant qualified to prevent the commission of such offences.[1]

4. Relative scope of Secs. 115, 116 and 117.—The wording of Sec. 116 is similar to that of Secc. 115. While the latter applies where the offence abetted is punishable with death or imprisonment[2] for life, the former applies where the offence abetted is punished with imprisonment. If a class of persons exceeding ten be abetted to commit such an offence, Sec. 117 would be applicable. If the offence abetted be theft, and the offence is not committed in consequence of the abetment, the punishment under Sec. 116 would be only a quarter of three years, that is to say, nine months, but under Sec. 117 it would be three years. Hence one who abets the public or a class of persons exceeding ten to commit theft should be charged under Sec. 117 rather than under Sec. 116. In other words, where a person is found guilty of a criminal act which is punishable under two different sections of the Penal Code, he may be convicted under both the sections, but should be punished only under that section which imposes the higher penalty.[3]

5. Abortive abetment.—An abetment that fails in its purpose is not visited in law by the same rigour as one which fulfils its purpose. Such a case may arise not only when no offence is committed in consequence of the crime, but also when the offence committed is not the offence abetted, though it may be more heinous, but inasmuch as the abettor cannot be held accountable for it, it is not the full measure of his reponsibility. But inasmuch as such an abetment may have led, though distantly, to the commission of that crime, it is laid down that he shall be liable to one-fourth of the punishment provided for the offence he had abetted. Such was held to be the case of one who had abetted the offence of bigamy on the part of a woman whose husband was alive.[4]

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1. Ram Nath Surma Biswas, 21 W. R. 9.
2. Subs. by Act 26 of 1955, Schedule.
3. Emperor *v.* Lavji Mandan, A. I. R. 1939 Bom. 452 at p. 453 : 41 Cr. L. J. 183: 185 I. C. 413 (2) : 41 Bom. L. R. 980.
4. Sanwar, 10 S. L. R. 171.

6. Abortive attempt to give bribe.—The section makes an abortive attempt at giving a bribe an offence from the point of view of the person who offers the bribe.[1]

The words "if that offence be not committed" are inapt and may lead to difficulty in construction. Suppose, for instance, that a man abets theft on the road[2] and the person abetted commits theft in a building.[4] Is the abettor liable to the penal consequences of this section or of Sec. 109? It has been held that in such a case the two offences are distinct, and that the abettor is not liable under Sec. 109. But an offence committed does not become a different offence from the offence abetted merely because it is punishable under different section. As observed before, if the two are *substantially* one, then the abettor is liable for the offence committed, and he cannot say that because the offence he has abetted fell under one section, and the offence committed falls under another section, therefore the two offences are different for the purpose of his punishment. The question has been already discussed at some length and reference must be made to it for the purpose of ascertaining whether the offence committed was committed in consequence of the abetment, and whether the offence committed is the same as the offence abetted within the meaning of this section (*see* Sec. 109)'.

7. Paragraph 2.—Turning now to the second clause, it will be observed that the public servants there spoken of are not all public servants, as that term is defined in the Code. The object of the clause is to provide for enhanced punishment only if the persons abetting or abetted is "a public servant whose duty it is to prevent the commission of such offence," that is to say, if the abetment is of a public servant whose duty as such public servant is to prevent the commission of the very offence abetted. Where, therefore, the prisoner was "feeling his way" if the civil surgeon will accept a bribe, and the latter stopped him from making further advances, it was held that the offence of abetment was complete but it was an offence punishable under the first clause and not under the second clause of this section. And this because though the civil surgeon was undoubtedly a public servant, still he was not a public servant whose duty it was as public servant to prevent the offering of bribes. It is not his duty to prevent the commission of such offence of bribing and further that it is the duty of every good citizen to do what he can to keep people about him honest, and to prevent the commission of any offence whatever. Cases might be readily supposed to which this latter half of the section would directly apply; for instance, it is the duty of a custom-house officer to prevent fraud upon the revenue in the way of smuggling, and consequently, abetting him in the commission of such a fraud would be abetting the commission of an offence by a public servant whose duty it is to prevent the commission of such offence.[4] In the case of the attempt to bribe the civil surgeon the proper measure of punishment was that laid down in the first paragraph. The same rule would apply to an offer of a bribe made to a police officer, for bribery is not a cognizable offence or one which it is the duty of a police officer to prevent. Illustrations (*a*) and (*b*) consequently fall under the first clause

Object of the section to provide for enhanced punishment.

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1. Qazi Rahimullah *v.* Emperor, A. I. R. 1935 Pesh. 26 at p. 27: 36 Cr. L. J. 26; *see* also Emperor *v.* Phul Singh, A.I.R. 1941 Lah. 276: I. L. R. (1942) Lah.402 : 42 Cr. L. J. 636.
2. Section 937.
3. Section 380.
4. Ram Nath Surma Biswas, 21 W. R. 9.

Illustrations (*a* and (*b*) fall under first clause while (*c*) and (*d*) fall under second clause.

while Ills. (*c*) and (*d*) are instances of the operation of the second clause. As this section applies also to special or local laws,[1] it has a wider application than the Code of which it is a part. Consequently, a pleader who send a printed circular to the other pleaders inviting them to sent him cases offering to share with them his fee in the case, was held to be guilty of abetment of an offence under Sec. 36 of the Legal Practitioners Act, and therefore, punishable under this section.[2]

8. Deterrent punishment for abetment of bribery.—There seems to be no doubt that offences of bribery or abetment of bribery rarely come to light and further that where such an offence is proved beyond all reasonable doubt, the perpetrators thereof must be visited with deterrent punishment. Where the object of the bribe-giver was to secure a lenient assessment of income-tax in the return for the bribe which he was offering to the Income-tax Officer, he is not entitled to any lenient consideration.[3]

117. Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

Abetting commission of offence by the public or by more than ten person.

Illustration

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place for the purpose of attacking the members of an adverse sect, while engaged in a procession, *A* has committed the offence defined in this section.

SYNOPSIS

1. Analogous law.
2. Principle.
3. "Abets."

PRACTICE AND PROCEDURE

4. Procedure.
5. Proof.
6. Charge.

1. Analogous law.—This section stood as Cl. 93 in the Draft Bill which contained the following additional illustration[4]:

> "(*b*) *A* inserts in a newspaper an article advising soldiers to shoot every commanding officer who uses them harshly. *A* has committed the offence defined in the clause."

Two objections were taken to this clause: (*i*) that it was too vague and would lead to malicious prosecutions; unless the instigation be confined to some overt acts like the illustration; and (*ii*) that the number "ten" was arbitrarily fixed. It was said that the substitution of the words "or any class of persons" should be an improvement. The force of the first objection was conceded, and the Commissioners recommended that "it may be most expedient to define the manner of instigation by the terms used in

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1. Section 40.
2. Purbati Charan Chatterji, I. L. R. 7 All. 498 at p. 504 (P. C.).
3. Taj Khan *v.* State, A. I. R. 1957 Raj. 1 at p. 5 : 1957 Cr. L. J. 96.
4. Clause 98 (now Sec. 114).

Cl. 113 (now Sec. 124-A) relating to attempts to excite feelings of disaffection to the Government of such terms as may be settled when that clause comes under consideration".[1] This suggestion was not, however, acceded to.

2. **Principle.**—The definition of abetment does not require that the persons abetted should be a defined and not be a fluctuating body of men. This section proceeds on the same assumption. Consequently, one may be punished for abetment though the prosecution may be unable to point to the men abetted. Such persons may be "the public", a term which means as it has been defined to include, "any class of the public or any community".[2] It is not necessary under this section that the offence abetted should be committed in other sections.

It will be observed that the abetment under this section involves the commission of an offence "by any number or class of persons exceeding ten" who must commit the offence collectively and not individually. Where, for instance, the prisoners abetted 12 coolies in breaking their separate contracts it was held that inasmuch as each breach of contract was a separate offence under Sec. 492 by each coolie, the abetment of such breach could not be punished under this section, notwithstanding that more than 10 coolies broke their contracts in consequence of such abetment.[3] An offence under Sec. 117 (abetment) does not necessarily involve an offence under Sec. 143 (unlawful assembly). Section 117, Penal Code, does contemplate the abetment of the commission of an offence by the public generally, or by any number or class of persons exceeding ten, it does not necessarily follow that the offence is to be committed by all the ten or more persons at one and the same time or that there should be an unlawful assembly.[4] (For comparison of Secs. 115 and 117, *see* notes Sec. 115.)

3. **"Abets."**—The posting of a leaflet, inciting the public to commit an offence would not be punished under this section, if it was removed before anybody could have read it. Such posting falls short of abetment defined under Sec. 107.[5] But instigating railway workers to lie on the railway line in the event of a strike has been held to be an offence.[6]

PRACTICE AND PROCEDURE

4. **Procedure.**—The procedure applicable to an offence under this section is the same as in the case of the offence abetted. The offence can be tried as a summons case.[7]

5. **Proof.**—The points requiring proof are—

(1) the accused had abetted;

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1. First Report, Sec. 205.
2. Section 12.
3. Queen *v.* Mahesh Chunder, 3 W. R. Cr. 13 at p. 24.
4. Agha Nazar Ali Sultan Muhammad *v.* Emperor, A. I. R. 1941 Sind 186 at p. 188 : 43 Cr. L. J. 68 : I. L. R. (1941) Kar. 352 : 196 I. C. 751.
5. Emperor *v.* Parimal Chatterjee, A. I. R. 1932 Cal. 760 at p. 761 : I. L. R. 60 Cal 327 : 34 C. L. J. 78 : 140 I. C. 787.
6. S. Subramania Ayyar *v.* Emperor, A.I.R. 1933 Mad. 279 at p. 279 (1) : 34 Cr. L. J. 524.
7. Narasinha Narayan Chandur *v.* Emperor, A.I.R. 1931 Bom. 199 at p. 199 : 33 Bom. L. R. 353 : 32 Cr. L. J. 718 : 131 I. C. 472.

(2) the commission of an act;

(3) which was an offence under the Code, or any special or local law;[1] and

(4) that the persons abetted were at least 11 persons, or the public generally.[2]

6. Charge.—In framing the charge the following form may be adopted:

"I (*name and office of Magistrate or Judge*) hereby charge you (*name of the accused*) as follows:

"That you———on or about the———day of———at———abetted the commission of offence of———by———numbering more than ten persons (*or* the public generally) by (*state the act done by accused in instigation*), and thereby committed an offence punishable under Sec. 117 of the Indian Peanl Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge (*and* by the said Court in case of committal)."

It may or may not be a duplication to frame a charge under Sec. 50 read with Sec. 117 as well as Sec. 120-B, but there can be no objection to it.[3]

There is no substance in the contention that it is not permissible to frame a charge of conspiracy when the matter has proceeded beyond the stage of conspiracy and that in pursuance of it offences have actually been committed.

The offence of conspiracy is an entirely dependent offence and though other offences are committed in pursuance of the conspiracy the liability of the conpirators for the conspiracy itself cannot disappear. In the Indian Penal Code, as originally enacted, conspiracy was not an offence. Section 120-B which makes criminal conspiracy punishable was added by the Indian Criminal Law Amendment Act, 1913 (8 of 1913) along with Sec. 120-A. Section 120-A defines conspiracy and Sec. 120-B provides for the punishment for the offence of conspiracy. Criminal conspiracy as defined in Sec. 120-A consists of an agreement to do an illegal act or an agreement to do an act which is not illegal by illegal means. Section 120-B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall be punishable in the same manner as if he has abetted such offence unless there was express provision in the Code for the punishment of such conspiracy. Criminal conspiracy was, however, not an unknown thing before the amendment of the Indian Penal Code in 1913. But what the amendment did was to make that conspiracy itself punishable. The idea was to prevent the commission of crimes by, so to speak, nipping them in

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1. Ganesh Waman Joshi, I.L.R. 55 Bom. 233; *see* also Konda Satyavatamma *v.* Emperor, A. I. R. 1932 Mad. 371 : I. L. R. 55 Mad. 90 : 32 Cr. L. J. 1131 ; Joti Prasad Gupta, A. I. R. 1932 All. 18 : I. L. R. 53 All. 624 : 33 Cr. L. J. 326, *contra* Mohan Lal Saksena, A. I. R. 1930 Oudh 497.
2. Ganesh Waman Joshi, *supra*.
3. Tarapada Mitra, A. I. R. 1933 Cal. 603 at p. 604 : 37 C. W. N. 426 : 145 I. C. 814 : 34 Cr. L. J. 1073.

the bud. But it does not follow that where crimes have been committed the liability to punishment already incurred under Sec. 120-B by having entered into a criminal conspiracy is thereby wiped away. No doubt, where offences for committing which a conspiracy was entered into have actually been committed it may not, in the particular circumstances of a case, be desirable to charge the offender both with the conspiracy and the offences committed in pursuance of that conspiracy. But that would be a matter ultimately within the discretion of the Court before which the trial takes place.[1]

118. Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or [2][imprisonment for life],

Concealing design to commit offence punishable with death or imprisonment for life.

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or if the offence be not committed, with imprisonment of either description for a term which may extend to three years, and in either case, shall also be liable to fine.

If offence be committed;

if offence be not committed.

Illustration

A, knowing that a dacoity is about to be committed at *B*, falsely informs the Magistrate that a dacoity is about to be committed at *C*, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at *B* in pursuance of the design. *A* is punishable under the section.

SYNOPSIS

1. Analogous law.
2. Scope.
3. Principle.
4. Meaning of words.
5. Criminal concealment when penal.
6. Criminally false representation.
7. Concealment by an act or illigal omission.

PRACTICE AND PROCEDURE

8. Procedure.
9. Proof.
10. Charge.

1. Analogous law.—The concealment of a design to commit an offence constitutes an abetment, within the meaning of Sec. 107, and such abetment is an offneoe when the person making the concealment was under legal obligation to disclose it.

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1. State of Andhra Pradesh *v.* Cheemalapati Ganeshwara Rao, A. I. R. 1963 S. C. 1850 at pp. 1864, 1865, 1866.
2. Subs. by Act 26 of 1955 Sec. 117 and Schedule, for "transportation for life" (w. e. f. 1-1-56).

For persons who are under such obligation, *see* Sec. 44 of the Code of Criminal Procedure.

2. Scope.—This and the next two following sections deal with concealment previous to the commission of an offence. Subsequent concealment is penalised by Secs. 202 and 203. The former are directed to the *prevention* of crime, the latter to *punishing them.*

3. Principle.—This and the next two following sections deal with the law of criminal concealment—the essence of the crime consisting in the facility thereby given to offenders for the perpetration of crime. This section recognises concealment as of two kinds : (*a*) concealment by misrepresentation, and (*b*) concealment by non-disclosure. The former affects the public generally, the latter only affects those upon whom it lies to make the disclosure. All the three sections only apply to offences punishable with imprisonment. They exclude those which are punishable with fine only. And, as the sections make it clear, the concealment to be criminal must be intentional or, at least, with knowledge that it will thereby facilitate the commission of crime:

4. Meaning of words.—"*Thereby facilitate the commission of an offence*". The offering of facility may in itself constitute abetment. When it is so, the offender may be liable as an abettor. "*Conceal*" means conceal from the public servants entrusted with the duty of preventing offences. A Sub-Inspector of Police aware of an impending dacoity may conceal the fact as much from his subordinates as he may conceal it from his superior officers who direct and control him in his executive duties. "*The existence of a design*" which does not necessarily mean a plot. But it must be something more than a mere mental determination to commit a crime. But the expression of that determination converts it into a design. "*Any representation . . . respecting such design*". A representation is a categorical statement of fact. It is not a mere expression of opinion. But the form is immaterial, if it was a representation, though it was expressed in the form of an opinion. "*If that offence be committed,*" the test of identity being its essential character rather than the section of the Code.

5. Criminal concealment when penal.—This and the next two following sections deal with the law of criminal concealment as a branch of the law of abetment. As the liability in such cases may as much depend upon false representation as an illegal omission, the highly penal rules here laid down require strict construction. The subject of concealment as treated in the section may consist of (*a*) false representation, (*b*) an act, or (*c*) an illegal omission.

6. Criminally false representation.—So far as the question of false representation is concerned, the section affects the public generally. For no one has a right to demand another to speak, but if he speaks he has no right to speak falsely. But however much may a false statement be reprobated by morality, law has no power to punish it as such. It visits a false speaker with its penalty, if his falsehood has deceived some one, or if at any rate it was intended to cause deception on a subject affecting public peace. And even then it makes allowance for thoughtless lies spoken on insufficient data and with no ulterior object in view. The statements which law regards criminal must be (*a*) known to be false; (*b*) they must be made respecting a design and the hall-mark of criminal is stamp on them; (*c*) they are made with

Every false statement if criminal—Test.

intent to facilitate or knowing it likely that he would thereby facilitate the commission of an offence punishable with death, or imprisonment for life. Consequently, it is not every false statement that is criminal. To be criminal it must answer the requirements of the above tests. Now, in the first place, what is representation? As remarked (in para. no. 4 above), it is not a mere expression of opinion or the statement of a probable contingencies or the suggestion of a possible hypothesis. It must be a categorical assertion at least an assertion having that effect, whatever may have been its form. Suppose, for instance, in the illustration appended to the section, *A* were to say to the Magistrate, "I hear that the dacoity rumoured to be committed at *B* will be committed at *C*"—the statement may be perfectly innocuous itself, for *A* may be merely giving expression to hearsay, or he may be adroitly suggesting to the Magistrate the relaxation of his vigilance at *B* so that the dacoity may more easily be committed. In the former case the statement would not amount to a representation at all, though in the later case it will be a representation within the meaning of this section.

Representation must be false to the knowledge of the maker.

The fact that a representation is made is not enough; it must be false to the knowledge of the maker. This will exclude the repetition of an idle rumour, of what is no more than an intelligent anticipation of a likely event. Lastly, the false representation must be made with intent to facilitate, or knowing it likely that he will thereby facilitate the commission of an offence. It is this element that tinctures the concealment with criminality, as it facilitates the perpetration of crime by making its prevention difficult. As, however, the object of law is to prevent the commission of serious crime, the last requisite confines the operation of the rule to offences punishable with death or imprisonment for life.

7. Concealment by an act or illegal omission.—Turning next the concealment by any act, cases are conceivable when the authorities may be easily deluded by a feint. In such a case there may be no word spoken but nevertheless, the purpose intended and the effects likely to be produced are the same. If, for instance, in the illustration given, suppose that *A* instead of misinforming the Magistrate about the scene of dacoity were to drop tools and things of the dacoits in the direction of *C* thereby making the Magistrate believe that the dacoits had taken that course, would the result be any different? As regards wilful misrepresentation and acts the rule is the same, and it is applicable alike to all, whether public servants or otherwise. But as regards illegal omissions the rule is different, for the public are under no obligation to furnish the authorities with information concerning offences other than those specified in Sec. 44 of the Code of Criminal Procedure,[1] In such offences it is the duty which the public share equally with the police, Magistrate and others to inform the authorities about "the commission of, or of the intention of any other person to commit" them.[2] Village headmen, accountants, landholders and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards are similarly enjoined with the duty of communicating to the nearest Magistrate

Persons omitting to comply with statutory obligation are guilty of illegal omission.

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1. The offences here specified are Secs. 121—126, 130, 144, 145, 147, 148, 302—304, 382, 392—399, 402, 435, 436, 449, 450, 456, 460.
2. Section 44, Cr. P. C.

or to the officer-in-charge of the nearest police station any information, which he may obtain respecting the commission of or intention to commit in or near their village any non-bailable offence or any offence punishable under Sec. 143, 145, 147 or 148 of the Code and of certain other offences committed or intended to be committed at any place out of India near such village.[1] In such cases then, there is on the part of the persons so named a further statutory obligation to assist the authorities in the manner and to the extent therein required. Porsons who omit to comply with such statutory requirements are then guilty of illegal omission for which they may be liable under this section, if it is prompted by the intention or knowledge of facilitating the commission of those offences, and if the omission was made "voluntarily".[2]

As regards the police and Magistrates within their jurisdiction their duties are more extensive, and as they are specially retained for the preservation of peace and suppression of disorder, their responsibilities are commensurately far greater. But in both cases the test is the same, namely, whether the concealment was wilful and whether it was made with the intent or knowledge of thereby facilitating the commission of the offence. The fact that the omission was likely to facilitate the commission of the offence is material and must be clearly established.[3] Added to it must be established knowledge of the design and knowledge of the value of its suppression.

PRACTICE AND PROCEDURE

8. Procedure.—An offence under this section is non-bailable, if the offence concealed is committed, otherwise the offence is bailable. In other respects the procedure is the same as in the case of the offence abetted.

9. Proof.—An offence under this section requires proof of the following partioulars :

(1) the existence of the design to commit an offence;

(2) which offence was one punishable with death or imprisonment for life;

(3) that accused concealed the existence of such design—

(*a*) by his act, or

(*b*) by an illegal omission, or

(*c*) by his knowingly making false representation;

(4) that the concealment was made voluntarily; and

(5) intending thereby to facilitate or knowing that he would thereby facilitate the comission of such offence;

to which may be added the aggravating circumstance;

(6) that the offence concealed was committed.

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1. Section 45, Cr. P. C. No one is however bound to report a case of bribery; Malik Daud, (1887) P. R. No. 30.
2. Jhugroo, 4 W. R, 2.
3. Kesree, (1886) 1 Agra 31.

10. Charge.—The following is an appropriate form of a charge under this section:

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

"That you,——on or about the—day of——at——, with the intention of facilitating or with the knowledge that you will thereby facilitate the commission of the offence of——(*specify the act*) (*or* omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under Sec. 118 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

"And I hereby direct that you be tried on the said charge (*or* in the case of committal by the said Court)."

119. Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent,

Public servant concealing design to commit offence which it is his duty to prevent—

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or make any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term ofsuch imprisonment, or with such fine as is provided for that offence, or with both:

if offence be committed;

or, if the offence be punishable wjth death or [1][imprisonment for life], with imprisonment of either description for a term which may extend to ten years ;

if offence be punishable with death, etc.;

or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

if offence be not committed.

Illustration

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that *B* designs to commit robbery, omits to give such information with intent

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1. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "transpo rtation for life" (w. e. f. 1st January 1956).

to facilitate the commission of that offence. Here *A* has, by an illegal omission, concealed the existence of *B*'s design, and is liable to punishment according to the provision of this section.

SYNOPSIS

1. Analogous law.
2. Principle.
3. Conviction under Sec. 119 but charge under Sec. 409, legality of.

PRACTICE AND PROCEDURE

4. Procedure.
5. Proof.
6. Charge.

1. Analogous law.—This section is a class section and applies only to public servants whose duty it is as such public servants to prevent the suppression of offences. Otherwise the section is the same as Sec. 118.

2. Principle.—The section is the adaptation of Sec. 118 to public servants. It prescribes an enhanced penalty applicable to the case of public servants whose duty it is, as such public servants to prevent the commission of the offence the design to commit which they conceal.

The liability of the public servants is under this section circumscribed by their duty. They only incur the graver consequence of this section if they conceal a design to commit an offence *which it is their duty to prevent*. The meaning of this phrase has already been set out under the last section.

3. Conviction under Sec. 119 but charge under Sec. 409, legality of.—No person can be convicted of an offence without a charge unless it is a case falling under Sec. 237 or Sec. 238 of the Code of Criminal Procedure. Even in cases where a conviction without charge is thus permissible, it is necessary to guard against the question of prejudice because the accused is entitled to know with certainty and accuracy the exact nature of the charge of which he is going to be convicted. If the facts are such as to give the accused notice of the offence for which he is going to be convicted though not charged with it, the question of prejudice may not arise; but the Court should in any event satisfy itself that the accused was not misled in his defence. Sections 119 and 409 of the Penal Code are in different chapters of the Code. The ingredients of both the offences are not the same. A charge under Sec. 409 obviously therefore cannot cover any of the ingredients except the ingredients of being a public servant which by itself is not an offence. Such a case is not one contemplated either by Sec. 237 or Sec. 238 of the Code of Criminal Procedure. When the facts constituting an offence under Sec. 119 of the Penal Code were not stated in the charge-sheet nor was the accused, at any time, put on notice of the same, and the charge framed against him under Sec. 409 was disproved, the accused could not be taken by surprise for an offence under Sec. 119 and convicted thereunder without a charge for such a conviction is against law.[1]

PRACTICE AND PROCEDURE

4. Procedure.—An offence under this section is non-bailable if the offence concealed is committed, or if it is punishable with death or imprisonment for the life otherwise it is bailable.[2] It is cognizable and compoundable

1. Saifuddin Ahmed Khan, *In re*, (1957) 2 Andh. W. R. 298 : 1957 M. L. J. (Cr.) 509.
2. Section 159, Act XVIII of 1923.

if the offence abetted is so, and it is triable by the Court by which the offence abetted is triable.

5. Proof.—The facts necssary to establish an offence under this section are the following :

(1) The existence of the design to commit an offence;

(2) that the accused was a public servant;

(3) that it was his duty to prevent the commission of that offence ;

(4) that he concealed the existence of such design—

(*a*) by this act, or

(*b*) by his illegal omission, or

(*c*) by his knowingly making false representation;

(5) that the concealment was made voluntarily;

(6) that the accused thereby intended to facilitate, or knew that he would thereby facilitate the commission of such offence, to which may be added the aggravating circumstance if the facts warrant it ;

(7) that the offence concealed was committed.

6. Charge.—The charge under this section should be framed on the same lines as a charge under Sec. 118, the following clause being added:

"That you——on or about the——day of——at——being a public servant whose duty it was to prevent the commission of the offence of——with the intention of facilitating, etc."

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence or makes any representation which he knows to be false respecting such design,

Concealing design to commit offence punishable with imprisonment—

shall if the offence be committed, be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth and if the offence be not committed, to one-eighth of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

if offence be committed;

if offence be not cammitted.

SYNOPSIS

1 Analogous law.
2. Procedure and proof.
3. Charge.

1. Analogous law.—This section is complementary to Sec. 118 which applies only to offences punishable with death or imprisonment for life. This section extends the same rule to offences punishable with imprisonment.

All offences, save only those punishable with a fine, are thus included in the two sections. The offences so excluded are too trivial to require prevention by such drastic rules.

2. Procedure and proof.—The procedure relating to an offence under this section is exactly the same as in the case of the offence abetted. The evidence must establish the same points as in a case under Sec. 118 except that, instead of proving that the offence concealed was punishable with death or imprisonment for life, it must be proved that it was punishable with imprisonment.

3. Charge.—The charge should similarly follow the wording of the form set out under Sec. 118.

CHAPTER V-A

CRIMINAL CONSPIRACY

120-A. When two or more persons agree to do, or cause to be done—

Definition of criminal conspiracy.

(1) an illegal act, or

(2) an act, which is not illegal by illegal means, such agreement is designated a criminal conspiracy :

Provided that no agreement (except an agreement to commit an offence) shall amount to a criminal conspisacy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

SYNOPSIS

1. Analogous law.
2. English law.
3. American law.
4. Difference between Engiish law and Indian law.
5. Principle.
6. Meaning of words.
7. Scope.
8. Scope of conspiracy.
9. Conspiracy.
10. Conspiracy *mens rea.*
11. Conspiracy—Sentence.
12. Single conspiracy.
13. Distinction between conspiracy and other offences.
14. Distinction between Secs. 120-A and 34.
15. Distinction between offence of criminal conspiracy and offence of abetment by conspiracy.
16. Criminal conspiracy.
17. Conspiracies punishable under the Code.
18. Essentials of criminal conspiracy :
    - Agrecment.
    - Act illegal.
    - Means illegal.
    - Overt act.
19. Explanation.
20. Proof.
21. Proof of criminal conspiracy.

1. Analogous law.—This chapter comprising Secs. 120-A and 120-B was entacted by the Indian Criminal Law Amendment Act, 1913.[1] Its scope is explained by the following Statement of Objects and Reasons[2] :

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1. Act VIII of 1913.
2. *Gazette of India*, 1913, Pt. V, p. 44.

Statement of Objects and Reasons to the Indian Criminal Law Amendment Act, 1913.

"The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and Sec. 121-A of that Code. Under the latter provision, it is an offence to conspire to commit any of the offences punishable by Sec. 121 of the Indian Penal Code or to conspire to deprive the King of the sovereignty of British India or of any part thereof or to overawe by means of criminal force or show of criminal force, the Government of India or any Local Government, and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof. Under Sec. 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other words, except in respect of the offences particularised in Sec. 121-A conspiracy *per se* is not an offence under the Indian Penal Code.

"On the other hand, by the common law of England if two or more persons agree together to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so agree, commit the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

"Experience has shown that dangerous conspiracies are entered into India which have for their object aims other than the commission of the offences specified in Sec. 121-A of the Indian Penal Code and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to as similate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months, or with fine, or with both."

This definition in this section is taken from that formulated by Lord Brampton,[1] who defined a conspiracy thus : "If two or more persons agree together to do something contrary to law, or wrongful or harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the crime of conspiracy." The gist of the offence here separated and enlarged is implied in the offence of abetment as defined in Sec. 107, "secondly" but this chapter is justified on the ground that cases occur which could not be punished as

1. Quinn *v.* Leatham, (1901) A. C. 495 at p. 528

those of abetment which naturally implies a closer connection between the criminal and the crime.

2. English law.—As the avowed object of the Legislature in enacting this chapter was to assimilate the Indian to English criminal law with an additional safeguard that the conspiracy must be followed up by an overt act, it will be instructive to see in what light the English Common Law views the offence of criminal conspiracy.

Criminal conspiracy under English Common Law.

Conspiracy is an offence peculiar to the English law and its present form has been gradual and marks three distinct stages in its evolution. In its first stage (A.·D. 1290—A. D. 1611) the offence, though formulated at common law, appears to have been confined to a conspiracy to obstruct or prevent or defeat or delay justice, or to exhort under colour of office, and even as such it remained without any adequate sentence. The offence, however, assumed a more concrete form in A. D. 1611, when in a decided case,[1] it was for the first time settled that the agreement for a conspiracy was indictable as a subtantive offence even when nothing had been done to execute it. The third and final stage in its development was reached some years later in A. D. 1665.

Then the Judges declared that "all confederacies whatsoever wrongfully to prejudice a hired person are highly criminal".[2]

This has since been held to include all combinations which involve violation of the private rights of individuals, which, if done by a single person would give a civil though not a criminal remedy against the delinquent. Sir Robbert Wright thinks that the inception of this development may be traced to the misunderstanding of a leading case by Hawkins[3] which led to a crop of cases without adequate examination of the data upon which it was founded. He analyses the decisions to show that, as a general rule, a combination to injure a private person is not criminal unless the means to be employed are criminal, that is, in other words, conspiracy as such is not punishable save when it is a conspiracy to commit a crime. Modern legal opinion indorses this view, but against it there] is the accumulated weight of decided cases[4] though they are by no means unanimous, some still confining the operation of the rule to conspiracy to commit an offences.[5] The English parentage ascribed to this chapter, so far as it relates to the conspiracy to do an illegal act or by ilegal means, is consequently of doubtful legality and policy.

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1. Poulter's cases (1611), 9 Co. Rep. 55; Kinnersley, (1749) 1 Stra. 93, cited *per* Wright on *Conspiracy Encyclopaedia of the Laws of England, tit* Conspiracy.
2. Hawk, *Pleas of the Crown*, Bk. 1, C. 72, Sec. 2.
3. Starling, (1665) Sid, 174, cited *per* Wright on *Conspiracy*, at pp. 37—43.
4. Rowland, (1851) 17 Q. B. 671 ; Lumley v. Cye, (1853) 22 L. J. Q. B. 471 ; O'Connell, 1 Cox. 413 ; Painell, 14 Cox. 508 ; Mulcahy, L. R. 3 H. L. 306 ; Kromme, (1892) 17 Cox. 492 ; Quinn v. Leatham, (1901) A. C. 495. The law laid down in Quinn v. Leatham has so far as it relates to acts done in furtherance or contemplation of a trade dispute, been altered by the Trade Disputes Act, 1906, Secs. 1, 3, 4, and 5 (3) (6 Ed. VIII, c. 47).
5. Turner, 13 East 228 ; Straton, 1 Camp. 549 n.

A conspiracy to corrupt the morals of a particular individual is an indictable offence at common law.[1] In *R.* v. *Delaval*,[2] Lord Mansfied said :

Conspiracy to corrupt the morals of particular individual is an indictable offence at common law.

> "It is true that many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court, and are appropriated to it. But, if you except those appropriated cases, this Court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores* : and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here. However, besides this, there is in the present case, a conspiracy and confederacy amongst the defendants ; which are clearly and indisputably within the proper jurisdiction of this Court."

Lord Campbell in Vol. 2 of his *Lives of the Chief Justices*[3] refers to this case and, after quoting the words already cited, adds the following passage which evidently formed part of the judgment[4] :

> "If Sir Francis Delaval had merely seduced this unfortunate girl by his own solicitations he might only have been liable to an action for damages at the suit of her father ; but entering into a wicked bargain by which he purchased her from another the two must be considered as conspiring to ruin her and they are both guilty of a misdemeanour."

Secondly, in *R* v. *Mears and Chalk*,[5] the two acoused were indicted in three counts for conspiring to procure by false pretences a girl to have illicit carnal connexion with a man. In giving judgment, Jervis, C. J., said[6];

> "It is unnecessary to discuss the first and second counts and upon them we give no opinion because we all think that the third is a good count; the Court being clearly of opinion that a conspiracy to solicit prostitution being against good morals and public decency is independently of the statute, an indictable offence."

Another illustration is afforded by *R* v. *Howell*.[7] It is also to be noted that in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*,[8] Viscount Simon, L. C., evidently had this class of case in mind, although he did not find it necessary to deal with it. He said[9]:

> "I am omitting consideration of those cases on the borderland of illegality, where the combination was held to amount to a criminal

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1. R. *v.* Shaw, (1961) 1 All E. R. 330 at p. 339.
2. (1863) 3 Burr. at p. 1438.
3. 1849 Ed. at p. 425.
4. Holliday, 21 4.
5. (1851) 4 Cox. C. C. 423.
6. (1851) 4 Cox. C. C. at p. 427.
7. (1864) 4 F. & F. 160.
8. (1942) 1 All E. R. 142 : (1942) A. C. 435.
9. (1942) 1 All E. R. at p. 146 : (1952) A. C. at p. 439.

conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct."

In the present case the issue involvnd in this third count was fully argued in the absence of the jury, and the learned Judge's ruling was in the following terms :

"In my opinion a conspiracy to debauch and corrupt public morals is a common law misdemeanour and is indictable at common law."[1]

Conspiracy to corrupt public morals was known to common law. A conspiracy to this end is indictable as a conspiracy to commit a criminal offence, which is calculated to cause public injury.[2]

3. American law.—It has been said that there is perhaps no crime an exact definition of which it is more difficult to give than the offence of conspiracy[3] a difficulty resulting in a large measure from the fact that the law on the subject of conspiracy except where settled by legislative enactment is beyond certain limits, in a very uncertain state;[4] the cases beyond such limits, which have been adjudged to be conspiracies, it has been said, "to stand apart by themselves" and to be "devoid of that analogy to each other which would render them susceptible of classification".[5] However, a conspiracy at common law has generally been defined, although, as said in some cases, definition is perhaps not precise and accurate[6] as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some aurpose not in itself criminal or unlawful, by criminal or unlawful means.[7] The offence thus defined excludes on confederations to acbomplish lawful objects by lawful means ; the offence includes all possible unlawful confederations. Under statutes making a combination to do an unlawful or criminal act indictable, only the first part of the above definition is applicable.[8]

At common law a conspiracy may be a plan to commit a crime, but it may also be an evil scheme or conspiracy designed to cause a civil injury.

Elements of criminal conspiracy.

The elements of a criminal conspiracy have been stated to be : (1) An object to be accomplished. (2) A plan or scheme embodying means to accomplish that object. (3) An agreement or understanding between two or more of the defendants whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement,

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1. *See* also R. *v.* Shaw, (1961) 1 All E. R, 331 at p. 339.
2. Shaw *v.* Director of Public Prosecution, (1961) 2 All E. R. 446 at p. 461.
3. Turner *v.* Security Plumbing Co. 141 S.E. 291 at p. 293.
4. Smith *v.* People, 25 Ill. 17 : 76 Am. D. 780.
5. Turner *v.* Security Plumbing Co., 141 S. E. 291 at p. 293.
6. Commonwealth *v.* Hunt, 4 Metc. 111 : 38 Am. D. 346.
7. Alexander *v.* U, S. C. C. A. Mo. 95 F. 2d 873.
8. Statutory offence defined—A combination or agreement between two or more persons to do an unlawful act—Lumpkin *v.* State, 168 S. E. 241 : 176 Ga. 446 ; Thomas *v.* State, 192 S. E. 659 : 56 Ga. App. 381 ; Hart *v.* State, 189 S. E. 547 : 55 Ga. App. 85 ; Jones *v.* State, 143 S. E. 613 ; 38 Ga. App. 266.

or by any effectual means. (4) In jurisdictions where the statutes so require, an overt act.[1]

Duration of conspiracy.

When once a conspiracy is shown to exist which in its nature is not ended merely by lapse of time, it continues to exist until consummated, abandoned, or otherwise terminated by some affirmative act,[2] but no general rule of law can accurately be laid down as to when the conspiracy is at an end. The withdrawal of some of the participants in a conspiracy and the joining of others does not interrupt the continuity of the conspiracy.[3]

Essence of criminal conspiracy.

The essence of a criminal conspiracy is the unlawful combination, and ordinarily the offence is complete when the combination is formed. From this it necessarily follows that, unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. It has been said that the law making conspiracy a crime is designed as a curb to the immoderate power to do mischief which is gained by a combination of the means.[4] Even in jurisdictions where an overt act is required by statute, there are decisons in which the offence is held to consist of the conspiracy alone. Where it is shown that a person joined with others in carrying out the common design; it is immaterial at what time he joined; he may be liable if he joins the conspiracy after its formation ; but the fact that one joins the conspiracy after it is formed does not affect the existence of the general scheme.[5]

Husband and wife.

Although at common law a husband could not be guilty of conspiring with his wife alone, under the Married Women's Acts of some States, a husband can be guilty of conspiracy with his wife alone.[6]

To constitute a conspiracy there must be a combination of two or more persons ; one person cannot conspire with himself, but a single person may be guilty of conspiracy although the person with whom he is charged with

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1. U. S. *v* Grossman, D. C. N. Y. 55 F. 2d. 408 ; U. S. *v.* Munday, C. C. Wash. 186 F. 375, reversed on other grounds 32 S. Ct. 53 : 222 U. S. 175 : 56 L. Ed. 149.
2. Nyquist *v.* U. S., C. C. A. Mich. 2 F. 2d. 504, *certiorari* denied 45 S. Ct. 508 : 267 U. S. 606 : 69 L. Ed. 810 ; Wilson *v.* U. S.., C. C. A. N. Y. 275 F. 307, *certiorari* denied 42 S. Ct. 57 : 257 U. S. 649 : 66 L. Ed. 416.
3. Telman *v.* U. S., C. C. A. N. M. 67 F. 2d. 716, *certiorari* denied 54 S. Ct. 860 : 292 U. S. 650 : 78 L. Ed. 1500.
4. Mifflin *v.* Commonwealth, 5 Watts & S. 461 : 40 Am. D. 527.
5. Craig *v.* U. S., C. C. A. Cal. 81 F. 2d. 816, *certiorari* dismissed 56 S. Ct. 670 : 298 U. S. 637 : 80 L. Ed. 1371, and Weinblatt *v.* U. S., 56 S. Ct. 671 : 298 U. S. 637 : 81 L. Ed. 1371, and rehearing denied Craig *v.* U. S., C. C. A. 83 F. 2d. 450, *certiorari* denied 56 S. Ct. 959 : 298 U. S. 690 : 80 L. Ed. 1408, rehearing denied 57 S. Ct. 6 : 299 U. S. 620 : 81 L. Ed. 457, *certiorari* denied Weinblatt *v.* U. S., 56 S. Ct. 959 : 298 U. S. 690 : 80 L. Ed. 1408, rehearing denied, 57 S. Ct. 6 : 299 U. S. 620 : 81 L. Ed. 457.
6. Dalton *v.* People, 189 P. 37 : 68 Colo. 44.

conspiracy died before the indictment was found, or was dead at the time of the trial, or if accused is charged with conspiracy with "persons unknown," and the conspiracy and the participation of accused therein is shown.

Since at common law husband and wife are considered one in law they cannot, alone, be guilty of a conspiracy, although it is otherwise, if they conspire with a third person or with "a person unknown," and the rule that husband and wife cannot alone be guilty of conspiracy does not absolve a wife from the consequences of criminal acts committed in the execution of a conspiracy with her husband, as pointed out in the C. J. S. title "Husband and Wife".

If one person only feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there is no conspiracy, since there is no union or concert of wills; but it has been held that, if three or more conspire to commit a crime the fact that one of them secretly intended to frustrate the conspiracy will not bar a prosecution and conviction of the rest for conspiracy.[1]

A seller of liquor to a prohibition agent is not chargeable with criminal conspiracy with the agent, although two defendants co-operating in sales to the agent may be charged with conspiracy, and their offence thereby aggravated from misdemeanour to a felony. A corporation may be counted in the number necessary to constitute a conspiracy; but a conspiracy between two corporations cannot be formed by the acts of one person acting as agent for both corporations.[2]

The fact that one of the conspirators was the servant of another conspirator does not preclude there being a conspiracy between them, and until there is an affirmative withdrawal from the conspiracy by the servant his acts bind the employer so far as to prevent the statute of limitations from running.[3]

Unlawful combination is the gist of the conspiracy.

The unlawful combination being the gist of the conspiracy, it follows that there must be an agreement of some kind. There must be unity of design or purpose, a concert of will and endeavour comprising what has been agreed to, not what has been done, although all the parties need not be actuated by the same motives. It has been said, however, that while a conspiracy is constituted by an agreement, it is the result of the agreement, and not the agreement itself.[4]

Mere knowledge without intentional participation is not enough.

Mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to co-operate is not enough to constitute on a party to a conspiracy, but that there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.[5]

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1. Commonwealth v. Wasson, 43 Pa. Super. 38.
2. U. S. v. Santa Rita Store Co., 113 P. 620 : 16 N. M. 3.
3. Hyde v. U. S., D. C. 32 S. Ct. 793 : 225 U. S. 347 : 56 L. Ed. 1114 : Ann. Cas. 1914 A. 614.
4. Marine v. U. S., C. C. A. Cal. 91 F. 2d. 691.
5. U. S. Zito v. U. S., C. C. A. Ill. 64 F. 2d. 772 ; Young v. U. S., C. C. A. Tex. 48 F. 2d. 26.

A mutual implied understanding or tacit agreement is essential.

No written, formal, or definite agreement is necessary to constitute a conspiracy, its existence being generally a matter of inference from the acts of the parties. It is sufficient to constitute the offence, so far as the combination is concerned, if there is a meeting of the minds, a mutual implied understanding or tacit agreement, all the parties working together, is with a single design, for the accomplishment of the common purpose. So, if two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy but it has been said that, if different groups of persons, although having a similar general purpose, co-operate without any privity with each other, but toward wholly separate ends, even though similar in character, the combination does not constitute a single conspiracy.

Concert of design and not participation in every detail of execution is essential.

Previous acquaintance between the conspirators is unnecessary, nor is it necessary that each conspirator should have seen the others, or have knowledge, as to who all the members of the conspiracy are. It is not essential that the parties meet or that they confer and formulate their plans, nor that each conspirator have knowledge of the scope of the conspiracy or the means by which the purpose is to be accomplished, nor that any time should have been set for the accomplishment of the design.[1] Neither is it necessary, that the plan of a combination shall embrace in detail in its early stages the various means by which it is to be executed, as it is sufficient that there is a general plan to accomplish the result sought by such means as may from time to time be found expedient. Conspiracy implies concert of design and not participation in every detail of execution, and it is not necessary that each conspirator should have taken part in every act or know the exact part performed or to be performed by the others in the furtherance of the conspiracy.[2] It has been stated in some cases that an act which is lawful when done by an individual does not become unlawful merely because it is done by two or more persons acting in concert; but the weight of authority seems to be to the effect that, while an act committed by an individual may not be unlawful, yet the same act, when committed by a combination of individuals, may be unlawful and criminal and may render the members of the combination liable to indictment for criminal conspiracy.[3] The test of the unlawfulness of a combination by several to commit an act which would not be unlawful if committed by one alone is the motive for combining, or in other words, the object to be attained. As long as the object or the combination is to further its own fair interest or advantage and not the injury of another, there is nothing criminal in the combination, but on the other hand, such a combination is unlawful and constitutes a criminal conspiracy, when the acts are done with malice, that is, without just cause or excuse which exists only where the injury inflicted is the means to some end legitimately desired and incidental thereto, and is not the result of a specific intent and immediate purpose of injury that benefit may ultimately come to the members of the combination.[4]

Test of unlawfulness of a combination.

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1. State v. Buchanan, 5 Harr. & J. 317 : 9 Am. D. 534.
2. U. S. v. Ford, D. C. Pa. 58 F. 2d. 1029.
3. Gebardi v. U. S., 53 S. Ct. 35 : 287 U. S. 112 : 77 L. Ed. 206.
4. Aikens v. Wisconsin, Wis. 25 S. Ct. 3 : 195 U S. 194 : 49 L. Ed. 154.

Criminal conspiracy at common law.

To constitute a criminal conspiracy at common law, it must be formed for the purpose either of doing an unlawful act by any means, or a lawful act by unlawful or criminal means, although under statutes providing that the object of a conspiracy must be an unlawful act, the doing of a lawful act in an unlawful way is not within the statute. If the agreement has an unlawful purpose, the means contemplated to effect such purpose are immaterial, and may be lawful; and it is not even necessary that the means should have been agreed on, or that any time should have been set for the accomplishment of the purpose. On the other hand, if the agreement has a lawful purpose but is carried out by criminal or unlawful means, it constitutes a conspiracy, where the purpose of the agreement is lawful and the means used in effecting such purpose are also lawful, a conspiracy charge will not lie; and a statute which assumes to make it a crime for persons to conspire to sell their goods at prices they will sell for in the course of trade, without regard to the means to be employed, is invalid.[1]

Criminal conspiracy under statutes.

To constitute a conspiracy under the statutes in some jurisdictions, it must appear that defendants agreed to commit a crime, or that they agreed to employ criminal means to accomplish a lawful object; and where the object of the agreement is not criminal, and the means employed constitute merely a trespass, for which the only remedy would be a civil action for damages, a charge of conspiracy will not lie. It is not essential, however, to criminal liability at common law that the acts contemplated should constitute criminal offence for which, without the elements of conspiracy, one alone could be indicted. It is an offence independent of the crime or unlawful acts which is its purpose; and it will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal, or if the end proposed or the means to be employed are, by reason of the combination, particularly dangerous to the public interest, or particularly injurious to some individual, although not criminal. The only exceptions to the criminality of combination are limited, it has been said, to cases where the combined number or persons have no more power for harm than would a person acting alone or individuals acting separately.[2]

Several purposes; single offence.

The purpose of a conspiracy to violate the law may be continuous, that is, it may contemplate the commission of several offences, or overt acts; but no matter how many repeated violations of law may have been contemplated, the conspiracy is a single offence.

At common law no overt act is necessary to constitute a criminal conspiracy, and this rule obtains unless changed or limited by statute. The only significance of acts done in furtherance of the object of a conspiracy is as evidence of the alleged combination, which alone constitute the offence.[3]

An overt act alone insufficient to constitute criminal conspiracy.

An overt act alone is insufficient to constitute a conspiracy, there must be an unlawful agreement to which the overt act is referable. The overt act must be a subsequent independent act following the conspiracy, and done to carry into effect the object thereof, and cannot succeed the

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1. U. S. v. Bernstein, D. C. Neb. 267 F. 295.
2. State v. Parker, 158 A. 797 : 114 Conn. 354.
3. State v. Repley, 31 Mc. 386.

completion of the contemplated crime. The overt act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation,[1] and if the act of a conspirator be done with the purpose of putting the unlawful agreement into effect, it is sufficient, although it has no tendency to accomplish its object. The conspiracy is complete on the forming of the criminal agreement and the performance of at least one overt act in furtherance thereof[2] and if several overt acts are charged in the indictment, it will be sufficient to show that one or more of those acts were committed in furtherance of the conspiracy.

Particular manner or means of the overt act is immaterial.

The particular manner in which, or means by which, the overt act was done is immaterial, nor is it necessary that all the conspirators should have joined in the overt act, or in every one of several overt acts. It has been held, however, that the conspirator must himself do the act or authorise it to be done.[3] a mere failure on his part to prevent another from doing it is not sufficient. The overt act, if in furtherance of the unlawful design, need not be in itself a criminal or unlawful act. *A fortiori* it is not necessary that the overt act should constitute the very crime that is the object of the conspiracy although it may constitute such crime, and the substantantive crime when charged as an overt act is not a constituent of the conspiracy, where the acts are a part of the operation in the prosecution of a scheme to defraud an insurance company by the use of the mails, they are overt acts in furtherance of the objects of the conspiracy, and the mere fact that some overt act of one of the conspirators may also constitute the crime of arson under the State law does not change the character of the conspiracy. If the overt acts were commited within the Court's jurisdiction, the place of the conspiracy is immaterial.[4]

Object need not necessarily have been accomplished.

To constitute criminal conspiracy, it is not essential that the object of conspiracy should have been accomplished,[5] and this is the rule even in jurisdictions where the statute requires an overt act in execution of the unlawful agreement. It is also immaterial that the accomplishment of the object of the conspiracy was impossible, although, on the other hand, it has been held that a person cannot be prosecuted for conspiracy to do something which he could not do.[6]

Corrupt motive or intent.

To render the formation for a common design of a criminal conspiracy there must be a a corrupt motive or intent, generally inferable whenever the means used are such as would ordinarily result in the commission of an unlawful act although it has been held that failure to prove a corrupt

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1. State *v.* Lowenberg, 243 N. W. 538 : 216 Iowa 222.
2. Weniger *v.* U. S., C. C. A. Idaho 47 F. 2d 692. Only one overt act is necessary—Williams *v.* U. S., C. C. A. Tenn. 3 F. 2d 933. Proof of several acts. Where the charge is conspiracy to secure an underrate in violation of inter-State commerce law, proof of several overt acts does not show more than one offence, the agreement being continuous—U. S. *v.* Howell, D. C. Mo. 56 F. 21.
3. U. S. *v.* McClarty, D. C. Ky. 191 F 518.
4. Waitte *v.* U. S., C. C. A. Or. 19 F. 2d 506, *certiorari* denied 48 S. Ct. 84 : 275 U. S. 545: 72 L. Ed. 417.
5. Dalton *v.* People, 189 P. 37 : 68 Colo. 44.
6. Commonwealth *v.* Maxberry, 13 Pa. Dist. & Co., 371.

motive on the part of one of the conspirators, will not warrant the direction of a verdict of acquittal as to him.[1] The fact that the motive of a party was not corrupt when he joined a conspiracy does not exculpate him if he remains a member thereof after learning of its illegality. To constitute the criminal intent necessary to establish a conspiracy to commit an act prohibited by statute, there must be both knowledge of the law and knowledge of its actual or intended violation. Guilty knowledge of the act done by the conspirators or of the facts, the existence of which is essential to consummate the conspiracy, is a necessary element of the offence,[2] although it is not necessary to show that the guilty knowledge was imparted to all of them at one and the same time, and by only one and the same means it only being necessary to show that each of the conspirators had guilty knowledge, no matter how, when, or where he acquired it. Act done innocently, although tending to further the object of a conspiracy, will not render their author a co-conspirator. Where an association, innocent in its inception, is formed, and the powers of such association are by those who have the control and management of it subsequently perverted to purposes of oppression, and injustice, only those will be liable who have participated in the perversion or who have assented thereto. So, also, persons who agree to do an act innocent in itself, in good faith, and without the use of criminal means, are not converted into conspirators because it turns out that the contemplated act was prohibited by statute.[3]

4. Difference between English law and Indian law.—Criminal conspiracy has been the subject of legislation from a very early period in England. As already stated, in A. D. 1305 an Ordinance[4] was passed to punish persons conspiring to corrupt the course of justice. Several statutes now exist prescribing penalties for criminal conspiracies to commit various offences, such as murder,[5] to cause explosion,[6] or those relating to unions[7] or those fomenting trade disputes.[8] It is of the essence of a conspiracy that two or more persons should agree to do an unlawful act, which agreement is then stated to be an overt act sufficient to complete the offence.[9] The proviso to this section is intended to overrule this view so far as it relates to a conspiracy, other than a conspiracy to commit an offence, and limit that offence to a overt act done in furtherance but independently of the conspiracy.

Indian definition narrower in some respects and wider in other respects than English definition.

But while in this respect the Indian definition is narrower than its English prototype, in another respect the offence here is much wider inasmuch as while here a criminal conspiracy as such is punishable, the English Common Law in England stands discredited[10] and has been greatly modified by statute, for which the Indian statute law furnishes no corresponding analogy. Moreover, under English law, since the husband and wife are treated as

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1. State *v.* Scarlett, 102-A. 162 : 91 N. J. Law 343.
2. Pettibone *v.* U. S., Idaho, 13 S. Ct. 542 : 148 U. S. 197 : 37 L. Ed. 419.
3. People *v.* Powell, 63 N. Y. 88; *Corpus Juris Secundum*, Vol. XV, pp. 1057, 1066 1068, 1072.
4. 33 Edw. 1.
5. (1861) 24 & 25 Vict., c. 100, Sec. 4.
6. (1883) 46 & 47 Vict., c. 3, Sec. 3.
7. 34 & 35 Vict. 31, Sec. 2 ; 39 & 40 Vict., c. 22, Sec. 16.
8. 38 & 39 Vict., c. 86, Sec. 3.
9. Mulcahy, L. R. 3 H. L. 306 at p. 326 ; O'Connell, 5 St. T. (N. S.) 1.
10. Wright on *Conspiracy*.

one person, they form an exceptions, but this exception too is not acceded to in this chapter. The result of this sweeping enactment is to make a mere breach of contract by two or more persons punishable as a crime. If for instance, the husband and its wife agreed to sell their house and then think better of it and refuse to convey, they would be liable to be imprisoned under the next section though the Civil Court may not have enforced specific performance of their contract. Other instances could be multiplied to illustrate the absurdity of this legislation.

The Statement of Objects and Reasons appears in this respect to be inaccurate, since it goes beyond merely assimilating the criminal law of India to that in force in England. The distinction is important inasmuch as an act may be illegal without being criminal,[1] and cases in England have clearly pointed out that a man may do acts prejudicial to the civil right of others without being indicted for conspiracy. So an indictment will not lie for a conspiracy to commit a mere civil trespass[2] or a conspiracy to deprive a man of an office under an illegal trading company.

5. **Principle.**—A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise *actus contra actum* capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.[3]

This definition forms the foundation of Sec. 120-A, I. P. C. The gist of the offence of conspiracy lies not in doing the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do any of the acts nor in inducing others to do them, but in the forming of the scheme or agreement between the parties. It is no doubt true that sometimes it is difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made, or concluded at a particular time or at a particular place. But the factum of the criminal agreement should not be confounded with its proof. So far as proof goes as said by Gross, J., in *Rex* v. *Brisac*[4] :

Gist of the offence of conspiracy.

Proof.

> "Conspiracy is a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose common between them."[5]

The constituent elements of the offence of criminal conspiracy are (1) an agreement between two or more persons, (2) to do an illegal act, or (3) to do a legal act by illegal means, and (4) an overt act done in pursuance of the conspiracy.[6] The first three ingredients suffice for the definition of criminal

Constituent elements of criminal conspiracy.

1. Section 43.
2. Turner, 13 East 228, dissented from *per* Lord Campbell, in Rowland, 17 Q. B 671, but re-established in Mogul Steamship Co. *v.* MacGregor Gow & Co., 33 Q. B. D. 591.
3. *Vide* the definition of Willes, J., in Mulcahy *v.* R., (1868) 3 H. L, 306 at p. 318.
4. (1803) 4 East 164 at p. 171.
5. Gutta Sriramulu Naidu *v.* State, (1963) 2 Cr. L. J. 546 at p. 554.
6. State *v.* Jaigovind, A. I. R. 1951 Raj. 89 at p. 91 : 52 Cr. L. J. 646 ; *see* also Rash Behari Shaw *v.* Emperor, A. I. R. 1936 Cal. 753 , 38 Cr. L. J. 545 : 41 C. W. N. 225.

conspiracy under English Common Law, but in the case of a conspiracy other than a conspiracy to commit an offence, this section further requires the doing of an overt act in furtherance of the conspiracy. In other words, while an overt act is necessary under both laws, English law considers the mutual consultation and agreement as a sufficient overt act,[1] whereas the Code in one instance goes a step further and requires some act independent of it. But the offence here is in other respects much wider.

6. Meaning of words.—*"An illegal act"* within the meaning of Sec. 43. *"Some act . . . is done . . . in pursuance thereof"*: The word "act" here also includes an illegal omission. Two soldiers *A* and *B* conspire to blow up a powder magazine. *A* is on sentry duty when *B* passes him; *A* does not challenge him. Both *A* and *B* are guilty of criminal conspiracy inasmuch as *A*'s failure to challenge *B* was an illegal omission being an act done in pursuance of the conspiracy between *A* and *B*. But if in this case *A* had gone to sleep when *B* passed, *A* was unquestionably guilty of an illegal omission, but not being in pursuance of the conspiracy it is not such an act as is necessany to constitute the crime. *"Is merely incidental to that object"*: The explanation refers only to Cl. 1, and is intended to show that the illegal act need not be material to the object of the conspiracy.

7. **Scope.**—The first class of cases which Sec 120-B is designed to cover is that in which the conspiracy is formed for the commission of a serious offence but no act or illegal omission has taken place in pursuance of it. Section 120-A which defines criminal conspiracy enacts that an agreement to commit an offence may itself amount to a criminal conspiracy even if no overt act follows on the agreement. The second class of cases is that in which the conspiracy is formed in order to do an illegal act or an act not illegal by illegal means, this sort of conspiracy in no case amounts to abetment and does not amount to a criminal conspiracy unless some act besides the agreement is done in pursuance thereof. Thus, whereas Sec. 120-A provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of Sec. 107, Sec. 120-B provides a punishment for criminal conspiracy where no express provision is made in this Code for the punishment of such a conspiracy". Where a criminal conspiracy amounts to an abetment under Sec. 107, it is unnecessary to invoke the provision of Secs. 120-A and 120-B because the Code has made specific provision for the punishment of such a conspiracy.[2]

Section 120-A of the Penal Code provides that when two or more persons agree to do, or cause to be done an illegal act or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. Section 120-B is the penal section. Thus the essence of the criminal conspiracy is an agreement to do an illegal act. Direct evidence in proof of conspiracy is seldom available and even when available it will be tainted, being that of an accomplice and would require corroboration. Generally, conspiracy is a matter of inference by circumstantial evidence. From the acts and conduct of the parties agreement could be inferred. For instance, if it can be proved that the accused pursued by similar acts the same object often by the same means, one performing one part of the act and the other another part of the same act, so as to complete it with a view to the attainment of the object which they weree pursuing, the Court will be at

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1. Mulcahy, L. R. 3 N. L. 306 at p. 326; O'Connell, 5 St. T. (N. S.) 1.
2. Jugeshwar Singh v. Emperor, A, I. R. 1936 Pat. 346 at p. 348 : 87 Cr. L. J. 893 : 17 P. L. T. 234.

perfect liberty to conclude that they had conspired together to effect that object. So proved acts of forgery and misappropriation by accused 1 and 2 at various times and at various places by the same devices would furnish strong evidence of the existence of conspiracy between them. Thus where there was no direct evidence of conspiracy, it was but held that the forgery of the vouchers would show unmistakably the existence of conspiracy between accused 1 and 2. Without the conjunction and but for the conspiracy it would not have been possible for the first accused to get up all those false vouchers and misappropriate the amounts covered by those vouchers.[1]

The gist of the offence under Sec. 120-A is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So, too, it is not an ingredient of the offence that all the parties should agree to do single illegal act. It may comprise the commission of a number of acts. Under Sec. 43 of the Indian Penal Code, an act could be illegal if it is an offence or it is prohibited by law. Under the first charge the accused are chaged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. The are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.[2]

8. Scope of conspiracy.—The scope of the conspiracy is determined by the agreement of the conspirators. It is quite right that if the terms of their agreement are such as to comprise the possibility that the crime that they agree to commit may be committed inside the United Kingdom, then their conspiracy will be indictable in the United Kingdom.[3]

9. Conspiracy.—A conspiracy in law requires the agreement of at least two persons and two minds. Where the person responsible for the costs of a limited company and the company are in effect one and the same person with one and the same mind, a charge of conspiracy with company cannot be against him.[4] In the above-noted case Nield, J., said:

> "I turn to the last of these points, which is much the most substantial, namely the submission by counsel for the defendant that in the particular circumstances of this case there can be no conspiracy, for the reason that there are not two persons and two minds involved. I am told further that there is no English authority on this particular point, and so one comes freshly to it, although assisted by some authorities not directly in point and by persuasive authorities from overseas, to which I would attach very great weight. It is important at the outset to emphasise two things. It is not a company which is here being proceeded against, it is an individual defendant ; and, most important, this is a criminal trial and one of gravity, in which a situation must be at all times construed favourably to an accused person. At the outset of my consideration of this point—and I have not postponed my consideration of it because I feel the parties would

1. C. V. Nair v. Government of India, 1963 Cr. L. J. 675 at pp. 683-84.
2. (1961) (2)Cr. L. J. 828.
3. R. v. Cox (Peter), (1968) 1 All E. R. 410 at p. 413.
4. R. v. McDonnel, (1966) 1 All E. R. 193 at p. 196.

wish to have my opinion quickly—I recall the very well-known observations of Visoount Haldane, L. C., in *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*[1] Lord Haldane, L. C., said[2] :

'A corporation is an obstruction. It has no mind of its own any more than it has a body of its own: its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'

"The Lord Chancellor went on to say[3] :

'. . . the fault or privity is the fault of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself.'

"As to the separate entity of a company, there can of course be no question.

"I was obliged to counsel for the Crown for quoting two civil cases, the first being the case of *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham Sons, Ltd.*,[4] a case under the Landlord and Tenant Act, 1954, very remote in its facts from this oase. Denning, L. J., however, in the course of his judgment animadverted on the status of a company when he said[5]:

'A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the oompany and is treated by the laws. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.'

"Denning, L. J., then referred to Lord Haldane's speech in *Lennard's* case,[6] to which I have referred, and also the oase of *R.* v. *I. C. R. Haulage, Ltd.*,[7] to which I shall refer later.

"A further case, *Lee* v. *Lees Air Farming, Ltd.*,[8] was cited to me. There Lord Morris of Borth-Y-Gest said:

'Nor in their Lordships' view were any contractual obligations invalidated by the circumstances that the deceased was sole governing

1. (1914-15) All E. R. Rep. 280 : (1915) A.C. 705.
2. (1914-15) All E. R. Rep. at p. 283 : (1915) A. C. at p. 713.
3. (1914-15) All E.R. Rep. at p. 283 : (1915) A. C. A. E. at pp. 713-14.
4. (1956) 3 All E. R. 624 : (1957) 1 Q. B. 159.
5. (1956) 3 All E. R. at p. 630 : (1957) 1 Q. B. at p. 172.
6. (1914-15) All E. R. Rep. 280.
7. (1944) 1 All E. R. 691 : (1944) K. B. 551.
8. (1960) 3 All E. R. 420 at pp. 425-26 : (1961) A. C. 12 at p. 26.

director in whom was vested the full government and control of the respondent company. Always assuming that the respondent company was not a sham, then the capacity of the respondent company to make a contract with the deceased should not be impugned merely beoause the deceased was the agent of the respondent company in its negotiation. The deceased might have made a firm contract to serve the respondent company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed his oontract would not have been affected. The circumstance that, in his capcity as a shareholder he could control the course of events would not in itself affect the validity of his oontractual relationship with the respondent company.'

"Lord Morris referred to *Salomon* v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*,[1] in 1897, in which, it will be recalled, Lord Maonaghten made some observations as to what is called a 'one-man company'. I have quoted these authorities relating to civil matters for one reason that they were quoted to me, and for a second reason as making it perfeotly clear that a oompany is a separate entity.

"The point which must be decided, as this is a conspiracy charge, is whether, when one man alone is responsible and solely has any sort of authority for doing any act of any kind for the company, there are two persons and two minds; and so I turn to look at some of the criminal cases which have been cited. The first was the case of *Public Prosecutions Director* v. *Kent and Sussex Contractors, Ltd.*[2] Viscouut Caldecote, C. J.'s judgment was referred to and also the judgment of Macnaghten, J. I quote from Macnaghten, J.'s judgment[3] :

'The charge against the respondent company was that for the purposes of the Motor Fuel Rationing (No. 3) Order, it, with intent to deceive, made use of a dooument which was false in a material particular. That such an act·· should be a criminal offence, it is necessary that it should be done with an intent to deceive. Mr. Carey Evans, on behalf of the respondent company, conceded that a body corporate is a "person" to whom, among other attributes which it may possess, there should be imputed that of a mind oapable of having knowledge and of forming an intention. It would, indeed, be too late in the way to suggest the oontrary of those propositions. It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate. Mr. Carey Evans says that, although a body corporate may be capable of having knowledge and also of forming an intention, it cannot have a *mens rea*. If the responsible agent of the company, aoting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends

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1. (1895-98) All E. R. Rep. 33 : (1897) A. C. 22.
2. (1944) 1 All E. R. 119 : (1944) K. B. 146.
3. (1944) K. B. at p. 156 : (1944) 1 All E. R. at p. 124.

to decieve I apprehend that, according to the authorities that my Lord has cited, his knowledge and intention must be imputed to the company.'

"The second case is *R.* v. *I. C. R. Haulage, Ltd.*[1] which was referred to by Lord Denning in the civil case which I quoted. The headnote to this report is concise[2] :

'An indictment for a common law conspiracy to defraud will lie against a limited company.'

"and it is to be observed that no one has doubted that proposition at any time. It is not open to the defence here to say otherwise and the defence has not so submitted. At the end of his judgment Stable, J., said[3] :

'In our judgment, both on principle and in accordance with the balance of authority, the present indictment was properly laid against the appellant company, and the learned Commissioner rightly refused to quash. We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case. Where in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding Judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case. It was because we were satisfied on the hearing of this appeal that the facts proved were amply sufficient to justify a finding that the acts of Roberts, the managing director, were the acts of the company and the fraud of that person was the fraud of the company that we upheld the conviction against the company.'

"That is the substance, I think, of the authority which has been cited to me in this case.

"It remains, however, to consider a Canadian case and another case which is not reported before reaching a conclusion. Counsel for the Crown relies, insofar as he is permitted to do so, on a case from Canada called *R.* v. *Electrical Contractors Association of Ontario and Dent*[4] and, as I pointed out before, I would certainly attach very great weight to such an authority from such a court, although it is not binding. I cannot but think that this decision, were I to follow it, would assist the Crown in the present case very considerably. Counsel for the defendant in the final stages of his argument submits that there are such essential differences between the Canadian case and the present one that it affords no support to the Crown's contentions. There is substance in that. That was a case dealing with

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1. (1944) 1 All E. R. 691 : (1944) K. B. 551.
2. (1944) K. B, 551.
3. (1944) 1 All E. R. at p. 695 : (1944) K. B. at p. 559.
4. (1961) O. R. 265.

alleged monopolies and restrictive practices, and may be one can draw a sharp distinction between the facts of that case and the facts of the present case; but some of the pronouncements undoubtedly support the Crown's contention. It was pointed out by counsel for the Crown that the points of argument are set forth in the report and the grounds for the appeal were[1]:

> '(*i*) That the learned Trial Judge erred in holding that the association could conspire with its officers and directors and in particular with the accused Dent in doing or refraining from doing an act. (*ii*) An officer of a corporation cannot conspire with his company. It is the essence of the charge in this prosecution that the association conspired with Dent. Unless this is proved, it is immaterial that either the association or Dent conspired with any other person. (*iii*) The president or a director of a corporation cannot conspire with that corporation to do or refrain from doing any act. A body corporate is an abstract, fictitious legal entity having no corporate personality or existence apart from that conferred upon it by common law and statute . . . . '

"I need not, I think, continue with the grounds of appeal. Sufficient be it to say that they were not upheld. The report continued[2]:

> 'It was not suggested by counsel that a corporation could not commit a crime or that the appellant was not indictable.'

"Then there was quoted again in the case of *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*,[3] and also the case of *R.* v. *I. R. C. Haulage Ltd.*,[4] where 'said the learned Judge'[5]:

> 'It was held that a company could be included in an indictment for conspiracy along with its managing director and others, the fraud of the director being imputed to the company. The basic proposition advanced by counsel that one alone cannat conspire cannot be questioned. A corporation cannot be found guilty of an offence under Sec. 411 (of the Criminal Code) merely because one person in control of the corporation intended to do an act contrary to that section.'

"As I say, this case in my judgment does support the contention of the Crown in the present matter.

"There was finally a summing-up quoted to me. The learned Recorder of London (Judge Aarvold) when he was Common Serjeant summed up to a jury in a case called *R* v. *Baker, Bosley, Ltd.*,[6] and some passages from that have been quoted. I need only say that I do not think that I can draw assistance from that summing-up to the extent of finding that it elucidates the present problem. I have now considered almost all the cases which have been cited to me by counsel, and one is presented with a situation, as I say, entirely new, in that there is no English authority on this point. I have reached the conclusion that, if the Canadian authority[7] should be regarded as

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1. (1961) O. R. at p. 270.
2. (1961) O. R. at p. 271.
3. (1914-15) All E. R. Rep. 280 : (1915) A. C. 705.
4. (1944) 1 All E. R. 691 : (1944) K. B. 551.
5. (1961) O. R. at pp. 271-72.
6. Unreported.
7. R. v. Electrical Contractors Association of Ontario and Dent, (1961) O. R. 265.

supporting the Crown's contention here, I am not able to follow it, and I have reached the conclusion that I should express the opinion or anticipatory ruling that these charges of conspiracy cannot be sustained, on the footing that in the particular circumstances there, where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds. If it were otherwise I feel that it would offend against the basic concept of a conspiracy, namely an agreement of two or more to do an unlawful act, and I think that it would be artificial to take the view that each of these companies can be regarded as a separate person or a separate mind, in view of the admitted fact that this defendant acts alone so far as these companies are concerned.

"It is interesting to observe that in the Canadian case an earlier edition of Mr. Glanville Williams' book[1] was referred to. I have been shown the later edition, and the learned author there expresses under the heading : 'Crime for which a corporation can be convicted' this opinion[2]:

'Probably (thereby being cautious) a company and its director cannot be convicted of conspiracy when the only human being who broke the law or intended to do so was the one director.'

"For that proposition there is a footnote which reads :

'So held (which does not seem to be quite an appropriate word) in America (followed by a reference to a case cited in an article in 50 Harvard Law Reports) and Canada (followed by a reference to a reported case in 1932 called *R.* v. *Martin*)"[3]

"Unfortunately that article and that case have not been available; no doubt there would have been considerable difficulty in obtaining them. I should certainly feel disposed, as I have indicated in referring to the case of *R* v. *Electrical Contractors Association of Ontario and Dent*,[4] to attach considerable weight to any such decision. I am only sorry I have not been able to see the judgment in the case of Martin. I am satisfied here that the learned author of the book which has been shown to me is correctly expressing the law as it is, and the true position is that a company and a director cannot be convicted of conspiracy when the only human being who is said to have broken the law or intended to do so is the one director, and that is the defendant in this case."

It is not correct to say that since the crime of conspiracy is an extension of the law relating to attempts, knowledge of material facts is just as essential in conspiracy cases as in offences of aiding and abetting and attempting to commit an offence. This is an attractive argument which at first sight would seem to be right:

It is plain that in its inception, conspiracy involved a criminal intent. Wright on the *Law of Criminal Conspiracies and Agreements* (1873) at page 5, deals with the period 1600-1800. Until absolute offences were created by statute

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1. Glanville Williams on *Criminal Law* (1st Ed., 1953), p. 683.
2. Glanville Williams on *Criminal Law* (2nd Ed., 1961), p. 861.
3. (1932) 3 W. W. R. 1.
4. (1961) O. R. 265.

no difficulty seems to have arisen—The intention was to violate the law and to do so a conspirator necessarily had to know what the law was that he was agreeing to break. It is interesting to note that according to Williams' *Criminal Law*, General Part, 2nd Ed. (1961), pp. 246 and 288, it has been held in the United States of America in a number of cases that conspiracy is an exception to the rule, that ignorance of the law is no excuse and that on a charge of conspiracy to do an act that is *malum prohibitum* the prosecution must prove on the part of the person agreeing (1) knowledge of the statutory prohibition and (2) an intention to do an act in contravention of it. In this country the law has not developed in this way. It may be for consideration whether that is not the way in which the law should be declared so far as conspiracy to commit an absolute statutory offence is concerned, or it may be that conspiracy should be confined to agreements to commit an intentional violation of the law.[1]

10. Conspiracy mens rea.—The decision in *Clayton*,[2] *Jacobs*[3] and *Sorsky*[4] clearly establish that a person can conspire to commit a statutory offence which is absolutely prohibited without having any knowledge of the existence of the statutory prohibition and therefore any intent to break the law or commit a crime.[5] It appears further that *Sorsky*[6] decided what *Clayton*[7] had indicated, that is to say, that he could also be found guilty of conspiring to commit such an absolute offence without knowing a material fact which constitute the offence so that his mind was equally innocent of any criminal intent.

In giving the judgment of the Court, which consisted of Viscount Caldecote, C. J., who had been a party to the decision in *Clayton*[8] and Humphreys, J., who had given the judgment in *Jacobs* case[9] and Oliver, J., who had also been a party to the decision in *Clayton's* case,[10] Humphreys, J., said[11] :

> "Passing next to counts 3 and 4 upon which all three appellants were convicted, counsel for Sorsky was bold enough to contend that the person supplying in these circumstances could not be convicted of an offence against the order unless there was proof of a *mens rea* on his party and that a charge of conspiracy to supply contrary to the order therefore involved knowledge by the accused that the amount of the quota of the supplies had been or would be exceeded.
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> "The all-sufficient answer to that argument is to be found in the wording of the orders in question which makes it abundantly plain that the supply of controlled goods contrary to the order is an offence irrespective of any knowledge or state of mind of the supplier. If authority is required in support of that proposition it will be found in the judgment of this Court in *Clayton's* case.[12] That case is also an authority for the proposition that conspiracy to contravene the terms of these orders does not require proof of that knowledge on the part of the accused indicated by the expression *mens rea*. To the same

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1. Regina *v.* Churchill, (1966) 2 W. L. R. 1116 at p. 1122.
2. 33 Cr. App. R. 113.
3. (1944) K. B. 417.
4. (1944) 2 All E. R. 333.
5. Regina *v.* Churchill, (1966) 2 W. L. R. 1116 at p. 1123.
6. (1944) 2 All E. R. 333.
7. 33 Cr. App. R. 113.
8. *Ibid*.
9. (1944) K. B. 417.
10. 33 Cr. App. R. 113.
11. (1944) 2 All E. R. 333 at p. 336.
12. 33 Cr. App. R. 113.

effect is *Rex* v. *Jacobs*,[1] in which it was contended for the appellants (who had been convicted of conspiring to contravene the provisions of the Price of Goods Act, 1939, by selling price-controlled goods at a price in excess of the permitted price) that the conviction was wrong in that there was no evidence that the vendors were aware that the permitted price had been exceeded. That argument was rejected by this Court, it being pointed out in the judgment that a criminal conspiracy consists in the agreement to do an unlawful act without reference to the knowledge on the part of the acoused of its illegality."

Mens rea is not a necessary ingredient in a charge of a conspiracy as to commit an absolute offence.[2]

As has often been said, the offence of conspiracy is the making of an agreement to do an unlawful act. It is the character and content of the agreement that matters, and the accused's knowledge of what in fact has been done is relevant if it throws light on that. Proof of a conspiracy in most cases depends on inferences to be drawn from the conduct of the parties. Proof that fuel, on which the rebate has been allowed and no repayment had been made, had been used by a number of persons acting together in a number of road vehicles could lead to the inference being drawn that they were parties to an agreement to use such fuel and so to do an unlawful act and were, therefore, guilty of conspiracy. The jury were not invited either by the prosecution or the Judge to consider whether such an inference could properly be drawn. They were told that it suffered to establish guilt if such fuel was in fact so used and the accused was a party to an agreement to use gas oil in road vehicle. The use of gas oil in road vehicles contravenes Sec. 200 (2) only if a rebate has been allowed on it and the amount of the rebate has not been refunded. An agreement to use in road vehicles gas oil on which a rebate has been allowed is not, therefore, *per se* an agreement to do an unlawful act, but it will be an agreement to do an unlawful act if the object is so to use gas oil in respect of which no repayment has been made. An agreement which is not to do an unlawful act will not be converted into an agreement to do an unlawful act by the fact that, unknown to the accused, gas oil is used in respect of which the required repayment has not been made. If the appellant had been a party to an agreement to use fuel in road vehicles in contravention of Sec. 200 (2), he must have known that would happen. The conclusion that such fuel was so used without his knowledge leads to the conclusion that he was not a party to an agreement to do unlawful act.[3]

The Court of Criminal Appeal felt constrained to dismiss the appeal by the decisions in three cases : *R.* v. *Clayton*[4]; *R.* v. *Jacobs*[5]. *R.* v. *Sorsky*.[6] In *R.* v. *Clayton*,[7] the incident charged conspiracy to contravene the Limitation of Supplies (Miscellaneous) Order, 1940[8] and the Limitation of

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1. (1944) K. B. 417.
2. Regina *v.* Churchill, (1966) 2 W. L. R. 1116 at p. 1124.
3. Churchill *v.* Walton, (1967) 1 All E. R. 497 at p. 500.
4. (1943) 33 Cr. App. Rep. 113.
5. (1944) 1 All E. R. 485 : (1944) K. B. 417.
6. (1944) 2 All E. R. 333.
7. (1943) 33 Cr. App. Rep. 113.
8. S. R. & O. 1940, No. 874.

Supplies (Miscellaneous) (No. 5) Order, 1940.[1] Asquith, J., delivering the judgment of the Court of Criminal Appeal, said[2] :

> "It was conceded that a person who sells controlled goods to unregistered persons in excess of his quota, and *a fortiori* if he has not any quota, commits a breach of the orders whether or not he knows that his action amounts to such breach, and no particular state of mind or intent on his part is a necessary ingredient in the offence, which is complete if, without more he does what the orders forbid. While it is admitted that applies in the case of an individual, we are invited to say that entirely different considerations apply when persons are charged with conspiracy, that is, with an agreement to do the act which is forbidden by the order. It was contended that in order to establish this charge, the accused must be shown not only to have agreed to the act, but to have known it was forbidden by the statutory provisons, and that *mens rea* in that sense is required. Now that is a proposition for which no direct authority has been cited and is one which we entirely reject. . . . We can find no support for the proposition that *mens rea* in this sense is needed in the case of conspiracy. We demur to the notion that there is anything particularly wicked attached to the word 'conspiracy'.
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> "No doubt in common speech 'conspiracy' has a melodramatic and sinister implication, but it has been pointed out that it carries no such implications in law. The definition of it is simply an agreement to do an unlawful act. . . .
>
> "It does not matter how prosaic the unlawful act may be or how ignorant the conspirators may be of the fact that the act is prohibited by the statutory provision."

In *R.* v. *Jacobs*,[3] the accused were convicted of conspiracy to contravene the Prices of Goods Act, 1939, by reselling price regulated in excess of the permitted price. Wrottesley, J., said to the jury[4] :

> ". . . if you are satisfied that they were engaged in the sale and forwarding it and bringing it about, it is not necessary that you should find, in order that they should be guilty of this crime charged, that they knew exactly what the right price was or that the price in question was the wrong one. It is not necessary that every member of the conspiracy should know that. The offence is to sell at wrong price, and in so far as they all agreed to do that, or any of them agreed to do that, they are guilty of that which they are charged by the prosecution."

Humphreys, J., in the course of delivering the judgment of the Court of Criminal Appeal dismissing the appeals, said[5] :

> "The unlawful act alleged to be the subject of the agreement in this case is the selling of price-regulated goods at a price in excess of

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1. S. R. & O. 1940, No. 2031.
2. R. v. Clayton, (1943) 33 Cr. App. Rep. 113 at pp. 118-19.
3. (1944) 1 All E. R. 485; (1944) K. B. 417.
4. (1944) 1 All E. R. at p. 486.
5. (1944) All 1 E. R. at p. 487; (1944) K. B. at p. 420.

> the agreement of the permitted price. There can be no question that the appellants did agree with Mulholland that they should buy and he should sell razor blades at 42 *s.* a gross. What then is the answer ? It appears to be that they did not know the terms or the orders regulating the price of the goods in which they dealt. But *ignorantia juris neminem excusat.*"

In both cases the question raised on appeal was whether it had to be shown that the accused knew that the act which they all had agreed to do was unlawful. In neither case was there any dispute that they had agreed to do that which was in fact unlawful.

In *R.* v. *Sorsky*,[1] H. Bresler and Sorsky were convicted of conspiracy to supply goods in contravention of the Limitation of Supplies (Miscellaneous) Order, 1940 and of conspiracy to contravene the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940. These orders did not prohibit dealings between registered persons in controlled goods, but made the supply of such goods by registered persons in excess of the quota held by the supplier to unregistered customers an offence. Sorsky had a stock of controlled goods but no quota. H. Bresler and Sons, Ltd., had a quota but no goods. Sorsky and Bresler agreed that Sorsky should sell to H. Bresler and Sons, Ltd., controlled goods which he would then sell as agent for that company to his customers. This agreement was lawful. The illegality arose because the quantity of goods supplied by H. Bresler and Sons, Ltd. through the agency of Sorsky to the customers exceeded the quota of H. Bresler and Sons, Ltd. The quota was proportion of the supplies made by H. Bresler and Sons, Ltd. in a previous period called "the standard period". Sorsky did not know what supplies H. Bresler and Sons, Ltd., had made in the standard period, or what was the quota of H. Bresler and Sons, Ltd. On appeal, it was argued on behalf of Sorsky that a person could not be convicted of an offence against the order unless there was *mens rea* on his part, and that a charge of conspiracy to supply contrary to the order therefore involved knowledge by the acoused that the amount of the quota had been or would be exceeded. Dealing with this argument, Humphreys, J., delivering the judgment of the Court said[2] :

> "The all-sufficient answer to that argument is to be found in the wording of the orders in question which makes it abundantly plain that the supply of controlled goods contrary to the order is an offence irrespective of any knowledge or state of mind of the supplier. If authority is required in support of that proposition it will be found in the judgment of this Court in *R.* v. *Clayton*.[3] That case is also an authority for the proposition that conspiracy to contravene the terms of these orders does not require proof of that knowledge on the part of the accused indicated by the expression *mens rea*. To the same effect is *R.* v. *Jacobs*[4] in which it was contended for the appellants . . . that the conviction was wrong in that there was no evidence that the vendors were aware that the permitted price had been exceeded.

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1. (1944) 2 All E. R. 333.
2. (1944) 2 All E. R. at p. 336.
3. (1943) 33 Cr. App. Rep. 113.
4. (1944) 1 All E. R. 485 : (1944) K. B. 417.

> "That argument was rejected by this Court, it being pointed out in the judgment that a criminal conspiracy consists in the agreement to do an unlawful act without reference to the knowledge on the part of the accused of its illegality."

In *R.* v. *Wheat, R.* v. *Stocks*,[1] Avory, J., said that the maxim *actus non facit reum nisi mens sit rea* was "admitted to be uncertain and often misleading in its application", and that in that case the maxim was satisfied "if the evidence establishes an intention on the part of the accused to do the act forbidden by the statute." . . . There the accused were charged with bigamy.

That Humphreys, J., was clearly right in saying that the supply of goods contrary to the order was an offence irrespective of the state of mind of the supplier cannot be disputed. He was also clearly right in sayiug that it was not necessary to prove knowledge of the illegality to establish a conspiracy to contravene the orders. He was also right in saying that a criminal conspiracy consists in an agreement to do an unlawful act without reference to the knowledge on the part of the accused of its illegality. It, however, appears to have been overlooked that the agreement between Sorsky and H. Bresler for the sale of controlled goods to H. Bresler and Sons, Ltd. and for their re-sale by Sorsky as agent for that company was not of itself an agreement to do something unlawful. The fact that, unknown to Sorsky, goods were sold in excess of the quota did not convert Sorsky's lawful agreement into a criminal conspiracy. If the conclusion had been reached that the agreement was to supply goods in excess of the quota, then the conviction of Sorsky would have been correct, for then he would have been a party to an agreement to contravene the orders.

The unfortunate consequence of the decision in *R.* v. *Sorsky*[2] is that it appears to be an authority for the proposition that if in fact what was done under an agreement was unlawful, then the parties to that agreement are guilty of conspiracy, even if what was done was without their knowledge. Hincholife, J., followed this decision with evident reluctance.[3] On this point the law is the same for conspiracy as for aiding and abetting, as to which Lord Goddard, C. J., said in *Johnson* v. *Youden*[4]:

> "Before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, 'I knew of all those facts but I did know that an offence was committed', would be allowing him to set up ignorance of the law as a defence. The reason why, in our opinion, the Justices were right in dismissing the informations against the first two defendants is that they found and found on good grounds, that they did not know of the matters which in fact constituted the offence and, as they did not

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1. (1921) All E. R. Rep. 602 at p. 604; (1921) 2 K. B. 119 at p. 126.
2. (1944) 2 All E. R. 333.
3. (1966) 2 All E. R. 215 at p. 220.
4. (1950) 1 K. B. 544 at pp. 546, 547.

know of those matters, it follows that they cannot be guilty of aiding and abetting the commission of the offence."

11. Conspiracy—Sentence.—Normally it is not right to pass a higher sentence for conspiracy than could be passed for the substantive offence : it can be justified only in very exceptional cases.

Although it must follow logically from what is said above that it could in a very exceptional case be right to charge conspiracy even whan the substantive offence had been committed and was charged, it should undoubtedly remain the general rule that when there is an effective and sufficient charge of a substantive offence, the addition of a charge for conspiracy is undesirable because it will tend to prolong and complicate the trial.[1] It is difficult to imagine any case in which it would be right to give a greater sentence for an attempt than could be given for the substantive offence. It was held to be wrong in *Reg.* v. *Pearce*.[2] In the above-noted case Lord Pearson observed:

"In Blackstone's Commentaries, Book 4, Chapter 29, page 37, it is said :

'The discretionary fines and discretionary length of imprisonment, which our courts are engaged to impose, may seem an exception to this rule. But the general nature of the punishment, viz. by fine or imprisonment, is in these cases, fixed and determinate, though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances.'

"That passage appears in the seventh edition dated 1775 and on the same page in the 21st edition dated 1844. In Russell on *Crimes and Misdemeanours*, 2nd Ed. (1826), Vol. I, p. 43, it said :

'The word "misdemeanour", in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name ; and they may be punished, according to the degree of the offence, by fine or imprisonment, or both'.

"In the Seventh Report of Her Majesty's Commissioners on Criminal Law (1843), page 104, it was stated :

'The general and ordinary punishment by the common law, in respect of all misdemeanours punishable by indictment or information, is fine or imprisonment, or both, the amount of which is altogether discretionary; and, in some instances, by whipping.'

"In *Reg.* v. *Rowlands*,[3] the defendants were prosecuted and convicted in respect of a conspiracy to raise wages. The actual sentence appears[4] to have been made up of three months' imprisonment on each of a number of counts. Patterson, J., in the course of pronouncing sentence, said[5]:

'The charge is not directly under this Act, because the Act makes it an offence, and makes it an offence punishable by summary

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1. *See* Reg. *v.* Dawson, (1960) 1 W. L. R. 163 at p. 172: (1960) 1 All E.R. 558 C.C.A. and Reg. *v.* Davey, (1960) 1 W. L. R. 1287 at p. 1295 : (1960) 3 All E. R. 533 C. C. A.
2. (1953) 1 K. B. 30 : (1952) 2 T. L. R. 618 : (1952) 2 All E. R. 718 C. C. A. ; Verrier *v.* Director of Public Prosecutions, (1966) 1 W. L. R. 924 at p. 934.
3. (1851) 5 Cox. C. C. 466.
4. *Ibid.* at p. 495.
5. *Ibid.* at p. 494.

proceedings before a Magistrate, and the charge in the indictment, as far as the offence is concerned, when proceeded for before a Magistrate against persons who have committed that offence, is confined to three calendar months' imprisonment ; but this is a charge of a conspiracy to do those acts, and that is an offence which is a misdemeanour, and which is punishable by our law with fine and imprisonment at the discretion of the Court. The Court is not confined to the time mentioned in the Act of Parliament, of three calendar months, but is at liberty and is to look into all the circumstances of the case, and see what in their opinion and their judgment is the right punishment to be inflicted on parties who have so conspired. I mention that, lest it should be supposed, in the sentence I am about to pass, that the Act of Parliament in any way restricted our power.'

"In *Reg.* v. *Castro*,[1] the decision, as shortly summarised in the headnote, was that 'Upon an indictment for misdemeanour containing two counts for distinct offences the defendant may be sentenced to imprisonment or penal servitude for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence.' In the course of his judgment Bramwell, L. J., said[2] :

'By the provisions of Magna Carta and the Bill of Rights Judges are restrained from giving inordinate punishments; but as the common law has not drawn a limit to the punishment which may be inflicted for a misdemeanour, even according to the proposition urged before us no difficulty arises as to a conviction upon an indictment for misdemeanour at common law ; the defendant might be sentenced at common law to seven years' imprisonment and a fine upon the first count, and to seven years' imprisonment with or without a fine upon the second count, to commence at the expiration of the sentence upon the first count.'

"No disapproval of this passage was expressed when the case came on appeal to this House.[3]

"In Stephen's *History of the Criminal Law of England* (1883), Vol. I, pp. 489-90, it is said :

'But apart from these statutory punishments there are punishments appointed by the common law, both for misdemeanours at common law and also for those statutory misdemeanours for which no punishment is provided by statute. These are fine and imprisonment and whipping . . . The statutory rules as to the amount of the fines and the length of the imprisonment which the Court may impose are vague to the last degree.'

"Then he mentions Magna Carta and the Bill of Rights.

"Having regard to those authorities, and the absence of any authority on the other side, I have no doubt that, whatever the

1. (1880) 5 Q. B. D. 490 C. A.
2. *Ibid.*, at pp. 509, 510.
3. Castro v. Reg., (1881) 6 App. Cas. 229.

historical origin may have been, the courts have for hundreds of years had power at common law to sentence to imprisonment for misdemeanours, and the length of the imprisonment has been at large and in the discretion of the Court.

"The contention that imprisonment for conspiracy or any other misdemeanour is (apart from statutory provisions) limited to a term of two years was put forward on an alternative ground. Be it assumed that originally at common law the term was at large and in the discretion of the Court. It is contended that from about the middle of the 19th century onwards there grew up a practice of not imposing imprisonment for any greater term than two years; and that the practice became by long usage so firmly settled as to be unalterable; either it hardened into a rule of law, or it came to govern, and, according to the correct view, should continue to govern, the exercise of the Court's discretion; and therefore any sentence of imprisonment for a greater term than two years, except under statute, is either unlawful or an improper exercise of discretion.

"It does seem to be true that in approximately the second half of the 19th century and the first half of the 20th century there was a general practice of limiting imprisonment to a maximum term of two years. But I think that is to be explained partly by the severity of the punishment by imprisonment in the 19th century, which made the courts reluctant to impose any long sentence of imprisonment, and partly by the existence of the other punishment of penal servitude which was then available. Penal servitude was introduced, to take the plants of transportation, by Statutes of 1853 (16 & 17 Vict., c. 99) and 1857 (20 & 21 Vict., c. 3) and the minimum term of penal servitude was three years. Evidently penal servitude was considered the appropriate form of punishment for a term of three years or more. Therefore in statutes providing for imprisonment after about 1850 the maximum term was two years. Many examples will be found in the Offences against the Person Act, 1861, for example, in Secs. 34, 35 and 36 which may be contrasted with the longer terms of penal servitude provided in Secs. 33 and 37. No doubt the prison system came to be arranged on the basis of imprisonment being up to two years and penal servitude being from three years upwards. There were later statutes relating to penal servitude in 1891 (54 & 55 Vict., c. 69) and 1926 (16 & 17 Geo. 5, c. 58). Then the Criminal Justice Act, 1948, by Sec. 1 (1) provided that :

> 'No person shall be sentenced by a court to penal servitude; and every enactment conferring power on a court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of this Act.'

"After that enactment there was no reason, by way of analogy or otherwise, for confining terms of imprisonment imposed by virtue of common law powers for misdemeanours within a maximum of two years.

"Soon there came the case of *Rex* v. *Morris*,[1] which was decided in 1950. Hallett, J., at assizes passed a sentence of imprisonment for four years for the common law misdemeanours of conspiracy. On appeal to the Court of Criminal Appeal the argument for the appellant was that there was no record for over a century of a sentence of imprisonment for a common law misdemeanour exceeding two years, and that limit had become part of the common law by long usage. The Court of Criminal Appeal, in a judgment delivered by Lord Goddard, C. J., rejected this argument, holding that the duration of the term of imprisonment for a common law misdemeanour always was and still is at the discretion of the Court. He said[2]:

'Of late years the courts have been very reluctant to impose a penalty more severe than that of two years' imprisonment, but that has been because until the reforms which took place during the latter part of the 19th century, imprisonment was a severe punishment. . . . The Penal Servitude Act, 1891, Sec. 1 (2), provided that when a sentence of penal servitude was prescribed by a statute a sentence of not exceeding two years imprisonment could be given instead. That is why courts frequently gave sentences of imprisonment for not more than two years for offences for which penal servitude up to 14 years, or penal servitude for life, could be given, but that did not affect their right to give longer sentences of imprisonment for common law misdemeanours. The law was that such misdemeanours could be punished by terms of imprisonment at the discretion of the courts, and there is no statute, which has taken that power from the courts.'

"I see no reason to differ from that judgment on this point and I think the decision was right, and the appellant's second contention must fail.

"Thirdly, it was contended on behalf of the appellant that it was not a proper exercise of judicial discretion to pass for the conspiracy a greater sentence than could have been passed for the substantive offence if it had been committed. This contention receives some support from a later passage in the judgment in *Rex* v. *Morris*,[3] where Lord Goddard, C. J., said :

'Mr. Dutton Briant has argued and I thought it was his best point—that it was not right to impose on a person, under the guise of a sentence of conspiracy, a longer sentence than could be imposed for the substantive offence he conspired to commit. At first sight that appears a very attractive argument. If a man conspires to commit an offence for which the maximum sentence is, by statute, two years' imprisonment, it is said that it is not right that a court should pass a longer sentence on him because he happens to have been prosecuted for a common law conspiracy. That might be so in a great many cases. Where the evidence showed that the only matter in which the defendant had been concerned was one definite offence, it would obviously be wrong by means of indicting him for

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1. (1951) 1 K. B. 394 : 66 T. L. R. (Pt. 2) 1050 : (1950) 2 All E. R. 965 C. C. A.
2. Rex. v. Morris, (1951) 1 K. B. 394 at pp. 396, 397.
3. *Ibid.* at p. 399

conspiracy, to impose on him a longer sentence than he could have received if he had been indicted merely for the substantive offence. But in the present case the appellant has been engaged in a traffic which obviously has been going on for many months ; he has had four motor cars fitted so that this traffic can be carried on, and was smuggling on a very extensive scale.'

"The general principle stated in this passage is clearly right, but the exercise of the discretion must depend on the circumstances and there must be room for some exceptions from the general rule. There was in the argument of this appeal some criticism of the last part of the passage cited above, on the ground that apparently other offences, not proved and not desired to be taken into account, were being allowed to increase the sentence. I think the words used do invite that criticism, but in substance it was right to make an exception in that case, because the conspiracy involved a combination of persons making elaborate preparations for smuggling on a large scale and might well be regarded as an offence different from, and more serious than, the substantive offence of merely smuggling in the particular watches concerned.

"In *Reg.* v. *Field*,[1] Lawton, J., delivering the judgment of the Court of Criminal Appeal said :

'Even if the object of the conspiracy had been the obstruction of the police, which it was not in the circumstances of this case the fact of the unlawful combination of these appellants to achieve that end would have changed its character and so enhanced its mischief that the joint act might properly be treated as a different, and more serious crime. In putting its reasons in those words the Court has applied to the facts of this case a well-known passage in the *Law of Criminal Conspiracies and Agreements*, by R. S. Wright (1873), page 83, cited with approval by this Court in *Reg.* v. *Blamires Transport Services Ltd.*[2]

"The judgment in the *Blamires* case[3] was given by Edmund Davies, J., who also presided in the Court of Criminal Appeal in the present case. In my opinion the reasoning in the *Blamires* case[4] and *Field's* case,[5] based on the passage in R. S. Wright's book, is correct and can be applied to the present case. There is in the book another passage at pages 81-82 which can be used as indicating factors to be taken into account in deciding whether the conspiracy is a crime different from and more serious than the substantive offences. The passage is this :

'There may be cases in which the agreement or concurrence of several persons in the execution of a criminal design is a proper ground for aggravation of their punishment beyond what would be proper in the case of sole defendant. Such would be cases in which the co-operation of several persons at different places is likely to facilitate the execution or the concealment of a crime, or in which the presence of several persons together is intended to increase the

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1. (1965) 1 Q. B. 402 at p. 423 : (1964) 3 W. L. R. 593 : (1964) 3 All E. R. 269 C. C. A.
2. (1962) 1 Q. B. 278 at p. 282 : (1963) 3 W. L. R. 496 : (1963) 3 All E. R. 170 C. C. A.
3. *Ibid.*
4. *Ibid.*
5. (1965) 1 Q. B. 402.

> means of force or to create terror, or cases of fraud in which suspicion and ordinary caution are likely to be disarmed by the increased credibility of a representation made by several persons.'

The contention that it is not a proper exercise of judicial discretion to pass for the conspiracy a greater sentence than could have been passed for the substantive offence if it had been committed receives some support from a later passage in the judgment in *R.* v. *Morris*,[1] where Lord Goddard said :

> "Counsel for the appellant has argued and I thought it was his best point—that it was not right to impose on a person, under the guise of a sentence of conspiracy, a longer sentence than could be imposed for the substantive offence he conspired to commit. At first sight that appears a very attractive argument. If a man conspires to commit an offence for which the maximum sentence is by statute two years' imprisonment, it is said that it is not right that a court should pass a longer sentence on him because he happens to have been prosecuted for a common law conspiracy. That might be so in a great many cases. Where the evidence showed that the only matter in which the defendant had been concerned was one definite offence, it would obviously be wrong, by means of indicting him for conspiracy to impose on him a longer sentence than he could have received if he had been indicted merely for the substantive offence. But in the present case the appellant has been engaged in a traffic which obviously has been going on for many months; he has had four motor cars fitted so that this traffic can be carried on, and was smuggling on a very extensive scale."

12. Single conspiracy.—In *Srichand K. Khetwani* v. *State of Maharashtra*,[2] the various firms to whom licences were issued were fictitious. The conspiracy was a general conspiracy to keep on issuing licences in the names of fictitious firms and to share the benefits arising out of these licences when no real independent person was the licensee. *Held* that the various members of the conspiracy other than the two public servants must have joined with the full knowledge of the *modus operandi* of the conspiracy and with the intention and object of sharing the profits arising out of the acts of the conspirators. It is, therefore, difficult to see that the mere fact that licences were issued in the names of eight different companies make out the case against the conspirators to be a case of eight different conspiracies each with respect to the licences issued to one particular fictitious company.

13. Distinction between conspiracy and other offences.—Conspiracy differs from other offences in this respect, that in other charges the intention to do a criminal act is not a crime in itself, until something is done amounting to the doing or attempting to do some act, to carry out that intention; conspiracy on the other hand consist simply in the agreement confederacy to do some act, no matter whether it is done or not.[3]

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1. (1951) 1 K. B. at p. 399 : (1950) 2 All E R. at p. 968.
2. A. I. R. 1967 S. C. 450 at p. 452
3. Amritalal Hazra *v.* Emperor, A. I. R. 1916 Cal 188 at p. 193 : I. L. R. 42 Cal. 957 : 29 I. C. 513 ; *see* also E. G. Barsay *v.* State, A. I. R. 1958 Bom. 354 : 60 Bom. L. R. 159 : 1958 Cr. L. J. 144 ; Amrita Lal Hazara *v.* King-Emperor, A. I. R 1916 Cal. 188 ; I. L. R. (1915) 42 Cal. 957 ; 19 C. W. N. 676 ; 29 I. C. 513 : 21 C. L. J. 331, Conspiracy to possess explosive substances under Sec. 120 B and Sec. 4 of the Explosive Substances Act, VI of 1908, the explosive substances not being in existence ; Nirmal Chandra De *v.* King-Emperor, 31 C. W. N. 239 : 100 I. C. 113 : 28 Cr. L. J. 241 : A. I. R. 1927 Cal. 265 (D. B) [charge under Sec. 12 (*f*) of the Arms Act read with Secs. 120-B and 116 of the Penal Code, that being no evidence on record of possession by the accused of arms the ammunition].

14. Distinction between Secs. 120-A and 34.—There is not mere substantial difference between conspiracy as defined in this section and acting on a common intention as contemplated in Sec. 34. While in the former the gist of the offence is the bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under Sec. 34 is the commission of a criminal act in furtherance of a common intention of all the offenders—which means that there should be a unity of criminal behaviour resulting in something for which an individual would be punishable as if it were all done by himself alone.[1]

15. Distinction between offence of criminal conspiracy and offence of abetment by conspiracy.—Distinction between the offence of criminal conspiracy as defined in Sec.120-A and the offence of abetment by conspiracy as defined in Sec. 107 of the Code. Section 120-A which defines the offence of criminal conspiracy and Sec. 120-B which punishes the offence are in Ch. V-A of the Indian Penal Code. This chapter introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy. It was introduced by the Criminal Law Amendment Act, 1913 (VIII of 1913). Before that, the sections of the Indian Penal Code which directly dealt with the subject of conspiracy were these contained in Ch. V and Sec. 121 (Ch. VI) of the Code.[2] The point before the Supreme Court in the above-noted case was the distinction between the offence of abetment as defined in Sec. 107 (Ch. V) and the offence of criminal conspiracy as defined in Sec. 120-A (Ch. V-A). While discovering the distinction Das, J., observed as follows:

"The point before us is the distinction between the offence of abetment as defined in Sec. 107 (Ch. V) and the offence of criminal conspiracy as defined in Sec. 120-A (Ch. V-A). Under Sec. 107, second clause, a person abets the doing of a thing, who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and an order to the doing of that thing. Therefore, in order to constitute the offence of abetment by conspiracy, there must first be a combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who committed it. It is sufficient if he engaged in the conspiracy in pursuance of which the offence is committed. It is worthy of note that a mere conspiracy or a combination of persons for the doing of a thing does not amount to an abetment. Something more is necessary, namely, an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing for which the conspiracy was made. Before the introduction of (Ch. V-A) conspiracy, except in cases provided by Secs. 121-A, 311, 400, 401, and 402 of the Indian Penal Code, was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy and amounted to a distinct offence. Chapter

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1. Provincial Government, C. P. and Berar *v.* Dina Nath Lala Ganpatrai, A. I. R. 1939 Nag. 263 at p, 264: I. L. R. (1939) Nag. 644: 41 Cr. L. J. 27: 1939 N. L. J. 373.
2. Pramath Nath Taluqdar *v.* Saroj Ramjan Sarkar, (1962) 2 S. C. R. 297 at p. 318.

V-A, however, introduced a new offence defined by Sec. 120-A. That offence is called the offence of criminal conspiracy and consist in a mere agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means; there is a proviso to the section which says that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The position, therefore, comes to this. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal means, some act besides the agreement is necessary. Therefore, the distinction between the offences of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence. Willes, J., observed in *Mulcahy* v. *The Queen*[1] :

> 'When to agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.'

"Put very briefly, the distinction between the offence of abetment under the second clause of Sec. 107 and that of criminal conspiracy under Sec. 120-A is this. In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence.

"So far as abetment by conspiracy is concerned the abettor will be liable to punishment under varying circumstances detailed in Secs. 108 to 117. It is unnecessary to detail those circumstances for the present case. For the offence of criminal conspiracy it is punishable under Sec. 120-B."

16. Criminal conspiracy.—The crime of conspiracy affords support for any who advance the proposition that criminal law is an instrument of government. As Stephen has pointed out[2] in its earliest meaning conspiracy was the agreement of persons who combined to carry on legal proceedings in a vexatious or improper way.[3] Although primarily a civil injury it was also punishable on indictment. The Star Chamber developed the criminal aspect of agreements of this nature into a substantive offence, and widened its scope; being

Earliest meaning of criminal conspiracy.

1. (1868) L. R. H. L. 306 at p. 317.
2. 2 H. C. L. 228.
3. (1300) Articuli super Chartas, 28 Edw. 1 : (1304) 33 Edw. 1 and 3 Co. Inst. 143 ; 4 B. L. Com. 136.

thus established the new offence eventually penetrated into the courts of common law but in its gradual evolution into a crime at common law of general application there can be discerned a close association with the law of principal and accessory. In this process of development it resembles the other preliminary crimes, incitement and attempt. It was, indeed, closely analogous to attempt[1] and in its earliest stages there was a tendency to regard it as a form of attempt to commit a wrong.[2] In the common law courts it was received as a loosely expressed doctrine "capable of almost indefinite extension". In effect it marked the point at which an agreement between two or more persons to do any act which the Court disliked even on moral ground, could be punished as a criminal conspiracy.[3] Thus it has been said that criminal conspiracy consist in "an unlawful combination of two or more persons, to do that which is contrary to law, to cause public mischief",[4] or to do that which is wrongful and harmful towards another person or to do a lawful act for an unlawful end, or by unlawful means, or wrongfully to prejudice a third person,[5] or to do a lawful act for an unlawful end[6] or by unlawful means or wrongfully to prejudice a third person.[7] It has been said that if several illegally concur in doing an act with a common object, they may be guilty of conspiracy, though they were previously unacquainted with each other.[8]

Criminal conspiracy as understood in common law courts.

But few things are left so doubtful in the criminal law as the point at which a combination of several persons for a common object becomes unlawful.[9]

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1. Stephen, 2 H. C. L. 227.
2. Holdsworth, 5 H. E. L. 201. But *see* now Board of Trade *v.* Owen and Seth Smith, (1957) 41 Cr. App. R. 11.
3. In Continental systems the crime seems to have been kept within narrower limits. For example, an agreement to commit a crime appears not to have been known as a crime in Germany until about 1927 [*see* Ebermayer, St. G. B. (4th Ed.). p. 273, note 1 on Art. 49b.]. For an earlier recognition in France, *see* Code Penal, Art. 89, and cp. Arts. 59, 60.
4. R. *v.* Brailsford, (1905) 2 K. B. 730 at p. 745. And *see* R. *v.* Boulton, (1871) 12 Cox. 37 ; R. *v.* Bassey, (1931) 22 Cr. App. R. 160.
5. Quinn *v.* Leathem, (1901) A. C. 495 at p 528 : 70 L. J P. 76, Lord Brampton. In R. *v.* Vincent, (1839) 9 C & P. 91. Alderson, B., laid it down that conspiracy is "a crime which consists either in a combination and agreement by person to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." In O'Connell *v.* R., (1844) 11 Cl. & F. 155 : 5 St. Tr. (N. S.) 1, Tindal, C. J., in delivering the opinion of all the Judges, said : "The crime of conspiracy is complete if two or more than two, should agree to do an illegal thing ; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful." In R. *v.* Seward, (1834) 1 A. & E. 713, Denman, C. J., said, "An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means" ; but in R. *v.* Peck, (1839) 9 A. & E. 686, upon this dictum being cited, he said, "I do not think the antithesis very correct" ; and in R. *v.* King, (1845) 7 Q. B. 782, he said, "The words 'at least' should accompany that statement." In R. *v.* Jones, (1832) 4 B. & Ald. 345 ; 1 N. & M. 78, however, several Judges gave a similar definition of the crime of conspiracy.
6. "With a corrupt intent." 8 Mos. 320; 1 Wils. (K. B.) 41. *See* R. *v.* Delaval, (1763) 3 Burr. 1434 at p, 1439.
7. 1 Hawk. c. 72, Sec. 2; Quinn *v.* Leathem, (1901) A. C. 1495n. Unless the word "wrongfully" means criminally, the authorities cited by Hawkins do not support this proposition. Wright on *Conspiracy*, p. 12.
8. By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. 8 ; 1 Hawk, c. 72, Sec. 2, in the notes. *See* the instance given in R. *v.* Parnell, (1881) 14 Cox. 508 at p. 515.
9. 3 Chitty, Cr. L. 1130.

The generally accepted definition of the offence is that given by Wilkes, J., on behalf of all the Judges in *Mulcahy* v. *R.*,[1] and accepted by the House of Lords in that and subsequent cases.[2]

Generally accepted definition of conspiracy.

A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means.[3] So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means.[4] And so far as proof goes conspiracy, as Grose, J., said in *R.* v. *Brisac*[5] is gernerally "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."[6] The number and the compact give weight, and cause danger, and this is more especially the case in a conspiracy like that charged in this indictment.

The gist of the offence of conspiracy then lies, not in doing the act, effecting the purpose for which the conspiracy is formed nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties.[7] The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged.[8] In an indictment, it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which is considered to give the public an interest to interfere by indictment.[9]

Gist of the offence of conspiracy.

17. Conspiracies punishable under the Code.—Certain conspiracies are otherwise punishable as distinct offences under the Code. Taking them into account, the Code now deals with the following conspiracies :

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1. L. R. (1868) 3 H. L. 306 at p. 317, cited with approval in R. v. Meyrick, (1928) 21 Cr. App. R. 94 at p. 99.
2. Quinn v. Leathem, (1901) A. C. 495 at p. 529. *See* R. v. Brailsford, (1905) 2 K. B. 730 at p. 746.
3. The phrase is clumsy, since the unlawful means must be expressed in acts; it would be better put "to do an unlawful act, whether as the ultimate end, or as a means to an end which may itself be lawful."
4. A civil action does not lie for a conspiracy unless it is put into execution and causes damage. 9 Co. Rep. 57 ; W. Jones 93 ; Savile v. Roberts, (1698) 1 Ld. Raym. 374 ; 1 Wms. Saund. 229b, 230 ; Barber v. Leister, (1859) 7 C. B. (N. S.) 175; Quinn v. Leathem, (1901) A. C. 495 at p. 510, Lord Macnaghten, 542, Lord Lindley ; Sorrell v. Smith, (1925) A. C. 700 ; Crofter Handwoven Harris Tweed Co. Ltd. v. Veitch, (1942) A. C. 435.
5. (1803) 4 East 164 at p. 171.
6. The question involved was whether a conspiracy, charged and proved, was an overt act of felony within the Treason Felony Act, 1848 (11 & 12 Vict. c. 12).
7. 1 East P. C. 462 ; R. v. Best, (1705) 2 Ld. Raym. 1167 : 6 Mod. 185 ; R. v. Spragg, (1760) 2 Burr. 994 (conspiracy to indict for a capital offence) ; R. v. Rispal, (1762) 3 Burr. 1320 (where conspiracy to injure a man by a false charge was held unlawful and a trespass tending to a breach of the peace). *See* O'Connell v. R., (1844) 11 Cl. & F. 155 ; 5 St. Tr. (N. S.) 1.
8. Sir W. Erle on *Trade Unions*, p. 31, adopted by Bruce, J, in R. v. Plummer, (1902) 2 K. B. 339 at p. 348. And *see* Mulcahy v. R., (1868) L. R. 3 H. I. 306 at p. 328.
9. Mogul S. S. Co. v. McGregor, (1892) A. C. 25. In certain of the older authorities reference is made to a bare conspiracy, unexecuted, as criminal. *See* R. v. Rispal, (1762) 3 Burr. 1320 ; 1 Lev. 62 at p. 12[illegible] : 1 Venter. 304 ; 1 Ld. Raym. 379 ; 1 Salk. 174 ; 1 Str. 193 ; T. Raym. 417.

(1) Conspiracy to wage war (Sec. 121-A).
(2) *Thugi* (Sec. 311).
(3) Belonging to a gang of thieves (Sec. 401).
(4) Being member of an assembly of dacoits (Sec. 402).
(5) Abetment by conspiracy (Sec. 107, "*Secondly*").
(6) Conspiracy to commit an offence.
(7) Conspiracy to do an illegal act.

The opportunities which the vagueness of this crime can offer to governmental oppression has been recognised by an independent judiciary conscious of the need to preserve the liberty of the subject. As Fitzgerald, J., said[1]: "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits."[2]

18. Essentials of criminal conspiracy.—The four essential ingredients of a criminal conspiracy have been already set out. Shortly stated, the offence involves (*i*) an *agreement* to do, (*ii*) an illegal act, or (*iii*) by illegal means, (*iv*) the agreement being followed by an overt act.

Section 120-A which defines conspiracy requires that there should be meeting of minds. This would mean unity of purpose. The agreement to do the illegal act may even be implied.[3]

The essence of conspiracy is that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstancial evidence.[4]

Agreement.

It will be observed that there can be no conspiracy without an agreement which is an advancement of the intention which each has conceived in his mind, which then passes from a *secret* intention to the stage of mutual consultation and concert, proof of which may be available in the evidence of an accomplice which must, however, be definitive as to the agreement "to do or cause to be done" the act charged; which, again, must be shown to be illegal within the meaning ascribed to that term in Sec. 43 which generally follows the English law.[5] It is immaterial whether the illegal act is the ultimate object of such

1. Irish State Trials, 1867.
2. Russel on *Crime*, 11th Ed., pp. 213-216.
3. Lakshmandas Chaganlal Bhatia *v.* State, A. I R. 1968 Bom. 400 at p. 416.
4. Bhagwan Swarup Lal Bishan Lal *v.* State of Maharashtra, A. I. R. 1965 S. C. 682 at p, 687.
5. Rowlands, 17 Q. B. 671; Parnel, 14 Cox. 505; O'Connel, 11 Cl. & Fin. 155; Gulab Singh, 35 I. C. (All.) 991; P. E. Billinghurst *v.* Emperor, A. I. R. 1924 Cal. 18; Muhammad Ismail *v.* Emperor, A. I. R. 1936 Nag. 97: 38 Cr. L. J. 106; Parsram *v.* Emperor, A. I R. 1937 Sind 58: 38 Cr. L. J. 651; Rash Behari Shaw *v.* Emperor, A. I. R. 1936 Cal. 753: 38 Cr. L. J. 545: 41 C. W. N. 225.

agreement or is merely incidental to that object.[1] It is similarly immaterial that the offence agreed on is one which one of the conspirators could not singly commit. So in an English case where a woman who erroneously believed herself with child conspired with another to procure abortion, she was held liable to be convicted of conspiracy to procure abortion although, if she had merely done the act to herself with like intent, she could not have been convicted.[2] It will be observed that many acts of conspiracy to be found in the law books would be punishable here as amounting to abetment, as for example, conspiring to obtain money[3] or goods by false pretences,[4] conspiring to defraud the public by mock-action[5] or by forcing up the price of shares by circulating false rumours,[6] and the like.

Act illegal.

To amount to the offence of criminal conspiracy an agreement must be to do that which is contrary to or forbidden by law. Being a highly technical offence, this ingredient of the crime is essential and must be strictly proved.[7] An agreement, which is immoral or against public policy, or in restraint of trade or otherwise of such a character that the Courts will not enforce it, is not necessarily *illegal*.[8] But since an act may be illegal without being criminal, it follows that an agreement to do an illegal act may amount to criminal conspiracy though it may not be punishable as such.[9] It may be an offence to conspire with another to do an act which, if done alone, would not be criminal, e. g. procuring a woman to become a prostitute,[10] or to have illicit connection with a man.[11]

Means illegal..

The end does not justify the means in criminal law. If, therefore, one conspires with another to employ illegal means to achieve a legal purpose one may be convicted of conspiracy. It is not difficult to conceive of such cases. For instance, it is not illegal to undersell a rival trader, but it would be illegal for the latter to combine to ruin the seller of cheap goods by inducing to give credit to a bankrupt purchaser and thereby cause him loss.[12]

Overt act.

The doing of an overt act, independent of the agreement, is a step further in prosecution of the object of the conspiracy and stamps it as criminal within the meaning of this section. This overt act here must be something distinct from that tending to prove merely the agreement.[13] The question is one of fact dependent upon the circumstances of each case. For instance, if *A* and *B* agree to murder *C*, letters passed between them as to the movements of *C* may either prove the agreement, or be overt acts in furtherance of its purpose. It all depends upon their nature and consent. So, where the accused were found to have

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1. Rash Behari Shaw *v.* Emperor, A. I. R. 1936 Cal. 153 at p. 160: 38 Cr. L. J. 545 : 41 C. W. N. 225.
2. Witchurch, 24 Q. B. D. 420.
3. Kenrick, 5 Q. B. 49.
4. Orman, 14 Cox. 381.
5. Lewis, 11 Cox. 404.
6. Aspinall, 20 Q.B.D. 48 at p. 69; Scott. *v.* Brown, (1892) 2 Q. B. 724; Mogul Steamship Co. *v.* MacGregor & Co., 23 Q. B. D. 598.
7. Amritalal Hazra *v.* Emperor, A. I. R. 1916 Cal. 188: I. L. R. 42 Cal. 957.
8. O'Connel, 11 Cl. & Fin. 155.
9. Witchurch, 24 Q. B. D. 420.
10. Howell, 4 F. & F. 160.
11. Delaval, 3 Bur. 1424; Grey (Lord), 9 St. Tr. 127; Means, 2 Den. 79.
12. Esdaile, 1 F. & F. 213; S. C. *sub. nom.* Brown, 7 Cox. 442.
13. Gulab Singh. 35 I. C. (All.) 991; Kalidas Basu, 39 C. L. J. 151.

conspired to import firearms and ammunition in contravention of the Arms Act, they were held guilty of this offence.[1]

A court is right in thinking that an agreement which is alleged to be a criminal conspiracy need not and cannot often be proved by direct evidence and it often happens that participation in overt acts in pursuance of the alleged agreement provide good grounds for the inference of participation in the agreement itself. But if in a case the only overt act is the issue of a cheque towards the payment of the price of the shares sold by the company such overt act by itself would not be sufficient material for inferring that there was participation by the accused in a criminal conspiracy.[2]

19. Explanation.—The explanation follows the general principle that an illegal act cannot be justified by reason of mistake, accident or the like. But the illegal act must have some bearing on the object of the agreement otherwise the two cannot be connected. For instance, suppose *A* and *B* agree to murder *C*. One of them, *A*, goes to purchase a revolver in a false name. Both are guilty because *A*'s illegal act, though not the murder of *C* of which *B* had conspired, is yet incidental to that object.

20. Proof.—It is not the law that every conspirator must be present at every stage of the conspiracy. If the conspirator concerned had agreed to the common design and had not resiled from that agreement, it can be presumed that he continued to be a party to the conspiracy. In the instant case, some of the accused were convicted under Sec. 489-B read with Sec. 120-B, I.P.C. Trafficking in C. C. Notes was done in pursuance of the conspiracy.

Every conspirator must not be present at every stage.

Held that the fact that several conspirators played different roles was wholly irrelevant in considering that charge. Each one is responsible for the acts of the other conspirators as well. The Court below should not have separated the several incidents and considered them in isolation. The conviction of any of the appellants under Sec. 489-C was redundant in view of the fact that they had been convicted under Sec. 489-B, I. P. C.[3]

21. Proof of criminal conspiracy.—The offence of conspiracy can be established by direct evidence or by circumstantial evidence. But Sec. 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary

Evidentiary value of acts is limited by two circumstances.

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1. Kalidas Basu, 39 C. L. J. 151, to the same effect Bachcha Basu, A. I. R. 1935 All. 162.
2. Rameshwar Daga *v.* State of West Bengal, A. I. R. 1965 Cal. 38 at p. 42.
3. V. Govindrajalu *v.* State of Mysore, A. I. R. 1962 Mys. 275 at p. 278.

value of the said act is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them.[1]

In the above-noted case the Court said : "The expresson 'in reference to their common intention' is very comprehensive and, it appears to have been designedly used to give it a wider scope than the words in furtherance of, in the English law; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only 'as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it'. It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section can be analysed as follows : (1) There shall be a *prima facie* evidence affording a reasonable ground for a court to believe that two or more persons are members of a conspiracy ; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other ; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them ; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it ; and (5) it can only be used against a co-conspirator and not in his favour."

Section involves five factors.

120-B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment[2] for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such conspiracy, be punished in the same manner as if he had abetted such offence.

Punishment of criminal conspiracy.

(2) Whoever is a party to criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine, or with both.

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1. Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, A. I. R. 1965 S. C. 682 at p. 687.

2. Subs. by Act 26 of 1955, Sec. 117 and Schedule, for "transporation" (w. e. f. 1st January, 1956).

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1. Analogous law.—This section is of course not retrospective,[1] but an offence made punishable under it may be otherwise dealt with; an abetment though conspiracy is a substantive offence, and is distinct from abetment.[2] This section prescribes punishment for really two offences of varying gravity, viz. (*i*) criminal conspiracy as such, and (*ii*) criminal conspiracy to commit an offence punishable with at least two years' rigorous imprisonment. The section is, moreover, supplimentary, as criminal conspiracies, though not expressly provided by the Court, were before the enactment of this section treated as abetment which again, when of the more serious character, is the subject of express and separate penalties.[3]

2. Principle.—The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment.

3. Meaning of words.—"*Where no express provision is made in this Code for punishment of such a conspiracy*": Express provisions are made in Secs. 121-A, 311, 401 and 402.[4] The provision need not specify the offence as one of conspiracy.

4. Distinction between Secs. 34, 120-A and 149.—*See* under Sec. 34, *supra*.

5. Applicability.—This section provides for punishment for criminal conspiracy "where no express provision is made in this Code for the punishment of such a conspiracy". Where an offence is committed in pursuance of a conspiracy to commit it, the conspiracy amounts to an abetment, and where conspiracy amounts to an abetment under Sec. 107, it is unnecessary

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1. Manmohan, 53 I. C. (Cal.) 999.
2. Chandi Ram *v.* Emperor, A. I. R. 1926 Sind 174 at p. 175.
3. E. g., Secs. 121-A—123, 128, 130, 131—138-A, 150, 157, 164, 212—216-A, 221, 236, 244, 257, 267, 294-A, 305, 306, 400—402, 411—414, 460.
4. In Udha Singh, 10 S. L. R. 69 : 35 I. C. 670, it was wrongly stated that the only such case was that under Sec. 121-A.

to invoke the provisions of Secs. 120-A and 120-B, because the Code has made specific provision for the punishment of such a conspiracy.[1] In other words, where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, Secs. 120-A and 120-B are wholly irrelevant. Conspiracy, it should be borne in mind, is one form of abetment (*see* Sec. 107. I P.C.) and where an offence is alleged to hatve been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under Sec. 109, I. P. C.[2] It is legal to try accused persons on a charge of conspiracy to commit an offence even if the substantive offence has been carried out.[3]

Section 120-A, I. P. C., read with Sec. 10, Evidence Act, will come into play only when the Court is satisfied that there is reasonable ground for belief that two or more persons have conspired together to comit an offence. There should be *prima facie* evidence that a person was a party to conspiracy before his act can be used against him or against his co-conspirator. The evidentiary value of the said "act" is limited in main by two circumstances, namely, that the "act" shall be in reference to their common intention and that it should be in respect of a period after the intention was entertained by any one of them.[4]

6. Scope.—Before Secs. 120-A and 120-B were added to the Penal Code, conspiracy to commit offences was not punishable. It became punishable as abetment if the offence was actually committed. This is evident from the language of Sec. 107 (second definition) which defines "abetment". By the amendment of the Penal Code by addition of Secs. 120-A and 120-B, the Legislature brought the law in India in line with the English law and made conspiracy itself punishable as distinct offence, apart from the object of conspiracy which, if carried out, would itself amount to an offence.

Section 120-B which is the penal section, says that whoever is a party to a criminal conspiracy to commit an offence punishable with death, shall be punishable in the same manner as if he had abetted such offence. Now the question is, does Sec. 120-B limit its operation to those who are parties only to the agreement at the moment of its formation, or it is also applicable to those who continue to be parties during the entire period during which the conspiracy continues. It is no doubt true that the offence is complete as soon as an agreement is made between the conspirators, and they being parties to that conspiracy they would be punishable under Sec. 120-B. But by its very language Sec. 120-B must apply to those who are members of the conspiracy during its continuance. The emphasis is on the words "are parties". It is not that the agreement as such is punishable

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1. Jugeshwar Singh *v.* Emperor, A. I. R. 1936 Pat. 346 at p. 348 : I. L. R. 15 Pat. 26 : 1937 Cr. L. J. 893 : 17 P. L. T. 234.
2. *In re* Mallimoggala Venkataramiah, A. I. R. 1938 Mad. 130 at p. 132 : 39 Cr. L. J. 266 : 46 M. L. W. 709.
3. *In re* Surajpal Singh Indrapal Singh, A. I. R. 1938 Nag. 328 at p. 333 : I. L. R. (1938) Nag. 516 : 39 Cr. L. J. 818 ; *see* also cases cited therein. Firm Govind Moti & Co. *v.* Sindhu Re-settlement Corporation Ltd., A. I. R. 1954 Kutch 33 : 1954 Cr. L. J. 1086.
4. M. C. Taneja *v.* State, (1970) 2 Cr. L. J. 946 at p. 947.

but being party to a conspiracy is punishable. The section is worded in the present tense and, therefore, cannot be exclusively read to mean whoever has been or had been party to a criminal conspiracy shall be punished, as if the offence was committed. In other words, it is intended to be treated as a continuous offence and whoever is a party to conspiracy during the period for which he is charged is liable under Sec. 120-B. The same is the view in foreign jurisdictions.

In this connection, one may with advantage refer to *American Jurisprudence*, Vol. II, Sec. 23, at page 559, where it is stated :

> "The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design."

In *United States* v. *Kissel*,[1] Mr. Justice Holmes in answer to a contention that the prosecution was barred by the Law of Limitation said :

> "But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distant conspiracies, rather than to call it a single one. . . . A conspiracy is constituted by an agreement, it is true, but is the . . . . result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. . . . A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any agreement specifically directed to that act."

There is not a single case where it has been asserted and accepted that merely because the objects with which the conspiracy was entered into were achieved and actual offences committed there could be no prosecution for the conspiracy itself or that since every conspiracy might amount to abetment of each of the offences committed, there can be no charge in respect of the conspiracy.

From Sec. 120-B it is clear that if the petitioners were parties to the conspiracy during its continuance when all of them were in Bombay they clearly committed the offence within Indian territories, and that being so, it is impossible to hold that the courts in India would have no jurisdiction to try the offence.[2]

Essential ingredient of the offence is the agreement to commit an offence.

The offence of criminal conspiracy is of technical nature and the essential ingredient of the offence is the agreement to commit an offence.[3] The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not these offences have actually been committed. The very fact of conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of

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1. (1909) 218 U. S. 601 : 54 Law Ed. 1168.
2. Abdul Kadar Saleh Mohomed *v.* State, A. I. R. 1964 Bom. 133 at pp. 134-35, 136 : I. L. R. (1963) Bom. 800.
3. B. N. Mukerji *v.* Emperor, A. I. R. 1945 Nag. 163 at p. 166 I. L. R. 1945 Nag. 176.

unlawful agreement.[1] It is undoubtedly true that the law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to that intention. It was observed in the case of *Mulcahy* v. *The Queen*[2] by Willes, J., as follows : "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable, when two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means." This dictum has been accepted as good law. The overt act in a case of conspiracy consists in the agreement of the parties and this is the view which has been adopted by the Indian Legislatures in the definition of "conspiracy" as given in Sec. 120-A, I. P. C. This definition excludes the agreement to commit an offence from the category of such conspiracies in which it is necessary that the agreement should be followed by some act ;[3] therefore, an offence under Sec. 120-B consists in the conspiracy without any reference to the subject-matter of the conspiracy. As stated above in *Mulcahy's* case, when there is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means and these persons agree to carry the design into effect, the very plot is an act in itself.[4]

It must be remembered that different persons may enter a conspiracy at different stages and that the persons so joining the conspiracy can be properly convicted of that conspiracy so long as the object of the conspiracy exists.

In a conspiracy, persons are often required to do various acts at various stages ; even if for the first time they come into the conspiracy, at a later stage they are members of the conspiracy provided their act is calculated to promote the object of the conspiracy. Thus it was held that where a conspiracy to file a false claim and to obtain a decree in support of that false claim initially consisted of two members and at a later stage a third person joined them and agreed to give false evidence in order to support the false claim, in other words to promote the object of the conspiracy, the third person was equally as a member of the conspiracy.[5] But the bare fact of association with persons who were conspirators would be highly insufficient to bring home to him charge of conspiracy.[6]

Criminal conspiracy is an offence created and made punishable by the Indian Penal Code. It is not an offence under the Sea Customs Act. The offence of conspiracy to commit a crime is different from the crime that is

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1. Bimbadhar Pradhan v. State of Orissa, A. I. R. 1956 S. C. 469 at p. 474 : 1956 S. C. R. 206 : 1956 S. C. J. 441 : 1956 S. C. A. 857 : 1956 A. W. R. (Sup.) 89 : I. L. R. (1956) Cut. 409 : 22 Cut. L. T. 276 : (1956) 2 M. L. J. (S. C.) 13 : 1956 Cr. L. J. 831.
2. (1868) 3 H. L. 306 : 1 C. L. 13.
3. Nirmal Chandra De v. King-Emperor, A. I. R. 1927 Cal. 265 at pp. 266, 267 (D. B.) : 31 C. W. N. 239 : 100 I. C. 113 : 28 Cr. L. J. 241 ; Amrit Lal Hazra v. King-Emperor, A.I.R. 1916 Cal. 188 : I. L. R. (1915) 42 Cal. 957 : 19 C. W. N. 676 : 29 I. C. 513 : 21 C. L J. 331.
4. B. N. Mukherji v. Emperor. A. I. R. 1945 Nag. 163 at p. 166 : I. L. R. (1945) Nag. 176 : 145 Nag. L. J. 71.
5. Lakhmi Chand v. Emperor, A. I. R. 1947 Sind 49 at pp. 54. 57 : 226 I. C. 631.
6. Rakhal Chandra Das v. Emperor, A. I. R. 1934 Cal. 647 at p. 649 : 129 I. C. 619 : (F. B.) ; B. N. Mukherji v. Emperor, A. I. R. 1945 Nag. 163.

Criminal conspiracy is separate from the crime that is the object of the conspiracy.

the object of the conspiracy, because the conspiracy precedes the commission of the crime ; and is complete before the crime is attempted or completed ; equally the crime attempted does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences. This is also the view expressed by the United States Supreme Court in *U. S.* v. *Robinowich*.[1] Subsequent to an order of confiscation and penalty under Sec. 167 (8) of the Sea Customs Act made by the Collector of Customs which is a judicial act the petitioners were charged with offences including an offence under Sec. 120-B of the Penal Code.[2] The petitioners contended that Art. 20 (2) of the Constitution protected them from being "prosecuted and punished for the same offence more than once". As stated earlier, their Lordships of the Supreme Court held that the offence of criminal conspiracy is separate from the crime that is the object of the conspiracy. The offence of criminal conspiracy was not the subject-matter of the proceedings before the Collector of Customs and therefore it could not be said that the petitioners had already been prosecuted and punished for the "same offence". The petitioners were not, and never could be, charged with criminal conspiracy before the Collector of Customs and therefore Art. 20 (2) of the Constitution could not be invoked.[3]

7. Conspiracy to commit offence.—In *State of Bihar* v. *Kailash Prasad Sinha*,[4] the accused was the licence-holder of the shop and there was evidence that he used to visit the offices. It was not proved that he filed any of the fabricated *chalans*. The only circumstances against him was that he knew of the passed *chalans* and must have been benefited by the fraud. In this case, therefore, the evidence of his being a member of the conspiracy consisted of the commission of the offences themselves by others. *Held* that it could not be said that the charge of conspiracy had not been proved against him. The offence of a conspiracy to commit a crime is different offence from the crime that is the object of the conspiracy, because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed. A crime attempted or completed does not require the element of conspiracy as one of its ingredients.

A charge under Sec. 120-B read with Secs. 420 and 471/467 of the Indian Penal Code was framed against all the accused, viz. Adya Prasad, Ragho Prasad and Ambika Prasad. The charges under Secs. 471, 467 and 420 of the Indian Penal Code were proved against accused Ragho and Adya Prasad. So far as charge under Sec. 120-B against these two accused was concerned the matter had gone beyond the stage of mere conspiracy and offences had actually been committed in pursuance thereof. *Held* that in the circumstances conviction also under Sec. 120-B was unnecessary. The charges against the other accused were not brought home to them and they were acquitted.[5]

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1. (1915) 238 U. S. 78 : 59 Law Ed. 1211.
2. That in imposing confiscation and penalties the Collector acts judicially has been held by the Supreme Court in its judgment pronounced on 16th May, 1957—F. N. Roy v. Collector of Customs, A. I. R. 1957 S. C. 648 : 1957 Cr. L. J. 1026 : 1957 S. C. A. 764 ; Assistant Collector v. Soorajmul, A. I. R. 1962 Cal. 656 : 56 C. W. N. 452 ; Collector of Customs v. A. H. A. Rahman. I. L. R. (1957) Mad. 642.
3. Le Roy Frey v. Superintendent, District Jail, Amritsar, A. I. R. 1958 S. C. 119 at p. 121 : 1958 S. C. J. 301 : 1958 M. L. J. (Cr.) 289 : 1953 Cr. L. J. 260.
4. A. I. R. 1961 Pat. 451 at p. 460 : 1961 B. L. J R. 411.
5. State of Bihar v. Kailash Prasad Sinha, A. I. R. 1961 Pat. 451 at p. 460 : 1961 B. L. J. R. 411.

It is plain that an agreement to commit murder being an agreement to commit an offence, falls within Sec. 120-B, and nonetheless so, because the means by which the murder is to be perpetrated are not agreed upon, or the means which are agreed upon are such as are not likely to prove, and do not in fact prove, effective. If once there is a conspiracy to commit murder, the case falls within Sec. 120-B, the offence under that section being the conspiracy, and not the acts by which the subject-matter of the conspiracy is to be carried into effect. But if the conspiracy is merely to do an act which is not illegal, though in the hope and belief that that act may result in the death of or injury to some person, that does not amount to a conspiracy to do an illegal act. To take an example: "If *A* and *B* agree that they will induce *Y* to point his finger at *X*, believing that *Y* is endowed with some special power which will enable him to kill *X* by so doing, there is no agreement to do an illegal act, and no conspiracy to commit an offence." But if the agreement is to commit the murder of *X*, and the first means to that end is to be to induce *Y* to point his finger at *X*, then the agreement being in its essence to cause the death of *X* and the means being subsidiary there is a conspiracy to commit an offence.[1]

If there was criminal conspiracy, the appellants should be punished for that offence even though the charge in respect of the substantive offence of theft or criminal breach of trust may not be brought home to them. Thus, in *R.* v. *Newland*,[2] where the defendants could not be charged under a statutory order due to a loophole in it, they were nevertheless held liable for conspiracy to commit an offence in breach of that order. The importance of the law relating to conspiracy is that it enables the conspirators to be prosecuted and punished even though they have not actually done anything in pursuance of their conspiracy, where the agreement is to commit an offence. In other words, an act may be a crime when done by two though not so when done by an individual acting alone.[3]

8. Conspiracy to fabricate false evidence.—As there is no express provision in the Code for punishment of conspiracy to fabricate false evidence, such a conspiracy falls within the ambit of the present section.[4] It is possible that the offence of fabricating evidence to obtain a capital conviction can be committed though the offender believes the accused to be guilty, and, indeed, though the accused is, in fact, guilty. And if the offence can be so committed, in like manner a conspiracy so to commit the offence may be established. But if one set of alleged conspirators know the charge to be false, and the other alleged conspirator has no such knowledge but believes the charge to be true, and it is his duty, if true, to pursue it, the inference of any concert between the two sets of conspirators is so far weakened as, measured by the standard of proof required in a criminal case, to disappear.[5]

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1. Emperor v. Shankaraya Gurushiddhaya Hiraremath, A.I.R. 1940 Bom. 365 at p. 366 : I. L. R. (1940) Bom. 695 : 42 Bom. L. R. 277.
2. (1954) 1 Q. B. 158 : (1953) 2 All E. R. 1067.
3. K. C. Kapoor v. State, A. I R. 1959 All. 75 at p. 77 : 1958 A. L. J 690 : 1959 Cr. L. J. 18.
4. Sahebrao Awadhut Maratha v. Emperor, A.I.R. 1938 Nag. 444 at p. 445 : I. L. R. (1939) Nag. 534 : 39 Cr. L. J. 838,
5. Dwarka Nath Varma v. Emperor, A. I. R. 1933 P. C. 124 at p. 131 : 34 Cr. L. J. 922 (P. C.) : 64 M. L. J. 466.

9. Section 71 not applicable to conspiracy.—Section 71, I. P. C., does not apply to conspiracy as defined in Sec. 120-B, I. P. C., i. e. in connexion with an offence committed in consequence of a conspiracy ; in other words, the conspiracy to commit an offence and the actual commission of the offence are two separate and distinct transactions. Section 120-B, I. P. C., provides punishment for conspiracy ; and it is idle to say that persons can be punished under that section if they only conspire and do not commit an offence, but cannot be punished under it if besides conspiring they actually proceed to commit the offence.[1]

10. Validity of joint trial.—In a case of conspiracy, it is not necessary for the validity of a trial to ultimately prove that the conspiracy alleged actually existed. The validity of a joint trial upon charges for offences alleged to be part of the conspiracy is determined by the initial accusation levelled by the prosecution against the whole body of accused persons.[2]

11. Offence of conspiracy when cannot survive.—The offence of conspiracy cannot survive the acquittal of the alleged co-conspirators. *F* cannot be convicted unless there be proof that he had conspired with person or persons other than his co-accused. If all the other accused have been acquitted of the charge of conspiracy, *F* alone cannot be held guilty.[3]

12. Cases.—Certain persons were charged with having being parties to the criminal conspiracy to commit theft by dishonest consumption and use of electrical energy belonging to the Calcutta Supply Corporation. All the persons were charged with an offence punishable under Sec. 120-A read with Sec. 39, Electricity Act and Sec. 379 of the Penal Code for having been parties to a criminal conspiracy to commit theft by dishonest consumption and user of electric energy belonging to a certain electric supply company. It was the prosecution's own case that there were two classes of conspirators or, at any rate two classes of operators, namely, (1) those who did the actual tampering and their adherents, and (2) the consumers and their servants who allowed that tampering to be done or that there were "tamperers and tamperees". It appeared that the first class of operators were in an agreement with each other and had in view one object, namely, to obtain money unlawfully by tampering with meters whenever possible, and the other class had in view the object of wrongful gain to themselves by allowing tampering of those meters and the making of a false record of the amount of electric energy consumed by them with consequential reduction in the amount of the bill they would have to pay to the Calcutta Electricity Corporation. Upon the evidence there was very little doubt that all the tamperers were actually acting in conjunction in close contact with one another and were giving to each other instruction, advice, and assistance in their unlawful avocation. It appeared quite probable that they were all operating in concert in such a manner as to constitute a criminal conspiracy within the meaning of Sec. 120-B, I. P. C. The consumers were not acting in concert and/or in agreement with all the persons constituting the tamperer class or with each other,

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1. Bala Huddar v. Emperor, A. I. R. 1933 Nag. 252 at p. 253 : 148 I. C. 157 : 35 Cr. L. J. 694 ; *In re* Suraj Pal Singh, A. I. R. 1938 Nag. 328 : 39 Cr. L. J. 818 : I. L. R. (1938) Nag. 516 ; but *see* notes under "Charge".
2. *Vide* K. Kunhammad v. State of Madras, A. I. R. 1960 S. C. 661 relying upon Babu Lal v. Emperor, A. I. R 1938 P. C. 130 ; Devi Prasad v. State, A. I. R. 1967 All. 64 at p. 67.
3. Fakhruddin v. State of Madhya Pradesh, A. I. R. 1967 A. L. J. 303 at pp. 304-5.

The real position was that each of the consumers, abetted by his employees or servants was acting in conjunction with some of the tamperers but was not acting in agreement with other consumers. It was held that it was not possible to say that every one of the accused was in agreement to do the same illegal act or cause the same illegal acts to be done.[1]

In a Sind case,[2] a provident fund society brought out a pamphlet containing misrepresentations as regards the management or directorate. The misrepresentations were contained in the statements that the directors were respectable men and that the management was in capable hands whereas in effect the directors were not respectable and the management was not in capable hands. The management of the business was not in the hands of the accused but in the hands of Jeramdas. He used accused persons merely as his instrument. They had not sufficient education or knowledge, for example, to understand what was being done and being done in their name. Some persons were induced to part their money in the fund by the dishonest misrepresentation contained in the pamphlet. The scheme placed before the public was of a highly speculative nature and it could not work. *Held* that it was difficult to find in the acts of the accused the *mens rea* or guilty mind which was necessary for conviction.

In a Calcutta case,[3] the loan rules of a company contemplated different reasons of loans. The applicant for a loan was to pay an admission fee and make a deposit. He was required to secure two co-members or secondaries who were also required to pay admission fee and the deposit called the opening deposit. After payment by the secondaries, the company was to advance loan up to a fixed maximum to the original applicant within a fixed period of 45 to 60 days. After the two co-members had paid admission fee and deposits, the original applicant was to get a refund of his opening deposit. The co-members or the secondaries were in the same way to get loans from the company on their sucuring two co-members or secondaries. If however the original applicant failed to secure two co-members within a week of his application he was, on sending a notice to a company, to get a refund of his deposit money with interest at the rate of six per cent. per annum within 180 days of the date of receipt of notice by the company. The petitioner (managing director) did not induce any one to be a member or to apply for loan or so to pay any money; it was the supervisors and the agents who were alleged to have induced persons to become members after they had complied with the loan rules of the company. It was held that the scheme might be of the snow ball nature but the literature of the scheme, principally the loan rules could not be described as misleading and deceptive. All the conditions of the scheme lanched by the company were set out in black and white. There was no room for misunderstanding. On a careful consideration of the scheme floated by the company of which the petitioners were the managing directors, and of the loan rules made available to the public, it was not possible to hold that the petitioners were responsible for the starting and carrying through a scheme of a fraudulent nature, so as to attract the operation of the

1. Rash Bihari Shaw v. Emperor, A. I. R. 1936 Cal. 753 at pp. 760 61 : 38 Cr. L. J 545.
2. Parasram v. Emperor, A. I. R. 1937 Sind 58 at pp. 59-60 : 38 Cr. L. J. 561.
3. Jotindra Nath Sircar v. Emperor, A. I. R. 1936 Cal. 440 at pp. 441-42 : 38 Cr. L. J. 209 : 166 I. C. 412. For similar cases, *see* Radha Ballav Pal v. Emperor, A. I. R. 1939 Cal. 327 : 40 Cr. L. J. 600 and Durgadas v. Emperor, A. I. R. 1934 Bom. 48 : 35 Cr. L. J. 644 : 148 I. C. 817 : 35 Bom. L. R. 1181.

Penal law against the petitioners. The scheme was a speculative one but could not be said to be dishonest. It was held that the scheme was of the "snow ball" nature and highly speculative it could not be said to be dishonest or fraudulent.

Distinct offences are offences falling under different sections of a penal enactment. Criminal conspiracy is an agreement by two or more persons to do or cause to be done an illegal act or a legal act by illegal means. The gist of the offence is a bare agreement and associations to break law. An agreement to commit an offence is an offence of criminal conspiracy.

In *Nirmalchandra* v. *Emperor*,[1] it was observed that it was true that the law did not take notice of the intention or the state of mind of the offenders and there must be some overt act to give expression to that intention. It was observed that the said overt act in a case of criminal conspiracy under Sec. 120-B consisted of the agreement of the parties. Offences under Sec. 120-B and Sec. 420, I. P. C., are distinct offences, and if the accused are charged with the offence under Sec. 420, I. P. C., it can be said that they are discharged of the offence under Sec. 120-B.[2]

13. Photographs of letters in a conspiracy case—How far admissible in evidence.—If a court is satisfied that there is no trick photography and the photograph is above suspicion the photograph can be received in evidence. It is, of course, always admissible to prove the contents of the document, but subject to the safeguards indicated to prove the authorship. This is all the more so in India under Sec. 10 of the Evidence Act to prove participation in a conspiracy. Detection and proof of crime will be rendered not only not easy but sometimes impossible if conspirators begin to correspond through photographers of letters instead of originals. Many conspiracies will then remain unproved because one of the usual methods is to intercept a letter, take its photograph and then to send it on and wait for the reply. But evidence of photographers to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked or false.[3]

PRACTICE AND PROCEDURE

14. Sanction to prosecute.—Section 196-A of the Criminal Procedure Code provides for previous sanction of the State Government to the institution of a prosecution for this offence where its object is to commit any non-cognizable offence or a cognizable offence not punishable with death.[4] The requirement of previous sanction under Sec. 196-A of the Code of Criminal Procedure is satisfied if sanction for the prosecution is obtained before the final charge-sheet is laid before the Magistrate who began the enquiry only thereafter.[5] But where several persons are charged with forgery and

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1. A. I. R. 1927 Cal. 265.
2. Firm Govind Moti & Co. v. Sindhu Resettlement Corporation Ltd., A. I. R. 1954 Kutch 33 at p. 36 : 1954 Cr. L. J. 1086.
3. Laxmipat Choraria v. State of Maharashtra, A. I. R. 1968 S.C. 938 at p. 946 : (1968) 2 S. C. J. 589 : 70 Bom. L. R. 595.
4. Thakur Das, I. L. R. 40 All. 41 ; *see* also Bhikhari Singh v. Emperor, A. I. R. 1934 Pat. 561 : I. L. R. 13 Pat. 729 : 36 Cr. L. J. 17 : 152 I. C. 282 ; *In re* Mallimoggla Venkataramiah, A. I. R. 1938 Mad. 130 : 39 Cr. L. J. 266 ; Hari Charan Misra v. Emperor, A. I. R. 1933 Pat. 273 : 34 Cr. L. J. 938 : I L. R 12 Pat. 353.
5. R. Vasu Nair v. T. C. State, A. I. R. 1955 T. C. 33 at p. 41 (D. B.) : 1954 Ker. L. T. 567.

abetment thereof a court is not bound to frame a charge of conspiracy under Sec. 120-B so as to attract the provisions of Sec. 196-A of the Code of Criminal Procedure. Where almost at the conclusion of a trial under Secs. 120-B, 467 and 467/109 of Penal Code, the Court discovers that no sanction under Sec. 196-A, Cr. P. C., had been granted, the legal consequence is merely as if the charge under Secs. 120-B, 467 had never been framed. The accused cannot be acquitted or convicted of an offence under Sec. 120-B.[1] The Public Prosecutor cannot withdraw under Sec. 494, Cr. P. C., from the prosecution under Sec. 120-B, because there is no valid prosecution. The Court should, in such a case, direct the jury to ignore the charge for the reason that they are not entitled to return a verdict on that charge. In such circumstances it would be neither illegal nor unjust nor unfair to the accused to convict them of the offence of abetment by conspiracy if it is proved.[2] Section 196-A of the Code of Criminal Procedure does not apply to a case of criminal conspiracy to commit an offence under Sec. 420 of the Penal Code which is a cognizable offence punishable with seven years' R. I. A criminal court is therefore competent to take cognizance of the offence without any sanction or consent under Sec. 196-A of the Code of Criminal Procedure.[3]

Absence of sanction—Effect.

The question whether sanction under Sec. 197 was necessary for instituting proceedings against the public servant on charges of conspiracy and of bribery, is now concluded by the decisions of the Judicial Committee in *H. H. B. Gill* v. *The King*,[4] and *Phanindra Chandra Neogi* v. *The King*,[5] and must be answered in the negative.[6]

Held that though the charge under Sec. 120-B required sanction no such sanction was necessary in respect of the charge under Sec. 409.[7] The absence of sanction does not prevent the Court from proceeding with the trial if the complaint also charges a conspirator of the principal offence committed in pursuance of the conspiracy or for abetment by him of any such offence committed by one of the co-conspirators under Sec. 109 of the Penal Code.[8] The fact that sanction was not obtained in respect of the complaint under Sec. 120-B did not vitiate the trial on the substantive charge under Sec. 409. There was in the case reported in *Mohan Lal* v. *State of Punjab*,[9] not only a charge for conspiracy under Sec. 120-B but also two other separate charges for offences under Secs. 409 and 477-A alleged to have been committed in pursuance of the conspiracy. The conspiracy to commit an offence is by itself distinct from the offence to do which the conspiracy is entered into. Such an offence, if actually committed, would be the subject-matter of separate charge. If that offence does not require sanction though the offence of conspiracy does and sanction is not obtained it would appear that the Court can proceed with the trial as to the substantive offence as if there was no charge of

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1. Emperor v. Pir Muinuddin Abdul Rahman, A. I. R. 1944 Sind 225 at p. 226 : I. L R (1944) Kar 316.
2. Syed Yawar Bakht Chowdhury v. Emperor, A I. R. 1940 Cal. 277 at p. 280 : I. L. R. (1940) 1 Cal. 531 : 41 Cr. L. J. 719 ; 189 I. C. 173.
3. Kandimalla Subbaiah, *In re*, 1958 Andh. L. T. 701 : (1958) 2 Andh. W. R. 523 : (1958) M. L. J. (Cr.) 882.
4. A. I. R. 1943 P. C. 128.
5. A. I. R. 1949 P. C. 117.
6. Ronald Wood Mathams v. State of West Bengal A. I. R. 1954 S C. 455 at p. 457 : 1954 S.C. J 649 : 1954 M W. N. 728.
7. Madan Lal v. State of Punjab, A. I. R. 1967 S. C. 1590 at p 1595.
8. *See* Mohd. Bachal Abdullah v. Emperor, A. I. R. 1934 Sind 4.
9. A. I. R. 1967 S. C. 1590.

conspiracy. In *Sukumar Chatterjee* v. *Mofizuddin Ahmad*,[1] where the charge was under Sec. 404 read with Sec. 120-B and no sanction was obtained it was held that the case could proceed though only under Sec. 404. Similarly, in *Syed Yawar Bakht* v. *Emperor*,[2] the accused was charged under Sec. 120-B read with Sec. 467 and also under Sec. 467 read with Sec. 109 of the Penal Code. No sanction was obtained. It was held that the consequence of not obtaining the sanction was as if the charge under Sec. 120-B read with Sec. 467 had never been framed but the accused could be convicted under the other charge, viz. under Sec. 467 read with Sec. 109 of the Penal Code. The same view has been taken by the Punjab High Court in *Ram Pat* v. *State*,[3] where it was held also that where a complaint discloses more offences than one, some of which can be inquired into without sanction and others only after sanction has been obtained, there can be no objection to the inquiry being carried on in respect of the first category of offences. Reference may be made to the decision in *Nibaran Chandra* v. *Emperor*.[4] The two petitioners were convicted under Sec. 120-B. They were also convicted under Sec. 384 and Sec. 384 read with Sec. 114 of the Penal Code, respectively. The learned Judge accepted the contention that the trial was vitiated as no sanction was obtained in respect of the charge under Sec. 120-B and set aside the conviction also under Sec. 384 and Sec. 384 read with Sec. 114 passed against the petitioners 1 and 2. But the report of the decision shows that he did so because he felt that by proceeding with the charge under Sec. 120-B, admitting evidence on that charge and that charge resulting in conviction prejudice was caused to the petitioners in the matter of the other charges and that, therefore, the trial could not be said to be severable.

Where for want of sanction under Sec. 196-A, Cr. P. C., the appellant could not be tried for offence under Sec. 120-B and Secs. 162 and 163, I. P. C, but only tried and convicted for offences under Sec. 120-B and Sec. 161, I. P. C., it was held that want of sanction under Sec. 196-A, Cr. P. C., would not affect his conviction under Secs. 120-B and 161, I. P. C.[5]

No sanction under Sec. 197, Cr. P. C., is necessary in the case of an offence under Sec. 120-B read with Sec. 161, I.P.C. for the simple reason that a public servant in conspiring or accepting or attempting to accept illegal gratification cannot be held to have committed the offence while acting or purporting to act in the discharge of his official duty. Sanction under Sec. 197 is not necessary for instituting proceedings against a public servant on charges of conspiracy and bribery.[6]

15. Procedure.—As regards procedure if the offence falls under Cl. 1 the procedure to be followed is the applicable to be that offence which is the object of the conspiracy—that is to say, it is cognizable - warrant or summons—bailable or non bailab'e as the offence which is the object of the conspiracy. It is not compoundable and is triable by the Court of Session if the offence which is the object of the conspiracy is triable exclusively by such Court; in the case of all other offences it is triable by the Court of

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1. 25 C. W. N. 357 : A. I. R. 1961 Cal. 561.
2. 44 C. W. N. 474 : A. I. R. 1940 Cal. 277.
3. (1962) 64 Punj. L. R. 519.
4. A. I. R. 1929 Cal. 754.
5. Gurbachan Singh v. State, 1970 Delhi 102 at p 107.
6. Gurbachan Singh v. State, 1970 Delhi 102 at p. 106.

Session—Presidency Magistrate or a Magistrate of the first class. If the offence falls under Cl. 2. a warrant or a summons may issue in the first instance. It is bailable and not compoundable and triable by the Presidency Magistrate of the first class.

16. Local jurisdiction.—It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and if has been consistently held that in an indictment for conspiracy the venue should by laid where the conspiracy was and not where the result of such conspiracy was put in execution.[1]

Conspiracy count must be tried separately.

The practice of adding what may be called a rolled up conspiracy charge to a number of counts of substantive offences has become common. This practice must cease except in simple cases, a conspiracy count (if one is needed at all) should be tried separately to substantive counts.[2]

17. Charge.—No person can be convicted of this offence without a proper complaint and a charge.[3] In a conspiracy case the accused can be charged with conspiracy with persons unknown, but if they are charged with conspiring with persons known, then such persons may be named in the charge otherwise the charge would fail.[4] An indictment for conspiracy must contain a statement of the facts relied upon as constituting the offence in ordinary and concise language, with as much certainty as the nature of the case will admit.[5] Strictly speaking, in cases where an offence has been committed in pursuance of a conspiracy, there should not be any conviction for conspiracy, but for abetment of the offence, for conspiracy, followed by act none to carry out the purpose of conspiracy amount to abetment.[6] Where a criminal conspiracy amounts to an abetment under Sec. 107 it is unnecessary to invoke the provisions of Secs. 120-A and 120-B.[7] The prosecution are at liberty to proceed accordingly and charge the accused for the offence committed and abetment thereof and are not bound to frame a charge of conspiracy under Sec. 120-B, Penal Code, so as to attract the provisions of Sec. 196-A, Cr. P. C.[8] The practice of adding a charge under Sec. 120 B in cases where it is not necessary, with the result that the jurors sitin the same trial as assessors, has been condemned.[9] It is legal to try accused persons on a

Absence of distinct charge—Effect.

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1. Goka'das Amarsee v Emperor. A. I. R 1938 Sind 333 at p. 336 : 35 Cr. L. J 585.
2. R. v. Griffiths, (1965) 2 All E. R. 449 at p. 450.
3. Bhikari Singh, I. L. R. 13 Pat. 729.
4. Lalit Mohan 8 I. C. (Cal.) 1059 ; Names of co-conspirators must be disclosed ; Perrins 72 J. P. 144.
5. Ray Mackenzie, (1892) 2 Q. B. 519 ; *Ex parte* Wilkins, 64 L. J. M. C. 221 ; McKenzie, (1903) 1 K. B. 56 ; Pulin Behary, 16 I. C. (Cal.) 257 ; Amritlal, I. L. R. 42 Cal. 957 ; Haji Sama, A. I. R. 1927 Sind 161.
6. Harsha Nath, I. L. R. 42 Cal. 1152 ; Amritlal, *supra* ; Golokc Behar Takal v. Emperor, 1938 Cal. 51 : I. L. R. (1938(Cal. 290 : 39 Cr. L. J. 161 ; *In re* Suraipal Singh, A I. R. 1938 Nag. 328 : I. L. R. (1938) Nag. 516 : 39 Cr. L. J. 818 ; Ram Krishna Sinha *v.* Emperor, A. I. R. 1938 Cal. 195 : 39 Cr. L. J. 417.
7. Jugeshwar Singh *v.* Emperor, A. I. R. 1936 Pat. 346 at p. 348 :37 Cr. L. J. 893 ; *In re* Malli Moggala Venkataramiah, A. I. R. 1938 Mad. 130 : 89 Cr. L. J. 266.
8. Emperor *v* Pir Muinuddin Abdul Rahman, A.I R. 1944 Sind 225 at p. 228 : I. L. R. (1944) Kar. 316.
9. Abdul Gafur Kotwal *v.* Emperor, A. I. R. 1938 Cal. 658 at p. 660 : 40 Cr. L. J. 101 : I. L. R. (1938) Cal. 636.

charge of conspiracy to commit offence even if the substantive offence has been carried out.[1] Where there is no distinct charge of conspiracy, or where it is unnecessary and the evidence is sufficient if believed to prove the particular offences with which the accused are charged, it is a waste of time and money to try and establish a conspiracy.[2] Where of the two accused one has been arrested with quantity of revolutionary leaflets inciting all and sundry to indiscriminate association in one place and the other for the distribution of those revolutionary leaflets at another place, it would not be wrong to introduce a charge under Sec. 120-B of the Code to justify a joint trial, nor can there be any objection to a charge under Secs. 117 and 120-B.[3]

The definition of criminal conspiracy under Sec. 120-A postulates an agreement to do an illegal act or acts and it is not necessary that every one of the persons agreeing to do those acts should be capable of committing an offence in respect of that act. Under the explanation to Sec. 120-A it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. The essence of the offence of conspiracy is the bare engagement and association to break the law whether any act be done in pursuance thereof by the conspirators or not.[4] Under Sec. 43 of the Indian Penal Code an act would be illegal, among other things, if it is an offence or if it is prohibited by law. It is not necessary that the agreement of conspiracy should be confined to the commission of only a single act ; it may comprise the commission of a number of acts. These principles were applied in *E. G. Barsay* v. *State*.[5] In this case six persons, of whom only three were public servants, were tried jointly by a special Judge on various charges and all of them were charged with having committed the offence of criminal conspiracy to do certain illegal acts ; this head of charge referred to three kinds of illegal acts, the first two of which would fall under Sec. 5 (1) (*c*) and Sec. 5 (1) (*d*) of the Prevention of Corruption Act. Under Sec. 5 (1) (*c*) of the said Act, a public servant is said to commit the offence of criminal misconduct in the discharge of his duty if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do ; and under Sec. 5 (1) (*d*) of the Act, a public servant would also commit the offence of criminal misconduct in the discharge of his duty if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. It was therefore argued that three of the accused, who were not public servants could not be charged with having agreed to commit these acts. The Bombay High Court repelled this argument. It was held, applying the principles earlier enunciated, that the charge framed against all the accused under the first head, the charge would not be illegal in any manner if all the accused were charged with having been parties to criminal conspiracy, having agreed to do certain illegal acts. The mere fact that three of the accused not being public servants would not be guilty of offences under Sec. 5 (1) (*c*) and Sec. 5 (1) (*d*) of the Prevention of Corruption Act would not introduce any infirmity in the charge. Similarly, it may be

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1. *In re* Surajpal Singh Indrapal Singh, A.I.R. 1933 Nag. 328 at p. 333 I. L. R. (1938) Nag. 516 : 39 Cr L. J. 818 ; Firm Govind Moti & Co. *v.* Sindhu, A. I. R. 1954 Kutch 83 : 1954 Cr. L. J. 1086.
2. Hans Raj *v.* Emperor, A. I. R. 1936 Lah 341 at p. 344 : 37 C. L. J. 564 : I. L. R. 16 Lah. 345.
3. Tarapada Misra v. Emperor, A. I. R. 1933 Cal. 603 at p. 604 : 145 I. C. 814 : 37 C. W. N. 426.
4. O'Connall v. Reg. (1844) 11 Cl. & F. 155 at p. 233.
5. A. I. R. 1958 Bom. 354 at p. 359 (D. B.) : 60 Bom. L. R. 159 : (1958) Cr. L. J. 1144.

that the remaining three accused (public servants) could not technically be guilty of committing theft in respect of property which was under their control as public servants. But that by itself would not introduce any infirmity in the charge.

In *Swamirathnam* v. *State of Madras*,[1] the charge as framed, discloses one single conspiracy, although spread over several years. There was only one object of the conspiracy and that was to cheat the members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy, did not charge the conspiracy and did not split up a single conspiracy into several conspiracies. Where the instances of cheating in pursuance of the conspiracy, they were parts of the same transaction and there was, therefore, no force in the contention that there had been misjoinder of charges.

Misjoinder of charges.

It is convenient in the charge to draw attention to the existence of facts which formed a connecting link between what might otherwise have appeared to be a series of different individual offences.[2] There is no reason to take exemption to a charge both under Sec. 117 and Sec. 120-B.[3]

When there is a general charge of conspiracy and the prosecution case is that the specific offences were committed by one or other accused in pursuance of the conspiracy, it is usual to mention in the subsidiary charges that the specific offence was committed in pursuance of the conspiracy ; but when the main charge of general conspiracy fails the conviction of one or more of the accused in respect of one or more of the specific charges is still quite legal.[4] In this connection reference may be made to *Kadiri Kunhahammed* v. *State of Madras*.[5] In that case the principal charge framed was one of conspiracy under Sec. 120-B read with Sec. 409 of the Indian Penal Code. The other charges were based on several illegal acts committed by one or more of the accused in furtherance of the conspiracy. The principal charge failed, but there was conviction in respect of a specific charge under Sec. 409 of the Indian Penal Code. This was challenged before the Supreme Court on the ground among others for misjoinder in view of the finding of the Trial Court that no general conspiracy was proved to exist. It was, however, held that the trial and the conviction in respect of one specific charge was in order ; and in this connection the Supreme Court relied on the decision of the Judicial Committee in *Bubulal Chokhani* v. *Emperor*.[6]

Mere presence in the meeting is not sufficient to frame a charge against the accused under Sec. 120-B, I. P. C., unless it is shown that he was guilty of some overt act.[7]

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1. A. I. R. 1957 S. C. 340 at p. 344, distinguishing Shapurji v. Emperor, A. I. R. 1936 Bom. 154 : 38 B. L. R. 106 : 37 Cr. L. J. 688, where no charge of conspiracy had been framed and Chorangudi Vankatadri, *In re*, I. L. R. 33 Mad. 502, which was decided before Sec. 120-B was introduced into the Penal Code.
2. S. Satyanarayana v. Emperor, A. I. R. 1944 Pat. 67 p. 72 : I. L. R. 22 Pat. 681.
3. Tarapada Mitra v. Emperor, A. I. R. 1933 Cal. 603 : 37 C. W. N. 426 : 34 Cr. L. J. 1073.
4. Indra Narayan Ray v. State, A. I. R. 1963 Cal. 64 at p. 67.
5. A. I. R. 1960 S.C. 661.
6. A. I. R. 1938 P. C. 130 : 64 I. A. 158.
7. Sumermal Tain v. Union Territory of Tripura, A. I. R. 1964 Tripura 41 at p. 45.

The charge should run thus :

"I *(name and office of the Magistrate, etc.)* hereby charge you (*name of the accused*) as follows :

"That you, on or about the——day of——at—agreed with (*name of* the co-conspirator) to do (*or* cause to be done) an illegal act, to wit—— (*or* an act to wit—which is not illegal, by illegal means to——) and that you did some acts, to wit——besides the agreement in pursuance of the said agreement to commit the offence of——punishable with death *or* [*imprisonment for life, etc.*) and thereby committed an offence punishable under Sec. 110-B of the Indian Penal Code ; and within my cognizance *or* the cognizance of the Court of Session or High Court).

"And I hereby direct that you be tried (by the said Court) on the said Charge."

18. Proof of conspiracy.—Under Sec. 120-B there must be an agreement between two or more persons to commit an offence or where the agreement does not amount to an offence in the doing of an act which is legal, in an illegal way there should also be established an overt act.[1]

There is no difference between the mode of proof of the conspiracy and that of any other offence. Conspiracy can be established by direct evidence or by circumstantial evidence.[2] In order to establish this charge the prosecution has to prove an agreement between these persons to do an illegal act. Where the conspiracy alleged is one to commit a series of crimes, mere proof of such an agreement between the accused is sufficient to sustain a conviction and no overt act need be proved. Proof of overt act is not necessary but if some of them were concerned in the overt acts that would go a long way to establish that the agreement was in fact made by them.[3]

To substantiate a charge of conspiracy the prosecution must prove the agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. Such agreement may be proved by direct evidence or inferred from other proved facts. But the inference of fact may be drawn only when the circumstances are such as to be incapable of any other reasonable interpretation. The law requires specific proof against each of the conspirators participating in particular design to do a particular criminal thing. The object of the conspiracy must be proved as laid.[4] Criminal conspiracy is a highly technical offence and all its ingredients must be strictly proved.[5] Unless a detailed and specific proof against each of the accused that they participated in a particular design to do a particular thing has been established, there can be no conviction under Sec. 120-B.[6] Where one of the two persons tried for an offence under Sec. 120-B read with Sec. 302, I. P. C.,

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1. Lennart Schussler v. Director of Enforcement, A. I. R. 1970 S. C 549 at p. 553.
2. M. C. Taneja v. State, (1970) 2 Cr. L. J. 945 at p. 947.
3. State of Bihar v. Kailash Prasad Sinha, A. I. R. 1961 Pat. 451 at p 459 : 1961 B. L. J. R. 411.
4. Sailendranath Mitra v. State, A. I. R. 1954 Cal. 373 at p. 374 : 55 Cr. L. J. 979.
5. Mihan Singh I. L. R. 5 Lah. 1.
6. Kodur Thimma Reddi, *In re*, A.I. R. 1957 A. P. 758 at p. 766 : (1957) 2 Andh. W. R. 156.

is acquitted, the other stands acquitted as a matter of course.[1] Where an accused was tried under Sec. 120-B read with Sec. 302 and under Sec. 364 of the Indian Penal Code and the jury retired without any verdict with regard to the charge under Sec. 302, but found him guilty of the charge under Secs. 120-B and 364, I. P. C., it was held that since the jury's verdict under Sec. 120-B read with Sec. 302 did not negative the charge under Sec. 302, the case should be remanded in order that the accused may be tried on the main charge, namely that of murder under Sec. 302.[2]

The points requiring proof are :

Points requiring proof.

(1) That the accused agreed with another.

(2) To do an act, or caused it to be done.

(3) That such act was illegal or was done by illegal means.

(4) An overt act if the agreement was not an agreement to commit an offence.

Mode of proof of agreement.

It is of the very essence of conspiracy that the conpirators should plot and act in secret. Privacy and secrecy are more characteristic of a conspiracy than a loud discussion in an elevated place open to public view in the garden of a stranger.[3] Direct evidence of agreement is not, therefore, always available. It has then to be established by the evidence of acts and conduct which connect the crime with common design in which the conspirators have probably been all assigned a part.[4] As Buller, J., said in a case, "In indictments of this kind there are two things to be considered : first, whether any conspiracy exists ; and next what share the prisoner took in the conspiracy. Before the evidence of the conspiracy can effect the prisoner materially, it is necessary to make out another point, viz. that he consented to the extent that the others did."[5] In considering the question of criminal conspiracy, it is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object which the conspirators set before themselves as the object of conspiracy and about the manner in which the object of conspiracy is to be carried out—all this is necessary as a matter of inference.[6] In cases where persons act in concert by virtue of a common intention and

1. Kasem Ali, 101 I. C. (Cal.) 481 ; Profulla K. Roy 1926 Cal. 345 at p. 348 ; Goloke Behar Takal v. Emperor, I. L. R (1938) 1 Cal. 290 : A. I. R. 1958 Cal. 51 : 39 Cr. L. J. 161 ; Benoyendra Chandra Pandey v. Emperor, 63 Cal. 929 : A. I. R. 1936 Cal. 73 : 37 Cr. L. J. 394 : Thakin Ba Sein v. Emperor, A. I. R. 1937 Rang. 161 : 38 Cr. L. J. 801 ; Punjab Singh v. Emperor, 15 Lah. 84 : A. I. R. 1933 Lah. 977 : 35 Cr. L. J. 322.
2. King-Emperor v. Osman Sardar, A. I. R. 1924 Cal. 809 at p. 811.
3. Bayyappanavara Muniswami v. State, A I. R. 1954 Mys. 81 at p. 83 (D. B.) : I. L. R. (1953) Mys. 625 : 1954 Cr. L. J. 905.
4. Brisac, 4 East 164 at p. 171.
5. Hardy, 1 Gurney's Ed. (369) ; 2 Starkie's *Evidence* (2nd), 234.
6. State v. Shankar Sakharam Jadhav, A. I. R. 1957 Bom. 226 at p. 229 : 59 Bom. L. R. 244 : 1957 Cr. L. J. 1107 ; Queen-Empress v. Basvanta, I. L. R. (1900) 25 Bom 168 : 2 Bom. L. R. 761 ; Benoyendra Chandra Pandey v. Emperor, A. I. R. 1936 Cal. 73 at p. 84 : I. L. R. 63 Cal. 962 :37 Cr.L.J. 394 ; R. v. Murphy, (1873) 3 C. & P. 29 ; Kodur Thimma Reddi, *In re*, A. I. R. 1957 A. P. 75 : (1957) A. W. R. 156 ; *see* also A. Desai v. State of Mysore, A. I. R. 1956 Mys. 46 : I. L. R. (1955) Mys. 641 : 57 Cr. L. J. 633.

of a criminal conspiracy their actvities cannot normally in the very nature of things be brought out in evidence by direct evidence because they are done in privacy. It is only from the members of the family or from the persons who are intimately connected with those persons or from their associates that evidence of conspiracy can be gathered.[1]

When conspirators have once agreed to do the thing the act of one is the act of all.

The fact that two persons were co-operating for the attainment of the same end is some indication, though not necessarily evidence of conspiracy. Bull in England and Schmidt on the Continent were engaged in forging a plate. While Schmidt was on the Continent, Bull ordered an innocent agent to manufacture the plate. Both Bull and Schmidt took delivery of it. On their trial, it was contended for Schmidt that he was only an accessory before the fact, and that so far as he was concerned it was as good as if Bull had himself manufactured the plate whereupon Reid, C. J., said: "That reasoning would be good if the actual maker had been a guilty party, because he would stand in a different position to those who had counselled him to the commission of the crime. But it altogether fails where the immediate agent is an innocent one. Then, those who had plotted and arranged that he should do the particular act are themselves principals. Suppose the prisoners had been both abroad, and that, having planned the forgery, one of them had given the order for the plate by latter, can it be doubted that they would be indicted as principals; and can it make any difference that one of them is in this country? It seems to me then, that the circumstances of the immediate agent in this forgery being an innocent person renders the rule of law as to principal and accessory inapplicable."[2] To which Alderson, B., added: "If a person does an act of this kind, with a guilty intent, he is not the agent of anyone. If he does it innocently, he is the agent of some person or persons; and if two had agreed to employ him, he is the agent of both. In this case, therefore, it is a question for the jury whether the prisoners were jointly acting in procuring this plate to be made. If they were then the engraver acts on behalf of both. Its makes no difference whether they were in England or elsewhere; when they have once agreed to do the thing, the act of one is the act of all although the rest be absent at the time."[3] So where some of the confederates inveigle themselves into the confidence of an innocent person and lure him to take the bait, all are guilty of the crime as principals.[4] They will, however, be principals or abettors here according to the part they have taken in the plot.

Detailed and specific proof against each accused is essential.

The offence of conspiracy under this section is one which requires detailed and specific proof against each of the accused that he individually participated in a particular design to do a particular criminal thing.[5] It is perfectly true that it is upon the prosecution to prove a case of conspiracy. Nevertheless, where groups of persons are found in constant communication and each group appears to have a single form of activity which is

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1. Govinda Reddy *In re*, A. I. R. 1958 Mys. 150 at p. 166: I. L. R. (1957) Mys. 177: 1958 M. L. J. (Cr.) 341: 1958 Cr. L. J. 1489: 1958 Mys. L. J. 278.
2. Bull, 1 Cox. 281.
3. Bull, 1 Cox. 281; Percy Henry Buxa, 11 Bom. L. R. 1153.
4. Moore's case 1 Leach 314 (Ring dropping case).
5. Emperor v. Aftab Mohamed Khan, A. I. R. 1940 All. 291 at pp. 295. 296: 41 Cr. L. J. 647: 188 I. C. 649: 1940 A. L. J. 206.

characterisic of the group communications between the two must receive the interpretation what the common objective of the two groups is the subject thereof, unless a satisfactory explanation is offered.[1]

It is open to the prosecution to select some of the acts only and charge the accused.

If, in proving the charge of conspiracy under Sec. 120-B read with Sec. 379 and Sec. 218 the prosecution choose to rely upon some acts of the conspirators committed by them in pursuance of the conspiracy, they would be entitled to ask for a conviction of the accused if they succeed in proving the charge. It is clearly not incumbent upon the prosecution to make all the acts committed by the conspirators the subject-matter of the charge. It is open to them to select some of the acts and charge the accused in respect of them.[2] It is legal impossibility when several persons are charged with the same conspiracy that some should be found guilty of one conspiracy and some of another between a number of applicants.

What is necessary, is that there would be one conspiracy involving all of them and not a series of conspiracies and criminal acts unconnected by unity of intention.[3] But to prove conspiracy, however, there need not be evidence of direct concert nor even of any meeting together of the conspirators. The agreement can be inferred from collateral acts, but these acts must show a common plan so as to exclude a reasonable possibility of the acts of the conspirators having been done separately and connected only by coincidence.[4] Though to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence ; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. It is not necessary that all should have joined the scheme from the first ; those who come in at a later stage are equally guilty, provided the agreement be proved.[5] It is not necessary that there should be express proof of conspiracy. It is not necessary to prove that two or more persons came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution There may be no witness to say that in their presence the conspirators agreed to carry out an unlawful object. From the acts an agreement can be inferred. If it is proved that they pursued, by the acts, the same object, often by the same means performing one part of the act and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, the Courts are at liberty to draw the inference that they conspired together to effect that object. The question whether certain acts were done in pursuance of a conspiracy or were done separately without

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1. Bhabesh Chandra Hazra v. Emperor, A I. R. 1934 Pat. 575 at p 576 · 36 Cr. L. J. 7.
2. State v. Laldas, A. I. R. 1953 Bom. 177 at p. 179 : 54 Bom. L. R. 955.
3. Mohammad Ismail v. Emperor, A. I. R. 1936 Nag 97 at p. 99 : I. L R.(1936) Nag. 152 : 58 Cr. L J. 106 ; Chandiram v. Emperor, A I. R. 1926 Sind 174 : 27 Cr. L. J. 286 : 92 I. C. 462 ; Krishan Chand v. Emperor, A. I. R. 1926 Sind. 171 : 27 Cr. L. J. 243 : 92 I. C. 419 ; Emperor v. Noni Gopal, I. L. R. 38 Cal. 559 : 12 Cr L.J. 286 : 10 I.C. 582.
4. Nitai Chandra Jana v. Emperor, A. I. R. 1937 Cal 433 at pp. 439. 440 : 38 Cr. L. J. 852 ; 170 I. C 201 ; *see* also Benoyendra Chandra Pandey v. Emperor, A. I. R 1936 Cal. 73: 37 Cr L. J. 394: 40 C. W. N. 432 : 64 C. L. J. 154 : I. L. R. 36 Cal. 929.
5. Barindra Kumar Ghose v. Emperor, 11 Cr. L J. 453 at p 467 : I. L. R. 37 Cal. 467; *see* also Mohamed Ismail v. Emperor, A. I. R. 1936 Nag. 97.

any pre-arranged plan depends upon the evidence in each case.[1] In *Ram Nath* v. *State*,[2] however, there was no evidence whatsoever of any premeditation or of a pre-arranged plan by the assailant of murdering Sunder. It was held by the Supreme Court that even if it was held proved that all the accused were seen at the spot at the time of the firing, that fact by itself could not be held enough to prove a common intention of the accused to murder Sunder. In such a situation when it would not be known who fired the fatal shot, none of such person could be convicted of murder under Sec. 302, I. P. C. When the evidence as to conspiracy under Sec. 120-B, I. P. C., has been rejected the same evidence cannot be used for proving a common intention proposed under Sec. 34.

If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused, the Court may accept the several statements as corroborating each other.[3] But it must be established that the several statements of accomplices were given independently and without any previous concert.[4]

19. Motive. Evidence of motive does not tantamount to evidence of conspiracy. Hence, where the evidence is merely evidence of motive and is direct or indirect evidence to show that the accused was actually in conspiracy, the Judge should tell the jury at once when the prosecution case is over that such evidence was not sufficient to convict him under the criminal conspiracy to murder the deceased[5] What may be a sufficient motive for an individual or a group of individuals may or may not be sufficient motive for others and it is, therefore, necessary to give importance to the occurrence itself, to the participation of the accused in the same and see, if they were responsible for the crime, although it may not be possible to hold that the motive ascribed was not sufficient or commensurate with the nature of the crime.[6]

20. Evidence of conspiracy.—In the majority of cases of conspiracy tone can hardly expect direct evidence to establish the charge. In such cases he guilt has to be inferred from facts and circumstances proved before he Court. It is well established, however, that the relevant facts and circumstances must be of such a compelling nature as must necessarily lead the Judge or the jury, as the case may be, to a finding that the accused person must be guilty. In other words, the inference of guilt must be irresistible and wholly incompatible with innocence.[7] Conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused done in pursuance of an

Guilt to be established by proof of facts and not merely proof of one's character.

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1. Benoyendra Chadra Pandev v. Emperor, A.I.R. 1636 Cal. 73 at p 84 :37 Cr. L. J. 384 : I. L. R 63 Cal. 929.
2. A. I. R. 1953 S. C. 420 at p. 424.
3. *See* Haroon Haji Abdulla v. State of Maharashtra, 70 Bom. L. R. 540 at p. 545 : A. I. R. 1968 S. C. 832.
4. *See* Bhuboui Sahu v. The King. 76 I. A. 147 at pp. 156-57 : A. I. R. 1949 P. C. 257 ; Mohd. Hussain Umar Kochra, etc. v. K. S. Dalipsingbji, A. I. R. 1970 S. C. 45 at p 56.
5. Ekabbar Mondal v. Emperor, A. I. R. 1937 Cal. 756 at p. 758 : I. L. R. (1937) 2 Cal. 315 : 39 Cr. L. J 182.
6. Hafijuddin v. Emperor A. I. R. 1934 Cal. 678 at p. 679 : 35 Cr. L. J. 1357 151 : I. C. 468.
7. Keshabdeo Bagat v. Emperor A. I. R. 1 45 Cal. 93 at p. 96 : I. L. R. (1944) 1 Cal. 595: 46 Cr L. J. 465 ; *see* also Rahimatullah Haji Karim v. Emperor. 70 Cr. L. J 471 ; Benoyendra Chandra Pandey v. Emperor. A. I. R. 1936 Cal. 73 : 37 Cr. L. J. 384 : I. L. R. 63 Cal. 929 ; Goloke Bihary Takal v. Emperor, A.I.R. 1938 Cal. 51 : 39 Cr. L. J. 161: I. L. R. (1938) 1 Cal. 290.

apparent criminal purpose in common between them.[1] It is from the point of view that overt acts may properly be looked to a evidence of the existence of a concerted intention. The criminality of the conspiracy is independent of the criminality of the overt acts,[2] but a man's guilt must be established by proof of facts and not merely proof of his character.[3] The prosecution may go into evidence on the nature of the conspiracy before it gives evidence to connect the accused with it.[4] The acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against all,[5] but they must directly tend to the proof or disproof of the matter in issue. "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct of character to have committed the offence for which he is being tried."

Such evidence may comprise printed handbills or placards or speeches of co-conspirators and resolutions at their meeting.[6] But before such evidence is admissible there must be proof of a conspirary and that the accused were members of the same conspiracy and that the act in question was done in furtherance of the common design. But if *A* and *B* are charged with a conspiracy to cheat *P*, evidence is admissible to prove that they had similarly cheated *R* and *S*.[7] The rule in this respect is formulated in the Indian Evidence Act.[8] Conspiracy may be proved by the evidence of the

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1. *Per* Gross, J., in Brisac, 4 East 171, followed *per* Wilkes, J., in Mulcahy, 3 H. L. 306 at p. 317: "It is perfectly true that the dark covertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof." *Per* Sir Lawrence Peel, C. J., in Hadger, cited in Starkie on *Evidence*, 132; Manmohan, 35 I. C. (Cal.) 999 at p. 1000; Harsha Nath, I. L. R. 42 Cal. 1153; Balmukand, (1915) P. R. No. 17: 28 I. C. 738; Goloke Beharry Takal v. Emperor, A. I. R. 1938 Cal. 51: I. L. R. (1938) 1 Cal 290: 39 Cr. L. J. 161; *In re* Suraj Pal Singh, A. I. R. 1938 Nag. 328: I. L. R. (1938, Nag. 516: 39 Cr. L. J. 818; Ram Krishna Sinha v Emperor, A. I. R. 1938 Cal. 195: 39 Cr. L. J. 417; Thakin Ba Sein v. Emperor, A. I. R. 1937 Rang. 161: 38 Cr. L. J. 801; Punjab Singh Ujagar Singh v. Emperor, A I. R. 1933 Lah. 977: 35 Cr. L. J. 322; Keshab Deo Bagat v. Emperor, A. I. R. 1945 Cal. 93: 46 Cr. L, J. 465: I. L. R, (1944) 1 Cal. 595.
2. Harsha Nath, I. L. R. 42 Cal. 1153.
3. Amritlal, I. L. R. 42 Cal. 957.
4. Hammond, 2 Esp. 719.
5. Section 10, Indian Evidence Act (I of 1872); Makin v. Attorney-General, (1894) A. C. 57.
6. Duffield, 5 Cox. 404; Annappa, 9 Bom. L. R. 347 at p. 349; Barendra, I. L. R. 37 Cal. 467: Amritlal, I. L. R. 42 Cal. 957.
7. Stenson 12 Cox. 111.
8. Indian Evidence Act (I of 1872), Sec. 101; Abani Bhusan, I. L. R. 33 Cal. 169; Nirmal Chandra De v. King-Emperor, A. I. R. 1927 Cal. 265 at p. 266—it is difficult for the prosecution to secure outside and independent evidence. The prosecution has to depend upon evidence of people who are engaged in detecting crimes of this sort. Bishambhar Nath Tandon v. King Emperor, A. I. R. 1926 Oudh 161 at p 168—The law of conspiracy is no longer in a fluid state in India and recognises the principle that a conspiracy need not be established by evidence of an actual agreement between the conspirators and that overt acts raise a presumption of an agreement and knowledge of the purpose of the conspiracy; Haji Shamo v. Emperor, A. I. R. 1927 Sind 161 at p. 163—It has been repeatedly laid down that a charge for conspiracy may be established either by direct evidence of an agreement between the conspirators, which, as observed by Earle, J. in R. v. Duffield, (1851) 5 Cox. C. C. 404—Is hardly ever adduced, or it may be established by evidence of circumstances from which the Court may raise a presumption of a common concerted plan to carry out the unlawful design. R. v. Parsons, (1762) 1 Bl. and W. 392: 96 E. R. 222; R. v. Murdhy, (1838) 8 C and P. 297; R. v. Brisac, (1803) 4 East 164: 102 E. R. 792; Mulcahy v. Queen, (1868) 3 H,

conduct of the accused and the surrounding circumstances both before and after the commission of the offence without proving any overt act of the accused.[1]

But the conduct and the surrounding circumstances must bear upon the offence and must not be too remote. For instance, the facts that the accused were sufficiently friendly with the conspirators to be putting them up in the mess where he was staying and was anxious to escape observation and was doing his best to conceal his whereabouts after the date of the occurrence connected with the criminal conspiracy, though all relevant are in no way conclusive of an agreement which is the gift of the crime.[2]

Four respondents were found in the temple in the middle of the night with house-breaking implements and aruvals and gun in their possession. The Court did not think that this by itself can suffice to support a conviction under Sec. 120-B Indian Penal Code. It is going a little too far to say that since they were all together they must have had a common object, and since they must have had a common object therefore they must have previously come to an agreement amongst themselves to commit the crimes.[3]

What may be proved in criminal conspiracy.

Mere evidence of association is not sufficient for an inference of conspiracy.[4] The question of what are the circumstances in which corroboration is required and the question of the amount of corroboration are largely matters which are in the whole purely academic where there is independent evidence which, if believed, leaves doubt that all the accused were members of the conspiracy.[5] In a case of criminal conspiracy it is not necessary to prove that a conspirator was aware of all the acts his fellow conspirators committed in pursuance of the conspiracy.[6] It is true that a mere agreement may bring the conspiracy into existence but nowhere it is said in the Code that after the offence no longer exists, criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting in accord, in furtherance of the objects for which they entered into the agreement.[7]

L. 306 ; Emperor v. Annappa Bharamgauda, (1907) 9 Bom. L. R. 347 ; Birendra Kumar Ghose v. Emperor, I. L. R, 37 Cal. 467 : 7 I. C. 359 : 14 C. W. N. 1114 ; Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy, 20 C. W. N. 292 : 35 I. C. 999 : 17 Cr. L. J. 439 ; Harsha Nath Chatterjee v. Emperor, I. L. R 42 Cal. 1153 : 21 C. L. J. 231 : 26 I. C. 313 : 19 C. W. N. 706 ; Jumo Allarakhia v. Emperor, (1916) 9 S. L. R. 223 : 34 I. C. 649 : 17 Cr. L. J. 233 ; and Kishanchand v. Emperor, A. I. R. 1926 Sind 171 : 20 S. L. R. 18.

1. Duffield, 5 Cox. 404 ; Annappa, 9 Bom. L. R. 347 at pp. 349 ; Barendra, I. L. R. 37 Cal. 467 ; Jamo Allarakhia, 9 S. L. R. 223 ; Kishian Chand, 20 S. L. R. 18.
2. Rakhal Chandra Das v. Emperor, A. I. R. 1930 Cal. 647 at p. 650. (F. B.).
3. Emperor v. Picha Kone, A. I. R. 1938 Mad. 726 at p. 727 : 39 Cr. L. J. 901.
4. Pran Krishna Chakravarti v. Emperor, A.I. R. 1935 Cal. 580 at p 585 : 36 Cr. L.J. 1322.
5. Emperor v. Nirmal Jiban Ghose, A. I. R. 1935 Cal. 513 at p. 517 : I. L. R. 62 Cal. 238 : 36 Cr. L. J. 1115.
6. Dur Mohammed v. Emperor, A I. R. 1934 Sind 57 at p. 62 : 35 Cr. L. J. 1337.
7. Abdul Rahman v. Emperor, A. I. R. 1935 Cal. 316 at p. 324 I. L. R, 62 Cal. 749.

By the terms of the definition itself, there ought to be two or more persons who must be parties to such an agreement and it is trite to say that one person alone can not be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself. If, therefore, four named individuals were charged with having committed the offence under Sec. 120-B, and if three out of these four were acquitted of the charge, the remaining accused could never be held guilty of the offence of criminal conspiracy.[1]

Legality of conviction of one accused for conspiracy on the acquittal of the rest.

If authority for the above proposition were needed, it is to be found in Archbold's *Criminal Pleading, Evidence and Practice*, 33rd Ed., p. 201, para. 361 :

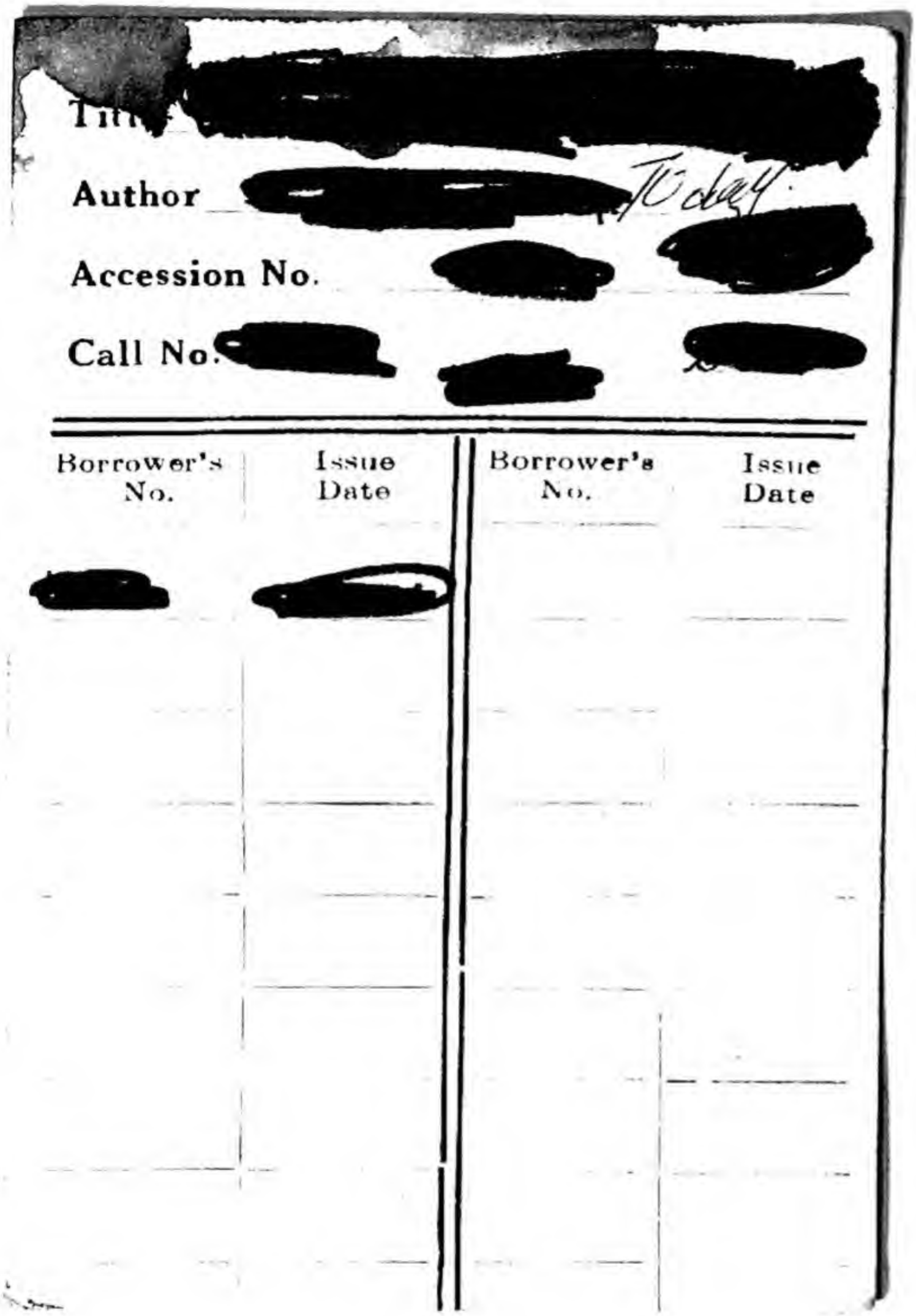
English cases.

"Where several prisoners are included in the same indictment the jury may find one guilty and acquit the others, and *vice versa*. But if several are indicted for a riot, and the jury acquit all but two, they must acquit those two also, *unless it is charge in the indictment and proved*, that they committed the riot together with some other person not tried upon that indictment.[2] And, if upon an indictment for a conspiracy, the jury acquit all the prisoners but one, they must acquit that one also, *unless it is charged in the indictment, and proved* that he conspired with some other person not tried upon that indictment.[3]

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(*Continued in Vol. II*)

1. Topandas v. State of Bombay, A. I. R. 1956 S C. 33 at p. 34 : 1956 S.C.R 881 : 1956 S. C. J. 86 : 1956 S. C. A. 74 : 1956 All W. R. (Sup.) 24 : 58 Bom. L.R. 492 : (1956) 1 M. L. J. (S. C.) 60 : 1956 Nag. L. J. 204 : 1956 Cr. L J. 138 (S C.); Archbold's *Criminal Pleading, Evidence and Practice*, 33rd Ed., p. 201, para. 201 ; 2 Hawk. c. 47 Sec. 8 ; 3 Chitty's *Criminal Law*, 2nd Ed., Vol. III, p. 1141 ; R. v. Thompson, (1886) 16 Q. B. D. 832 R. v. Manning, (1883) 12 Q B. D. 241 ; R. v. Plummer, (1902) 2 K.B. 339 (*see* the observations of Lord Justice Wright on p. 343 and of Lord Justice Bruce on p. 347) ; King-Emperor v. Osman Sardar, A.I.R. 1924 Cal. 809 : 25 Cr. L. J. 1048 : 81 I. C. 824 ; Jogibin Ghose, 9 C. L. J. 663.
2. 2 Hawk c. 47, Sec. 8.
3. 2 Hawk c. 47, Sec. 8 ; 3 Chitty's *Criminal Law*. (2nd Ed.) 1141 ; R. v. Thompson, (1886) 16 Q.B.D. 832; R. v. Manning, 12 Q.B.D. 241 ; R. v. Plummer, (1902) 2 K. B. 239.


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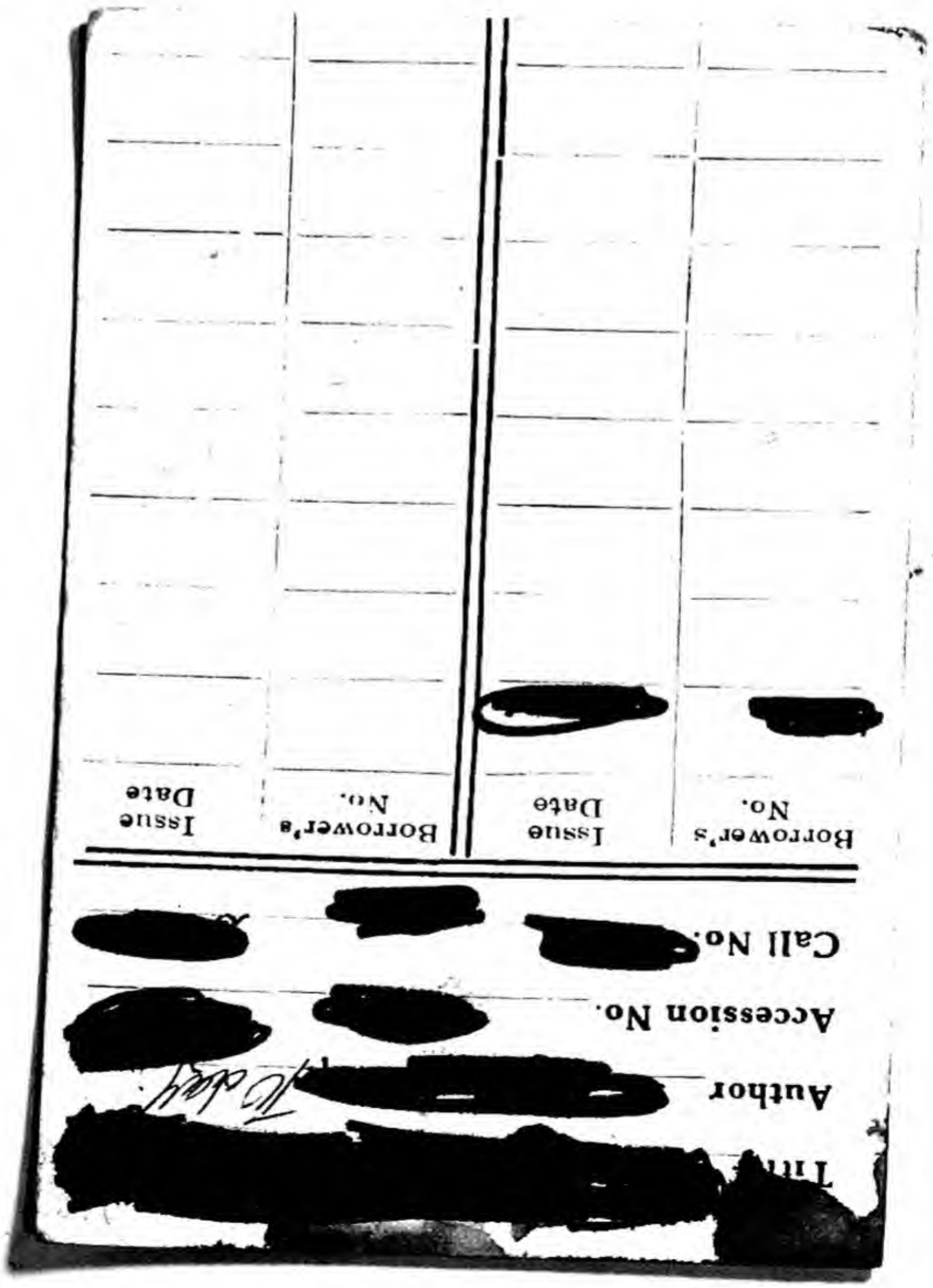
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